



James R.J. Martin, II
jim.martin@citynet.net

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VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Earl E. Devaney, Chairman
Recovery Accountability and Transparency Board
P.O. Box 27545
Washington, D.C. 20038-7958

Lawrence E. Strickling
Assistant Secretary of Commerce for Communications and Information
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, DC 20230

Re: Formal Protest of BTOP Award to the Executive Offices of the State of West Virginia
Dated September 9, 2010

Dear Chairman Devaney and Secretary Strickling:

I want to thank you for promptly responding to our formal protest letter addressing the BTOP grant awarded to the Executive Offices of the State of West Virginia (the "EOWV"). The foundational goals of the BTOP program are well documented in the American Recovery and Reinvestment Act ("ARRA") legislation; namely the unique opportunity to leverage taxpayer funded investments for the economic and social benefits made possible through broadband expansion. The cornerstone of our evolving digital economy is based on the fundamental ability for our citizens to gain access to affordable high-capacity broadband solutions. This is an acute challenge for West Virginia given the rural nature of our state, which finds us today ranked 48th nationally in broadband enablement. Given the unique opportunity to promote the goals of the BTOP program, I sincerely believe this formal protest deserves your full and complete attention.

On September 30, 2010, we received a copy of the response from the EOWV to the NTIA submitted by James Pitrolo, the Legislative and Policy Director under Governor Joe Manchin. The EOWV's response clearly highlights why the NTIA needs to suspend the award to the EOWV until such time as its plan is substantially modified. Specifically, the EOWV attempts to hide behind procedural compliance while ignoring the glaring conflicts and misrepresentations documented in our original protest letter and further ignores the EOWV's inability to comply with BTOP goals and objectives. Proclaiming to meet BTOP procedural requirements while continually ignoring clearly defined BTOP objectives is unbecoming of West Virginia's public servants. The EOWV is clearly unable to defend its broadband program on the merits as it pertains to the objectives of the BTOP program, and this fact affirms our claim that the EOWV broadband program is a complete waste of taxpayer money.

The EOWV's response, as penned by Mr. Pitrolo, attempts to isolate the issue to a singular event dealing with network openness and sadly fails to address even this singular issue adequately. Surprisingly absent are other key and equally important issues as to providing benefits to the citizens of West Virginia or evidence supporting how the EOWV will tactically accomplish a progressive broadband enablement strategy for West Virginia (currently ranked 48th in the nation). We believe this behavior and the breakdown of West Virginia's leadership stems from the reality of a plan that is simply indefensible under the mildest form of scrutiny. It is our absolute conviction upon these and other facts that the EOWV's grant should be suspended immediately until the NTIA and the EOWV adequately address the issues at hand and insist on modifications to ensure the citizens of West Virginia are protected and to ensure a path forward for West Virginia under the enumerated goals of the BTOP program.

We will again list below our formal items of protest in bullet form for your consideration, along with specific questions that should have been answered by the EOWV, but rather, were avoided in its response to our protest. Given the publicly messaged superiority of EOWV's plan, and I quote, "a model plan for others to follow", it only stands to reason that a "model plan" approved under the BTOP legislation, and as measured by meeting or exceeding BTOP objectives, should easily embody the purposes of the legislation and stand on its own merits. The issues we are addressing are of the simplest form, straight forward and should be adequately defended with facts, not hearsay, political posturing or diversionary tactics. Moreover, the EOWV should be happy to provide this clarity to the NTIA and the citizens of West Virginia; they are, after all the public servants of our State, and are charged with looking out for the economic and social interests of our citizens. What could possibly be more important in our growing digital economy than having a platform on which to communicate the soundness, quality and intent of the EOWV's broadband strategy? I can't think of a more important public issue influencing West Virginia's economic future.

To facilitate continued dialogue between the NTIA, the EOWV and Citynet we are again providing the following items of protest:

The State's Purported Broadband Enablement of 700,000 households and 110,000 businesses.

The State's claim that its plan will broadband enable 700,000 households and 110,000 businesses is a blatantly false claim under the EOWV's application. The reality is that the State's Plan provides direct benefits solely to State Agencies and that there will be no direct or indirect benefits propagated to the citizens, households, businesses or community institutions that reside in West Virginia. There are no material facts to suggest the State's Plan achieves any of these BTOP objectives. ***The EOWV should demonstrate to the NTIA how its plan tactically solves existing broadband barriers in West Virginia and how the businesses and citizens of West Virginia will be directly enabled under this plan. Moreover, the EOWV should be required to identify the key broadband challenges facing West Virginia and demonstrate how their plan solves those challenges in a material manner.***

Economic Development and Job Creation.

The EOWV's Plan does absolutely nothing to empower high job-creation businesses or institutions. In fact, the plan provides no direct broadband benefits for the businesses or community institutions in West Virginia. It is narrowly and solely focused on State Agencies that can afford existing Frontier services after last mile construction to these facilities is completed. ***The EOWV should explain why it failed to address this most basic of BTOP objectives, yet insinuated that it would accomplish this goal when in fact it clearly cannot under its plan. Specifically, beyond the Communications Workers of America Union's self-interests, how does the EOWV's plan empower job creation within West Virginia? Is the EOWV implying that existing union jobs supersede the overall well-being and economic future of the citizens of West Virginia? The EOWV should answer this question with precision and it should be substantiated with facts, not hyperbole.***

Creating Middle Mile Infrastructure.

The EOWV's statement that its plan will create middle mile infrastructure again is blatantly false, and, at best, a spin on words. The State's Plan calls for building isolated fiber extensions from existing Frontier network facilities to specific State Agencies. These are clearly isolated Last Mile assets, and not Middle Mile facilities. These isolated assets will be of little or no use to anyone other than Frontier, even if the State of West Virginia insisted they be 100% open for others to use. There are no Middle Mile Assets being constructed. This shortfall has been affirmed through on-going dialogue with Commerce Secretary Kelley Goes, the chief architect of the State's Plan. ***The EOWV needs to provide maps along with a detailed inventory of planned assets to be constructed and to demonstrate how such facilities could possibly be construed as Middle Mile assets as represented in its application. The EOWV needs to adequately demonstrate and clarify all planned fiber assets and associated equipment.***

Open Access Network Facilities.

The State's Plan articulates open and fair access to the assets in question in its application, when in reality Frontier Communications will own and operate these taxpayer-funded assets. This does not support the purported guidelines of the BTOP program. Moreover, the State has not been required to publish pricing for use of these publicly funded assets. Again, the EOWV's response is wholly incomplete, inaccurate and inadequate. We would respectfully suggest that NTIA officials should understand that existing carrier interconnection agreements are heavily influenced by FCC regulations and requirements for assets built, owned, operated and funded by the incumbent carriers themselves, not assets funded by taxpayers. NTIA officials also should understand that under these regulations Competitive Local Exchange Carriers seeking to use fiber assets owned by Frontier have been consistently denied access based on "lack of availability". Now, West Virginia's leadership is trying to claim that these new taxpayer funded assets should fall under the same FCC guidelines as those established for assets funded wholly by the incumbent carriers themselves, when in fact the assets deployed under the State's Plan are an entirely new set of assets.

Mr. Pitrolo's response also falls wholly short of explaining why the State's plan fails to address other key broadband enablers such as Internet service providers, wireless service providers and cable service providers – all of which would seek open access to such facilities, but none of which qualify under FCC/CLEC regulations regarding open access requirements under carrier interconnection agreement guidelines. Rather than take simple proactive measures to ensure fully open access by all potential broadband providers, the EOWV has chosen a path of least resistance which can only result in suboptimum future use and utility of the assets in question, assets funded by taxpayers for the benefit of taxpayers. This inability to address the simplest of measures again signals special interest influence over basic common sense solutions. Conversely, and this point cannot be over-emphasized, because of the isolated nature of these Last Mile assets, they will be of little use to anyone other than Frontier. The EOWV did not require a simple form contract to ensure Frontier's compliance on this issue (nor did it address other obvious concessions) in exchange for \$69,000,000 of taxpayer money. The EOWV and Frontier Communications have steadfastly refused to provide the taxpayers with basic measures to ensure optimum use of the assets in question. These actions (or inactions) are highly troubling.

The EOWV needs to explain why it did not require Frontier Communication to sign a simple form letter outlining Frontier's obligations to guarantee open access to the assets in question and to establish modest pricing reflective of the investment by taxpayers, along with several other basic measures to ensure optimum utility and public benefit. Another such example is affordability of service: How is it possible, knowing that affordability is itself a key inhibitor of broadband consumption in West Virginia, that EOWV officials did not require simple price concessions, a modification or lowering of price structures in exchange for \$69,000,000 of taxpayer investment? Price negotiations are a common everyday occurrence in the private sector, notwithstanding \$69 million in leverage. Thus far, EOWV officials have steadfastly refused to embrace this most basic fiduciary duty relative to their public service. In reality, this represents a simple 1 page contract amendment. The real question is: Why not?

Partnership with West Virginia Broadband Deployment Council.

The EOWV's application references a partnership and implied approval and support by the West Virginia Broadband Deployment Council ("Council"), the legislated body established to address broadband expansion in West Virginia. In fact, the Council had no input, nor did it evaluate, address, discuss in any material detail the pros or cons of such a plan with Commerce Secretary Kelley Goes, whom is also the appointed Chairperson for the Council. In fact, Secretary Goes, when questioned or challenged in regard to the EOWV's broadband plan, insisted that it was under the strict control and discretion of the EOWV. In addition, the EOWV's plan was strictly communicated as a fall-back plan, a "just in case plan". In retrospect, we find it troubling that Secretary Goes did not embrace the Council for advice, while simultaneously messaging a fallback plan that received the full support of the EOWV. Ironically, in the self-scoring section of the EOWV's own application, the ***proposal scored only 1 out of a potential 100 points*** for achieving BTOP objectives, yet it received the largest awarded grant in round 1 of the BTOP program. How the State's Plan was handled versus how it was represented indicates clear political form over substance. I find the 1% BTOP compliance score, and Secretary Goes'

actions to purposely omit input from the legislated body established in West Virginia to address broadband, as particularly troubling.

The EOWV needs to explain to the NTIA how it failed to consult with its own legislated Broadband Deployment Council despite the fact that Secretary Goes leads both initiatives, and to clarify for public disclosure the actual role played by the West Virginia Broadband Deployment council relative to the implied support referenced in the State's application.

Partnership with West Virginia Higher Education Policy Commission.

The State's application referenced support and partnership with the West Virginia Higher Education Policy Commission (the "WVHEPC"). In fact, the WVHEPC and the institutions it represents will receive no benefits under the State's \$126 million BTOP grant. The WVHEPC was required to submit its own application in round 2 of the BTOP grant process in the hopes of securing some benefits to address its broadband needs. This is again troubling and again accentuates how misguided the State's Plan is in practice. Verbal messaging aside, the EOWV clearly is not concerned with addressing the needs of West Virginians.

The EOWV needs to explain how its model plan failed to address the most basic needs of the institutions represented by the WVHEPC and the basis on which the implied partnership with WVHEPC was founded respective of their BTOP application. The NTIA should inquire as to the needs of WVHEPC and contemplate how a Middle Mile solution would have addressed their distinct challenges. EOWV officials should clarify this partnership as one based on material facts or one based on political appearances.

Affordability.

Recently, Citynet received its initial set of documents requested under the West Virginia Freedom of Information Act Request from EOWV officials pertaining to the State's BTOP grant. Despite having only a cursory view of the documents, there are examples of State Agencies (the sole purported beneficiaries of the EOWV's plan) complaining about the affordability issues referenced in Citynet's Protest letter. These documents demonstrate the obvious challenge of affordability, consistently referenced by Citynet as a core inhibitor to broadband expansion in West Virginia. Many State Agencies simply cannot afford the price of service from Frontier. In an email dated March 8, 2010, a Jefferson County official notified EOWV personnel that it could not afford to use the fiber (*i.e.*, to light its service from Frontier). The Jefferson County official was told by an EOWV official that, quote, "Even if you don't plan to order service now, it would be prudent to have the fiber available for future use." Here we have clear evidence of the cost issue and evidence of imprudent use of grant funds to construct fiber that cannot be used by the State Agency in question. How does this comply with BTOP objectives?

The EOWV's application, to be more precise, should read as follows: **"West Virginia is going to focus on enabling a subset of State Agencies, that consist of those agencies that can afford Frontier's rate structure, but we will prepare for future expansion of taxpayer spending by funding fiber construction to the subset of State Agencies that cannot afford such services; the results will be to greatly increase revenues flowing to Frontier on the taxpayers' dime resulting**

in yet more taxpayer expense for the consumption of services while purposely omitting benefits for the businesses or citizens of West Virginia and while purposely omitting the institutions of higher education in West Virginia, and while purposely shirking our fiduciary duty to the citizens of West Virginia to address the affordability issue, and, in combination, fail to identify or address the key broadband enablement challenges facing our State today or as we move into the future, but rest assured some State Agencies were enabled.”

The EOWV should be required to explain how affordability is not a core issue in West Virginia, and the EOWV should disclose the number, the subset, of State Agencies that can afford the purchase or use of such fiber routes and those that cannot. Further, the EOWV should explain why it again hides behind procedural compliance to defend its inability to secure service price concessions from Frontier in exchange for \$69,000,000 in taxpayer capital investments, solely for the financial benefit of Frontier and Frontier’s subsequent ability to earn yet more money from the taxpayers by serving these State Agencies in perpetuity. The EOWV should examine the anti-competitive nature of this solution and give consideration to placing those agencies into a disadvantaged situation – locking them out from more affordable and innovative service options.

Meeting Legislated BTOP Objectives not BTOP Procedural Compliance.

The legislated goals and objectives of the BTOP program are clearly documented in the ARRA with a heavy emphasis on broadband expansion, broadband enablement, economic development, the creation of jobs through high job-creating businesses and institutions, and unlocking the barriers for unserved and underserved communities. These are the same honorable goals Citynet is defending in this correspondence with the NTIA and the EOWV. We would draw your attention to the self-assessment portion of the BTOP application and affirm that the self-assessment is the basic measurement tool in assessing an applicant’s ability to achieve BTOP goals as documented in the application itself. You will note that the EOWV’s own self-assessment contained in their original application was 1 out of 100 possible points, a compliance rating of 1%. Given the numerous deficiencies of the EOWV’s BTOP plan this should not come as a surprise. However, we would be curious to know how a BTOP applicant with a 1% compliance rating received funding, and, better yet, how EOWV officials can somehow construe this as a “model” for others to follow.

The EOWV should be required to produce an updated self-assessment along with a written dialogue that substantiates their ability to meet each major goal and objective established in the legislated rules defining the BTOP program. And, the EOWV should address how its BTOP plan solves the key challenges facing West Virginia. The basis of this discussion should focus on the facts at hand and not political speak.

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There are also technical compliance issues as they relate to oversight and accountability that result from handing taxpayer funded assets to a for-profit third party that is not legally required to fulfill such compliance, nor does such third party have published or predetermined rate structures as required by all other applicants. To be clear, these procedural issues pale in

comparison to the core challenges facing West Virginia, but they do persist despite the totally inadequate response received from Mr. Pirrolo at the EOWV.

The items of protest identified in this letter are symptomatic of the broader deficiencies of the EOWV's broadband plan. This plan is regressive in nature, ill advised and simply does not employ sound enablement principles. The challenges in West Virginia stem from a total lack of open-access Middle Mile infrastructure and economically prohibitive transports costs reaching 20 to 30 times the national average of broadband enabled communities. This aspect of affordability manifests itself in many different ways. For innovative Internet service providers, this cost, or issue of affordability, prevents expansion into smaller rural communities. For consumers, this cost, or issue of affordability, is reflected in the low performance metrics (megabits of service received) when compared to national averages. For others, it represents a consumption limitation in that the consumer or business simply cannot afford the price of the service. This issue of affordability cannot be resolved solely on the goodwill of Frontier Communications, a monopoly that will always prioritize profits over enablement, an exact replication of the formula that today finds West Virginia ranked 48th nationally in broadband enablement. We clearly know what is not working.

Given the multitude of issues clearly evident with the EOWV's BTOP grant, we are requesting that the NTIA immediately, without delay, suspend all funding of the EOWV's BTOP grant. Officials from the NTIA should do a thorough analysis of the issues outlined in this correspondence and require EOWV officials to respond publicly and directly to these challenges on an item-by-item basis. We would encourage and welcome public hearings on this matter. The citizens of West Virginia deserve transparency and accountability from their public servants and this is especially true given the magnitude and importance of broadband enablement in our State. Together, we need to ensure BTOP objectives are achieved and maximum broadband benefits are propagated to businesses and citizens of West Virginia. It is only through your help that we can achieve the desired results.

Mr. Devaney and Mr. Strickling, you perhaps may be our last hope for bringing broadband sanity to West Virginia. We fully recognize it is uncomfortable to address inadequacies in a BTOP grant once it has been awarded, let alone for Citynet to publicly challenge the Executive Offices of the State of West Virginia. Indeed, it is not an experience we enjoy and a path few others would take.

On a personal note, I was born and raised in West Virginia and I have built a successful West Virginia-based business that addresses and solves broadband challenges on a daily basis with an acute awareness on the future economic implications this process will levy on our State. Given the magnitude of the BTOP opportunity, an opportunity to bring lasting change and real benefits to the great State of West Virginia, I am compelled to force this issue to a productive end and I refuse to bow to the mounting political pressure. Together we need to do the right thing for the future of West Virginia, a future that currently rests in your hands.

Earl E. Devaney
Lawrence E. Strickling
October 6, 2010
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We look forward to hearing from you shortly and strongly encourage a face-to-face meeting at your earliest convenience.

Very truly yours,

A handwritten signature in black ink that reads "James R.J. Martin, II" followed by a stylized monogram "KLM".

James R.J. Martin, II
President/CEO