



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

Dear Chairman Devaney and Secretary Strickling:

We are writing to you to formally protest the award of funds to the Executive Offices of the State of West Virginia (“EOWV”) under the Broadband Technology Opportunities Program (“BTOP”). Citynet is of the firm belief that the plan for the expenditure of the BTOP funds as currently contemplated by the EOWV is wholly contrary to the requirements of the NTIA and will result in a complete waste of taxpayer money.

By way of background, in March, 2010, the National Telecommunications and Information Administration (“NTIA”) announced that it was awarding more than \$126 million to the EOWV under the BTOP program. According to the Executive Summary of the EOWV application submitted to the NTIA:

The West Virginia Statewide Broadband Infrastructure Project plans to bring high-speed Internet access to this vastly underserved region by expanding the state’s existing microwave public safety network and adding about 2,400 miles of fiber. The expanded statewide network expects to directly connect more than 1,000 anchor institutions, including public safety agencies, public libraries, schools, government offices, and other critical community facilities at speeds of up to 45 Mbps. As a result of this project, every K–12 school in the state will have a high-speed Internet connection. In addition, access to healthcare, distance learning opportunities, and broadband and video applications for emergency first

responders will be greatly expanded. The project intends to spur affordable broadband service impacting more than 700,000 households, 110,000 businesses, and 1,500 anchor institutions, by allowing local Internet service providers to connect to the project's open network.

Citynet acknowledges that the Executive Summary describes a project that meets the stated goals, objectives and requirements of the NTIA. However, based on numerous meetings between Citynet and West Virginia Secretary of Commerce Kelley Goes, it is clear that the EOWV has no intention of spending the BTOP funds in a manner that is consistent with the plan as described in the Executive Summary.¹

The Executive Summary of the EOWV's application describes a "middle mile" fiber project that will result in 2,400 miles of new fiber being constructed. It is asserted by the EOWV that the new fiber will benefit "more than 700,000 households, 110,000 businesses and 1,500 anchor institutions by allowing local Internet service providers to connect to the project's *open network*." (Emphasis added) Based on the meetings with Secretary Goes as noted above, and her description of how the EOWV's project actually will be implemented, the assertions in the Executive Summary are false.

Specifically, Secretary Goes has advised Citynet that approximately \$40 million of the BTOP funds will be given to Frontier Communications (as the successor-in-interest to Verizon)² to construct "tails" to government facilities only from the nearest Frontier hub or similar facility. The "tails" will be "last mile" fiber facilities, not middle mile fiber facilities, and will constitute the full extent of fiber construction under the EOWV's plan. Once constructed, the government agencies will have the ability to order services from Frontier, *and only Frontier*, pursuant to the already existing MPLS contract between the State of West Virginia and Frontier.³ In other words, Frontier will be given \$40 million in taxpayer funds to build out its network on a last mile basis to West Virginia government agencies and, *if* the government agency orders services under the MPLS contract, then Frontier will bill the government agency for those services at existing (and exorbitant) prices. A complete windfall for Frontier.

Importantly, the fiber construction being proposed will not benefit any households, businesses, healthcare entities or anchor institutions (unless it is a state agency). Rather than building true middle mile fiber that will pass households, businesses, and anchor institutions, only last mile fiber will be built to the particular state agency that orders services from Frontier. Despite the representation by the EOWV that 2,400 miles of middle mile fiber will be built with the BTOP funds, the reality is that only a fraction of that amount of fiber will be built, and even what is built, will not benefit the public at large. Frontier essentially is being given a grant of \$40 million to build last mile fiber to any state agency that wants to order, and can afford to pay for, services from Frontier. Of course, any state agency that orders services from Frontier in this circumstance will have to pay Frontier the existing service charges under the MPLS contract.

¹ Citynet would note that it has no objection to the expenditure of funds by the EOWV related to construction of additional microwave towers in the State of West Virginia. Citynet's concerns are related to the purported "middle mile" fiber network described in the EOWV's application.

² Frontier closed its merger with Verizon on June 30, 2010.

³ Frontier is the successor to Verizon Business with respect to the MPLS contract.

Recently, the EOWV filed its first quarterly report with the NTIA. Tellingly, in discussing the purpose of the grant, the EOWV makes *no* mention of using the grant funds to bring broadband connectivity to households and businesses in the State of West Virginia. See, <http://www2.ntia.doc.gov/files/grantees/WestVirginiaQ1PR2010.pdf> Despite the content of the EOWV's original application, it is clear that the 700,000 households and 110,000 businesses discussed in the application will not benefit from the BTOP award to the EOWV.

Given this new arrangement, Citynet questions how the EOWV can meet its responsibilities under the BTOP program. How will the EOWV demonstrate to the NTIA that the public funds are being properly spent with adequate oversight? For example, if Acme High School wants to order a DS3 from Frontier, Secretary Goes explained that the EOWV will order that facility from Frontier and Frontier will invoice the EOWV for the estimated cost of construction and the EOWV will pay Frontier's invoice. Going forward, Acme High School (or its local school board) will pay Frontier for the monthly cost of the DS3 at the existing MPLS contract rate. Most disturbing about this arrangement is that **Frontier will own the resulting fiber facility**. The BTOP awardee – that being the EOWV – will *not* own the fiber facilities resulting from the expenditure of the public funds.

Under the terms of the Notice of Availability of Funds released July 9, 2009 (the "NOFA"), significant oversight requirements are imposed on awardees. For example, awardees are responsible for accounting for all income generated by projects funded with public monies. See, *Federal Register/Vol. 74, No. 130/Thursday, July 9, 2009/Notices at p. 33113*. Pursuant to the plan of the EOWV, Frontier will own all assets created by the expenditure of public monies. Obviously, the EOWV has no ability to account for the money generated by Frontier from the taxpayer funded assets.

Indeed, Section IX of the NOFA sets forth a myriad of reporting requirements for awardees. In this case, the putative awardee is Frontier, yet the NTIA has no ability to compel Frontier to comply with the reporting requirements of the NOFA. Moreover, the NOFA provides for a mechanism whereby an awardee can petition the NTIA for permission to sell assets that result from the expenditure of public monies. Yet, in the case of the EOWV's plan, the sale of assets provision is entirely ignored as all assets resulting from the expenditure of public funds will automatically be owned by Frontier without any obligation to fulfill the requirements of the NOFA.

Furthermore, awardees are responsible for guaranteeing that BTOP funds are only spent for "eligible costs" as that phrase is used in the NOFA. See, *Federal Register/Vol. 74, No. 130/Thursday, July 9, 2009/Notices at p. 33112*. As described above, however, the EOWV will simply be paying invoices submitted to it by Frontier. Thus, the EOWV will have no control over the uses of the funds by Frontier and will have no knowledge whether Frontier is spending the funds for eligible or ineligible costs.

The NOFA also requires that the network resulting from the expenditure of BTOP funds be “open”. This requirement is highly problematic in this situation on at least two fronts. First, given that Frontier will only be constructing “tails” or last mile facilities, there are no facilities for other carriers to connect to as the result of this purported “middle mile” project in violation of the scalability requirement of the NOFA. *See, Federal Register/Vol. 74, No. 130/Thursday, July 9, 2009/Notices at p. 33114.* Thus, as a practical matter, the network will be closed to competitive entities because any fiber that is constructed will serve just a single purpose – *i.e.*, to provide services to the government entity that orders the services from Frontier.

Second, and more troubling, is the EOWV’s position that the network is “open” simply because Frontier will permit other entities to use the resulting facilities pursuant to the terms of existing interconnection agreements. Historically, a common problem faced by carriers that ordered fiber-based services from Verizon under existing interconnection agreements or tariffs was that Verizon nearly always responded that “no facilities are available”. Under the plan of the EOWV, Frontier (as successor to Verizon) will be the *sole party* determining how much fiber to construct for any particular project. Thus, even if the fiber facilities were constructed in a manner that allowed for the use thereof by entities other than a single government facility, there is no ability to ensure that enough fiber is constructed so that competing carriers will have the ability to use to the resulting assets. After construction, competing carriers likely will continue to face the same “no facilities available” response that they faced with Verizon in violation of Section V.2.c.iv and v of the NOFA. Moreover, other potential competitors such as cable companies will have no ability to access the fiber since they do not have interconnection agreements with Frontier. Thus, the NTIA will have no ability to police discriminatory and “openness” violations of the NOFA because Frontier will own the assets, not the actual BTOP awardee.

Furthermore, given that the fiber facilities will be built with public funds at no cost to Frontier, the prices for use of the facilities by other entities should be nominal at most – not based on current interconnection agreement or tariff prices. Currently in West Virginia, a DS3 facility costs approximately \$10,000.00 per month. That same DS3 facility in the Pittsburgh area costs approximately \$500.00 per month. The reason for this disparity is the fact that West Virginia wholly lacks sufficient middle mile fiber facilities and connection to the Internet backbone. Given the amount of money that the EOWV intends to spend on fiber facilities, those monies should be directed to true “middle mile” fiber construction and connection to the Internet backbone. Otherwise, the problems faced by West Virginia residents and businesses to obtain true broadband at affordable prices will remain in perpetuity.

One of the enumerated goals of the BTOP as set forth in the NOFA is economic growth and job creation. Yet, the expenditure of BTOP funds as currently contemplated by the EOWV will result in little or no economic growth. Certainly, no jobs will be created as the result of paying \$40 million to Frontier. Frontier simply will be using existing manpower to construct the last mile fiber to the state agencies if and when orders are placed. The EOWV’s plan is a zero sum proposition as far as economic growth and job creation are concerned.

To add further color to the problems with the EOWV's current plan, the West Virginia Higher Education Policy Commission (the "WVHEPC") has filed an application in Round II seeking BTOP funding for broadband enablement because the EOWV's plan completely fails to address the needs of higher education in West Virginia. The WVHEPC is the entity that oversees and operates all of the public colleges and universities in the State of West Virginia. How is it that the EOWV has been awarded \$126.4 million – the largest Round I award – and the colleges and universities in the State of West Virginia will receive no benefit? In fact, even if fiber facilities were built to those entities under the current plan of the EOWV, it would be a useless act because the bandwidth needed by those entities is not available under the existing MPLS agreement with Frontier.

The Coalition anticipates it will be portrayed by the EOWV as trying to prevent the State of West Virginia from benefiting from the BTOP award. Nothing could be farther from the truth. Citynet is intently focused on doing what is best for the State of West Virginia. Allowing Frontier to hold state agencies hostage under the MPLS pricing regime in perpetuity is contrary to the goals of the NOFA. In addition, given the size of the award to the EOWV, Citynet is extremely concerned that no additional funds will be forthcoming to benefit the private citizens and businesses in West Virginia from the second round of BTOP funding. If that is the case, and the EOWV executes its plan as currently intended, the State of West Virginia will remain broadband deficient.

Despite repeated pleas for the EOWV to change its current course of action, Secretary Goes has made clear that the EOWV will not do so. As the result, Citynet is left with no alternative but to pursue this protest and/or other avenues of relief. Otherwise, the anti-competitive effects could be devastating. For example, competitive entities that already have invested capital to provide services to state agencies may find themselves without a customer due to political or financial pressure to disburse BTOP funds to locations already having services. In essence, the EOWV's current plan provides Frontier not only a competitive advantage over existing competitive providers, it likely means that competitive options (superior to Frontier's) will be priced out of the market relative to installation cost alone, thereby leaving the end-users (*i.e.*, the state agencies) with no choice (current or future) to enjoy lower services costs, higher bandwidth performance and advanced service capabilities.

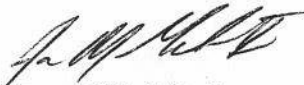
The misguided implementation of the EOWV's plan introduces serious long-term economic risks for the State of West Virginia, limits state agency choice and effectively locks out competitive carriers. The beneficiary of the EOWV's plan is not the State of West Virginia, it is clearly Frontier. The citizens of West Virginia will be shocked once these realities take hold and become more acute and recognizable over time. Thus, Citynet respectfully requests that the NTIA suspend the award to the EOWV until such time as the EOWV provides the NTIA with a plan that complies with the requirements of the NOFA.

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Please advise at your earliest convenience as to how the NTIA will address the deficiencies in the EOWV's plan. In addition, if you believe we should pursue this matter via a different mechanism or in a different forum, we would appreciate hearing from you on that issue.

We look forward to hearing from you and we thank you for your attention to this highly important matter.

Sincerely,



James R.J. Martin
President/CEO

- xc: Senator John D. Rockefeller
- Senator Carte Goodwin
- Representative Shelley Capito
- Representative Alan Mollohan
- Representative Nick Rahall
- Governor Joe Manchin, III
- Lieutenant Governor Early Ray Tomblin
- Secretary Kelley Goes
- Michael Fletcher, WV PSC
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- Jerry Berman, Chairman, Center for Democracy & Technology