N A R U C

National Association of Regulatory Utility Commissioners

March 4, 2010

Secretary Timothy F. Geithner
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

RE: Expediting Release of Advice on the Proper Tax Treatment of ARRA Broadband Grants

Dear Secretary Geithner:

The National Association of Regulatory Utility Commissioners (NARUC) is recognized by Congress and the Courts as a proper representative of State Public Service Commissions.[1] *NARUC's State commission members protect both utility ratepayers and the public interest*. You have already received a NARUC letter highlighting concerns about the possible tax treatment of *smart grid* grants provided under the American Reinvestment and Recovery Act, PL 111-5 (2009).[2] This letter raises similar concerns about grants provided under ARRA's Broadband Technologies Opportunities Program, administered by the National Telecommunications and Information Administration (NTIA), and the ARRA's Broadband Infrastructure Program, administered by the Rural Utilities Service (RUS).

This is a critically important issue with significant implications for jobs, economic recovery, and the rollout of broadband infrastructures. The Treasury and Internal Revenue Service (IRS) should expeditiously clarify tax implications for these ARRA grant funds. Grant applicants continue to express concern over the possible tax treatment of awards.[3] Unfortunately, even tax experts are unsure of the tax consequences of stimulus grants. The agencies providing grants *cannot* resolve this issue.[4] Some *immediate* guidance from Treasury or the IRS is needed.

Nothing in ARRA indicates that the RUS/NTIA broadband (or smart grid) grants are taxable. If the Department of Treasury and the IRS determine that ARRA grants are taxable it will significantly

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1 See 47 U.S.C. § 410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Board to consider issues of concern to both the Federal Communications Commission and State regulators with respect to universal service, separations, and related concerns; Cf.. 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). Cf. *NARUC, et al. v. ICC,* 41 F.3d 721 (D.C. Cir 1994) (where the Court explains "…Carriers, to get the cards, applied to…(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system.). See also *United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985) ("Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions." 471 U.S. 52, n. 10)

2 See *January 25, 2010 Letter to the Treasury Secretary from NARUC President Coen and Electricity Committee Chair Brown* at: http://www.naruc.org/Testimony/10%200125%20NARUC%20letter%20to%20Treasury%20re%20SG%20Grant%20taxation.pdf.

3 See *NOFA #2 Presentations on BroadbandUSA.gov Website,* posted on OCAAM Networks' Blog by Juan Vela on February 5, 2010, at: http://www.occamnetworks.com/bsp/perspective/blog/index.php?entry=entry100205-104917 (last accessed March 2, 2010).

4 Indeed, the most recent FAQ on point provided by NTIA/RUS appears to raise more issues and resolve none. The FAQ states: "*Q: Are BIP grants taxable? If so, can the grantee use grant funds to pay the taxes? A: Applicants who are not exempt from taxation should consult with their tax advisors on the potential tax consequences of BIP grants. Federal taxes are not an eligible cost under Federal grant programs such as BIP. For an example of the analysis that the IRS may apply to BIP grants see: http://www.irs.gov/pub/irs-drop/n-03-18.pdf. BIP staff cannot provide guidance on tax implications to applicants.*"

undermine Congressional intent. It *could* ultimately increase costs to utility ratepayers NARUC's members are charged to protect. It most certainly *will* curtail the scope of grant funded broadband infrastructure, mapping, and adoption projects.[5] Because ARRA was designed to stimulate the economy, taxing these grants is both counterproductive and clearly inconsistent with Congressional goals. An additional tax burden decreases the capital available for the projects (blunting the stimulus' impact) and increases the cost of investments.

We appreciate your prompt February 5, 2010 response to our "smart grid" letter. However, more targeted and explicit tax guidance is needed. That guidance is needed quickly. We are also encouraging the Departments of Commerce and Agriculture to work with your department to ensure an IRS determination that ARRA grants are non-taxable, perhaps as "non-taxable contributions to the capital of a corporation by a non- shareholder."

Thank you for your consideration. If you have any questions or concerns, please do not hesitate to contact Brad Ramsay, NARUC General Counsel at 202-898-2207 or jramsay@naruc.org.

Sincerely,

David C. Coen
President
NARUC

Ray Baum
Chairman
NARUC Telecommunications Committee

cc: The Honorable Douglas Shulman, Commissioner, Internal Revenue Service
The Honorable Lawrence Strickling, Asst. Secretary for Communication & Information, NTIA
The Honorable Jonathan Adelstein, Administrator, Rural Utilities Service
The Honorable Anna Gomez, Deputy Asst. Secretary for Communications & Information, NTIA
The Honorable Jessica Zufolo, Deputy Administrator, Rural Utilities Service
Mr. Thomas Power, Chief of Staff, NTIA
Mr. Larry Atlas, Senior Advisor, NTIA
Ms. Michelle Carey, Senior Advisor, NTIA
Ms. Sara W. Morris, Office of Congressional Affairs, NTIA
Mr. James McConnaughey, Senior Economist, Office of Policy Analysis & Development, NTIA

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[5] If BTOP and BIP grant are taxable, a grantee will need to produce funds to pay the taxes – which some estimate to be as much as 35-40% of any grant award. This will be in addition to the 20% matching requirements. Raising that capital would be a serious impediment, and perhaps impossible, for many of the projects Congress sought to support. See, e.g. *February 3, 2010 Letter from John S. Kamanski, Counsel to Maine Fiber Company, to Ms. Sara W. Morris, Office of Congressional Affairs, NTIA*, at page 1.