

Broadband Funding in American Recovery and Reinvestment Act of 2009

March 16, 2009

The \$787 billion economic stimulus bill, the American Recovery and Reinvestment Act of 2009 (“Recovery Act” or the “Act”), was enacted by President Obama on February 17th after a fractious and largely party-line debate in Congress. The law contains \$7.2 billion of new spending on broadband infrastructure deployment and related broadband matters, of which \$4.7 billion will be administered by the National Telecommunications and Information Administration (NTIA) and \$2.5 billion will be administered by the Rural Utility Service (RUS), a division of the U.S. Department of Agriculture (USDA).

NTIA Broadband Grant Program. As more fully set forth below, the NTIA’s broadband grant program will be used to provide grants for broadband infrastructure deployment and programs aimed at increasing broadband adoption, access and use by unserved and underserved communities and a variety of public service organizations, such as schools and colleges, libraries, medical and health care centers and community support organizations. The grants, which must be awarded by the NTIA no later than September 30, 2010 and must be technologically neutral, can be provided to virtually any type of non-profit or state and local governmental organization or, upon NTIA’s approval, for-profit entity, and must be spent within two years of being awarded. Also, grantees are required to provide at least 20 percent of the funding for their proposed projects from other sources. The Act provides a variety of criteria that the NTIA must consider when awarding grants or that NTIA must impose as conditions of the grants, including non-discrimination and network interconnection obligations.

RUS Broadband Funding Program. The funds provided by the Recovery Act to RUS will be distributed as grants under a new program that will be established by RUS for that purpose and/or as loans and loan guarantees under existing RUS programs. RUS thus far has not provided any guidance regarding how it will divide the funding between grants and loans and loan guarantees. RUS has stated, however, that it intends to “leverage” its \$2.5 billion of funding through loans and loan guarantees to cause investment in excess of \$2.5 billion and that it may offer grant/loan combinations. All funding distributed by RUS under the Act, whether grants, loans or loan guarantees, is required to be used for projects which serve areas that are at least 75 percent rural. In addition, only one entity may receive financing from the program in any given rural area and no project that is financed through the program can also receive NTIA grants. The Act requires RUS to utilize existing broadband loan and loan guarantee programs but it is not clear to what extent, if at all, RUS will modify these programs when distributing the funds provided under the Act. RUS’s primary existing program provides broadband loans and loan guarantees to non-profit and for-profit entities, but generally excludes governmental organizations and entirely excludes telecom providers that serve more than two percent of the total number of subscriber lines in the United States, such as Verizon, AT&T and Qwest. Financing under this RUS program is allocated based on certain preferences which favor deployments in unserved and inadequately served small, rural communities and favor entities that previously have received financing under a related RUS loan program aimed at rural voice telephony deployments.

NTIA and RUS Cooperation and Implementation Timetables. NTIA and RUS, in conjunction with the Federal Communications Commission (FCC), held a public hearing on March 10 regarding the broadband programs. In addition, NTIA and RUS released a Joint Request for Information and Notice of Public Hearing (RFI) on March 11 seeking public input regarding various issues related to their respective broadband programs and announcing six upcoming open public meetings that will be held in March.¹ The

¹ Each meeting will feature a particular theme, such as (i) definitions that will need to be adopted for the broadband programs, (ii) the role of the states in the programs, (iii) the relationship between the agencies’ respective programs, (iv) the application selection criteria and (v) the role of for-profit applicants in the broadband programs. Four of the meetings will be held in Washington, D.C. on March 16, 19, 23 and 24. Two meetings will be held on March 17 and 18 at other locations. Although the locations have not been confirmed, the meetings are expected to be held in Flagstaff, AZ and Las Vegas, NV. All of the meetings will be webcast.

March 10 meeting and the RFI make clear that NTIA and RUS intend to closely coordinate the implementation of their respective programs. The two agencies intend to use similar timetables for awarding funding and may provide a streamlined means of apply for funding from their respective programs.²

Each agency intends to offer three tranches of funding with each tranche representing roughly one-third of the funding available. Applications for the first tranche of funding are likely to be due towards the end of the second quarter of 2009; applications for the second tranche of funding are likely to be due in the fourth quarter; and applications for the third tranche are likely to be due in the second quarter of 2010. Both agencies expect to issue eligibility criteria and application and project requirements in the next 60 to 90 days. This is both an aggressive and very tight timeline. Public comments on the RFI are due on April 13 and will need to be reviewed and evaluated by the agencies before they issue their respective program rules. Further, applicants will need a sufficient period of time after the rules are released to develop their applications. Accordingly, it is very possible that the application deadline for the initial tranche of funding will slip into the third quarter.

Strategy for Seeking NTIA and/or RUS Broadband Funding. Because neither the Act nor the RFI contains firm requirements or procedures for awarding funding, we recommend that prospective applicants file comments in response to the RFI and undertake proactive advocacy with NTIA and /or RUS, interested congressional members, executive branch personnel and/or appropriate state agencies. Such advocacy should be aimed at ensuring that your positions are incorporated into the final rules and procedures adopted by the agencies. Also, applicants intending to seek first-tranche NTIA or RUS funding immediately should begin outlining their projects and developing any desired partnerships.

Please do not hesitate to contact us if you would like assistance to participate in the NTIA and/or RUS rulemaking process or to develop projects appropriate for funding.

NTIA Broadband Technology Opportunity Program

The Act establishes a new grant program to be administered by NTIA entitled the Broadband Technology Opportunity Program (BTOP). Specifically, the Assistant Secretary of Commerce for Communications and Information, who heads the NTIA, is required to develop the new program to satisfy the following objectives—

- provide broadband services to consumers residing in unserved areas and improve broadband services to consumers residing in underserved areas³
- provide broadband education, awareness, training, access, equipment and support to (i) schools, community colleges and higher education institutions; (ii) libraries; (iii) medical and healthcare providers; (iv) community support organizations; (v) organizations and agencies that facilitate greater use of broadband service by low-income, unemployed, aged and otherwise vulnerable populations; and (vi) job-creating strategic facilities located in certain state and federal economic zones
- improve access to, and use of, broadband services by public safety agencies
- stimulate the demand for broadband, economic growth and job creation.

Further, the grant program must serve the overarching policy goals of the Act, which are (i) preserving and creating jobs and promoting economic recovery; (ii) assisting those most impacted by the recession; (iii) providing investments needed to increase economic efficiency by spurring technological advances in science and health; (iv) investing in infrastructure that will provide long-term economic benefits; and (v) stabilizing state and local government budgets in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases.

The Recovery Act provides the NTIA with wide latitude regarding its administration of the grant program but requires the NTIA to report on its progress to the House and Senate every 90 days. In addition, the Office of Management and Budget, at least initially, is requiring NTIA to report on its progress implementing the BTOP on a weekly basis. The NTIA also is required to consult with the FCC when developing the BTOP and “may” consult state governments for assistance in identifying unserved and underserved areas

² The Act specifically states that BTOP funding may not be used to fund projects in any “area” receiving RUS funding. However, NTIA and RUS representatives at the March 10 meeting stated that they may permit applicants to seek funds from both agencies’ programs to fund “separate portions” of a single project.

³ Congress expressly noted in its conference committee report that it expects grants to serve rural, suburban and urban areas.

in a state and regarding how to allocate grant funds in a state. However, there are no limits on the types of entities that may be awarded grants—the law permits NTIA to award grants to state and municipal governments and agencies, Indian tribes, U.S. territories and non-profits and, to the extent that NTIA determines that it is in the public interest to do so (and we expect that NTIA will), for-profit entities. In addition, funds may be used to acquire equipment and deploy infrastructure (*i.e.*, supply-side projects), but also may be used for projects that facilitate access to pre-existing broadband services (*i.e.*, demand-side projects).

Under the Act, the NTIA may develop any type of BTOP application process that it deems appropriate, provided that the NTIA takes into account the following criteria:

- All awards must be made by September 30, 2010 and all projects that are awarded grants must be substantially completed within two years of receiving funds.
- Award grants must be technologically neutral.
- Funded projects should not be able to be implemented during the grant period absent federal BTOP funding, although applicants may use other sources of funding in addition to BTOP funding.
- Unless NTIA provides a waiver, at least 20 percent of the funds used for a project must come from sources other than the BTOP.
- To the extent practical, grants must (i) be awarded in every state; (ii) increase the affordability of, and subscribership to, broadband by the greatest population of users; (iii) provide the greatest broadband speeds possible to the greatest number of users; (iv) enhance service for health care delivery, education and children; and (v) not result in unjust enrichment if a project's non-recurring costs are also funded through another federal program.
- The NTIA must “consider” whether grants are awarded to socially and economically disadvantaged small businesses.
- All grantees must comply with “non-discrimination and network interconnection obligations” established by the NTIA in coordination with the FCC and these obligations must be at least as restrictive as the FCC’s existing broadband policy statement, which mandates that consumers (i) have access to the lawful Internet content of their choice; (ii) be able to run applications and services and attach devices of their choice, provided that doing so is legal and will not harm the network; and (iii) are entitled to competition among network providers, application and service providers and content providers.

In addition, of the \$4.7 billion allocated for the BTOP:

- At least \$200 million is set aside for expanding public computer center capacity, including at libraries and community colleges.
- At least \$250 million is set aside for “innovative programs to encourage sustainable adoption of broadband service.”
- \$10 million is set aside for audits and oversight of the BTOP.
- Up to \$350 million is set aside for the creation and maintenance of a national broadband inventory and capabilities map by the NTIA, which must be made publicly available within two years.
- An amount determined by the NTIA will be provided to the FCC to develop a national broadband plan by the FCC within one year.

Based on this statutory guidance, we understand that NTIA currently plans to distribute funding through at least three separate programs: (i) a grant program supporting supply-side and demand-side broadband projects serving unserved and underserved areas that will be funded with approximately \$3.5 billion; (ii) a \$200 million grant program to be used to expand public computer center capacity, including libraries and community colleges; and (iii) a \$250 million grant program to be used for innovative programs to encourage sustainable adoption of broadband services.⁴

⁴ The remainder of the \$4.7 billion BTOP fund will be used for administration and oversight, to fund the development by the FCC of a national broadband plan and to fund nationwide mapping of broadband availability.

The NTIA is instructed under the law to issue a request for proposals (RFP) seeking BTOP grant applications. As noted above, NTIA intends to issue the RFP in 60-90 days and it presumably will provide additional information about how to apply for BTOP grants and guidance regarding how grant applications will be evaluated and processed by NTIA. NTIA has established a Web site at <http://www.ntia.doc.gov/broadbandgrants> where it will post information about the BTOP. Also, grantees must provide quarterly reports to NTIA regarding their progress and this information, as well as various other information about grant applications, grantees and funded projects, will be made available to the public by the NTIA in a fully searchable database.

RUS Broadband Program

The Act allocates \$2.5 billion for loans and loan guarantees under the Rural Electrification Act of 1936 (REA) and for grants under a new broadband grant program to be adopted by RUS. RUS has not provided any guidance to date as to how it will divide its funding allocation between grants and loans and loan guarantees. In addition, it is not yet clear whether RUS solely will award loans and loan guarantees under its existing REA programs; whether RUS will modify these programs for purposes of awarding funding provided under the Act; or whether, in addition to existing REA programs, RUS also will award loans and loan guarantees under newly created programs.

Irrespective of how RUS distributes funding under the Act, the Act imposes the following criteria on all loans, loan guarantees and grants awarded using such funding:

- 75 percent of the area served by each project awarded funding by RUS under the Act must constitute “a rural area without sufficient access to high speed broadband service to facilitate rural economic development, as determined by the Secretary of Agriculture”
- Priority must be given to projects that will—
 - provide consumers with more than one service provider
 - provide access to the highest proportion of rural residents without broadband service
 - involve rural telecommunications companies that are current or previous borrowers under another REA program that funds the provision of voice telecommunications services to rural areas
 - be fully funded, can be promptly commenced and can be completed if the requested financing is approved.
- No area served by a project financed under this program may receive funding under the BTOP.

To the extent that RUS primarily awards loans and loan guarantees using funding provided by the Act under existing REA programs, it is likely that RUS primarily will rely on Title VI of the REA, which established the Rural Broadband Access Loan and Loan Guarantee Program (“Title VI Program”) in 2003. The Title VI program permits RUS to finance projects that “furnish, improve, or extend a broadband service” to rural communities. Under the Title VI program, RUS makes loans and loan guarantees pursuant to the following criteria:

- Most for-profit and no-profit entities are eligible to receive financing, including Indian tribes, but financing is not available to (i) entities that already serve more than two percent of the total number of subscriber lines in the United States, which effectively excludes the larger national and regional carriers; and (ii) to partnerships comprised of individuals. Financing also is available to state and local governments but only to serve areas that were not served as of April 30, 2003.
- Financing must be used to provide broadband services to incorporated or unincorporated places that have no more than 20,000 residents according to the most recent census and that are not located in a standard metropolitan statistical area, although RUS may permit the facilities that will be used to provide such service to be located outside of the community to be served. However, RUS will not provide financing to more than one entity intending to serve a single area.
- Financing must be used to fund the provision of broadband services of at least 200 kbps upstream and downstream, although RUS may modify this data rate at its discretion. The loans may be used to purchase or lease broadband facilities, but only may be used to acquire existing broadband facilities if the acquisition is necessary and incidental to furnishing or improving rural broadband service and the facilities are not acquired from an affiliate of the applicant. Financing may not

be used to purchase customer terminal equipment to be owned by customers of the applicant, to purchase vehicles not used primarily in construction and for any operating expenses.

- Financing is committed in the following order of priority: (i) areas where broadband service currently is not available to residential customers and no entity has committed to provide such service; (ii) areas where broadband service is not available to residential customers at rates comparable to neighboring urban and suburban areas and/or the quality of existing service is not satisfactory as determined by RUS, taking into account data rates, system latency and data rate restrictions; and (iii) areas where broadband service is available to residential customers.
- Applicants must apply for at least \$100,000 of financing and the loans must be repaid during the expected life of the financed facilities. In addition, the applicant must provide RUS with a first-tier security interest against all of the applicant's property and must provide credit support for at least 20 percent of the requested loan amount, but no less than the operating costs of providing service for the first year (unless this latter requirement is waived by RUS). Up to 40 percent of financing may be used to refinance existing loans issued by RUS under this program but at least 60 percent of the financing must be used for the construction or improvement of facilities and equipment for broadband services.

There are three types of loans and loan guarantees offered under the Title VI Program. These are—

- direct cost-of-money broadband loans bearing an interest rate equal to the cost to the Department of the Treasury of borrowing using obligations of comparable maturity
- direct loans with a four percent interest rate for projects that will serve a community of less than 2,500 people that is not currently receiving broadband services and that is located in a county with a population density that does not exceed a maximum amount specified by RUS each year
- loan guarantees up to 80 percent of a commercial loan provided that (i) the lender meets various financial criteria established by RUS and (ii) that the loan bears a fixed rate of interest based on currently applicable market rates, is not used to pay interest on another loan and does not involve a balloon payment.

NTIA and RUS Request for Information

The RFI requests public comment on a very wide range of issues related to the implementation of the NTIA and RUS broadband programs. The RFI does not contain any firm proposals and thus provides virtually no guidance as to the agencies' current intentions with respect to their respective programs. Among the general topics for which the RFI requests comments are:

- How should the agencies apportion available funds among the statutory objectives of their respective broadband programs?
- How should NTIA and RUS coordinate their efforts?
- What role should NTIA provide state governments with respect to the BTOP?
- What selection criteria, evaluation priorities and application procedures should be used to award BTOP grants and RUS funding?
- What types of entities should be eligible for BTOP grants?
- How should NTIA define various terms in the Act for purposes of implementing the program, such as "broadband service," "innovative," "unserved," "underserved" and "non-discrimination?"
- How should RUS divide available funding between loans, loan guarantees and grants?
- How should RUS determine whether a project serves an area that is 75 percent rural and how should RUS define terms such as "high speed broadband service" and "economic development?"

We anticipate that NTIA and RUS will receive a very large volume of responses to the RFI. As noted above, the time that it will take the agencies to review and evaluate the responses prior to issuing rules for their respective broadband program may push back the agencies' currently anticipated funding timelines for the first tranche of funding.

For more information, please contact—

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