

COMMUNICATIONS AND TECHNOLOGY ALERT

BROADBAND FUNDING IN AMERICAN RECOVERY AND REINVESTMENT ACT OF 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 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.

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.

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.

CONTACT INFORMATION

If you would like assistance to participate in the NTIA and/or RUS rulemaking process or to develop projects appropriate for funding, please contact—

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