AKIN GUMP
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NTIA and RUS Procedures, Conditions and Criteria for Round One of Recovery Act Broadband Funding

July 30, 2009

The American Recovery and Reinvestment Act of 2009 ("Recovery Act") included $7.2 billion of new spending on broadband infrastructure deployment and related broadband matters. The National Telecommunications and Information Administration (NTIA) and the Rural Utility Service (RUS), a division of the U.S. Department of Agriculture, recently released a joint Notice of Funds Available (NOFA) outlining the application procedures, conditions applicable to the funding, and application evaluation criteria for the first round of Recovery Act broadband funding. Approximately $4 billion of funding is available under this NOFA. Remaining Recovery Act broadband funding is expected to be awarded in two subsequent funding rounds pursuant to separate notices. NTIA and RUS reserve the right to modify the funding rules for such subsequent funding rounds.

The broadband funding available under the NOFA is divided between RUS's Broadband Initiatives Program (BIP), which will issue approximately $2.4 billion in grants, loans and grant/loan combinations, and NTIA's Broadband Technology Opportunities Program (BTOP), which will issue approximately $1.6 billion in grants. BIP funding includes up to $1.2 billion for "Last Mile" (terms set forth in quotes defined below) and $800 million for "Middle Mile" "Broadband Infrastructure" projects, as well as $325 million for a national reserve that can be used to fund either. Of the Last Mile BIP funding, $400 million will be issued as grants for projects that serve "Remote" areas and $800 million will be issued as loans or loan/grant combinations for projects serving "Non-Remote" areas. BTOP funding includes up to $1.2 billion for Last Mile and Middle Mile Broadband Infrastructure projects, up to $50 million for "Public Computer Center" projects and up to $150 million for "Sustainable Broadband Adoption" projects. In addition, RUS and NTIA reserve the right to redesignate funding from one category to another (subject to certain Recovery Act thresholds in the case of BTOP) and to direct funding not assigned under this NOFA to future funding rounds.

Definitions

For purposes of BTOP and BIP, the following definitions apply. However, RUS and NTIA representatives have stated publicly that they intend to provide additional guidance regarding certain of these definitions in the coming weeks.

- **"Broadband"** means two-way data transmissions with advertised speeds of at least 768 kilobits per second (kbps) downstream and at least 200 kbps upstream to end-users, or, in the case of Middle Mile projects, data services that will support provision of broadband transmissions speeds to end-users.

- **"Broadband Infrastructure"** projects are Last Mile and Middle Mile projects.

- **"Last Mile"** projects are infrastructure projects the predominant purpose of which is to provide broadband services to end-users. Applications proposing Last Mile Broadband Infrastructure projects must propose to serve the entire territory of each census block included in the proposed funded service area, unless the applicants receive a waiver of this requirement.[1]

- **"Middle Mile"** projects are broadband infrastructure projects that are not predominantly intended to provide service to end-users, such as interoffice transport, backhaul, Internet connectivity and special access. **"Non-Remote"** areas are areas that do not qualify as Remote.

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[1] To obtain a waiver, an applicant must provide a reasoned explanation for why serving the entire territory is infeasible, such as where a census block covers more than 100 square miles or is larger than the applicant's authorized operating area.

- **"Non-Rural"** areas are areas that do not qualify as Rural.

- A **"Public Computer Center"** is a place that provides broadband access to the general public or a specific vulnerable population, such as low-income households, the unemployed, the aged, children, minorities and people with disabilities.

- **"Remote"** areas are Unserved, Rural areas that are 50 miles from the limits of a Non-Rural area.

- An area is **"Rural"** if it is not within the limits of a city, town or incorporated area with more than 20,000 inhabitants and not within an urbanized area (meaning densely populated territory as defined in the latest decennial census by the U.S. Census Bureau) that is contiguous and adjacent to a city or town with a population of more than 50,000 inhabitants.

- An area of one or more contiguous census blocks is considered **"Underserved"** (i) for purposes of Last Mile projects if at least one of the following criteria is met: (a) no more than 50 percent of covered household have access to facilities-based, terrestrial broadband services; (b) no fixed or mobile broadband service provider advertises broadband transmission speeds of at least 3 Mbps downstream; or (c) the rate of household broadband subscription is 40 percent or less; and (ii) for Middle Mile projects, if one interconnection point terminates in an area that is considered Unserved or Underserved for purposes of Last Mile projects.

- An area of one or more contiguous census blocks is considered **"Unserved"** if at least 90 percent of covered households "lack access to facilities-based, terrestrial, fixed or mobile broadband service."

Applicant Eligibility

All entities are eligible to apply for BIP and BTOP funding, including for-profit entities, nonprofit entities and state and local governmental entities.

Project Eligibility and Funding Conditions

Project Eligibility and Funding Conditions Applicable to BIP and BTOP

To qualify for BIP and BTOP funding, a proposed broadband project must—

- be able to be substantially completed no later than two years after the date that funding is awarded[2] and must be fully completed no later than three years after funding is awarded

- be determined by RUS and NTIA to be technically feasible (any applicant requesting funds over $1 million must submit a system design and project timeline, certified by a professional engineer)

- be sustainable beyond the funding period[3]

- to the extent that it proposes a Broadband Infrastructure project, commit to certain nondiscrimination and interconnection obligations,[4] which include (i) adherence to the principles contained in the Internet Policy Statement issued by the Federal Communication Commission (FCC) in 2005;[5] (ii) nondiscrimination with respect to all lawful Internet applications;[6] (iii) disclosing any network management policies applicable to the proposed service prominently on the service provider's Web

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[2] A project receiving BIP funding is considered to be "substantially complete" once 67 percent of the funding awarded to the project has been expended. A project receiving BTOP funding is considered "substantially complete" once 67 percent of its project milestones have been satisfied and 67 percent of the funding awarded to the project has been expended.

[3] It is not clear whether this is a requirement. The NOFA states that funded projects are "*expected* to convincingly demonstrate" (emphasis added) that they are sustainable.

[4] These obligations apply throughout the life of an awardee's facilities but do not apply to any other facilities operated by the awardee that are not funded by BIP or BTOP. In addition, these obligations apply to all contractors and subcontractors of awardees that deploy or operate facilities funded by BIP or BTOP.

[5] The FCC's Internet Policy Statement 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.

[6] Discrimination claims initially must be brought before the FCC and thereafter may be brought to NTIA or RUS, as applicable, if the FCC takes no action.

page and providing notice of any changes in these policies; (iv) offering direct or indirect connectivity to the public Internet;[7] and (v) offering interconnection to any requesting parties where technically feasible on reasonable rates and terms[8]

- only propose to use funding to pay for eligible costs as defined in the cost principles set forth in the Office of Management and Budget (OMB) circulars applicable to the particular type of applicant (for example, OMB has issued different circulars for nonprofit and for-profit entities) and in the NOFA. To qualify as eligible, costs must be reasonable, allocable and necessary for the project.

In addition, all gross income generated by projects funded by BIP and BTOP during the three-year funding period must be reinvested to further "eligible project objectives." Further, an awardee may not sell or lease broadband facilities funded by BIP or BTOP unless (i) the sale price represents "adequate consideration"; (ii) the purchaser or lessee agrees to fulfill the terms and conditions imposed on the facilities under BIP or BTOP; and (iii) either (a) the sale or lease is described in the original application or (b) the funding agency waives the prohibition on such sale or lease, and the sale or lease occurs at least 10 years after the original funding date.

Project Eligibility and Funding Conditions Applicable Only to BIP

To qualify for BIP funding, an application also must meet the eligibility and funding conditions described below in addition to the conditions specified above that are applicable to both BIP and BTOP funding. First, BIP applications must propose projects that serve areas that are at least 75 percent (i) Rural and (ii) either Unserved or Underserved.[9] BIP *grants* will be awarded exclusively to projects serving Remote, Unserved Rural areas, and BIP loans and loan/grant combinations will be awarded to projects serving Non-Remote and Underserved Rural areas. BIP projects that serve both Remote and Non-Remote areas will receive loan or loan/grant combinations, but not grants. For any loan/grant combination award, the applicant will decide the size of the grant portion of the award, but it cannot exceed the loan portion of the award.

Second, only projects that RUS determines to be financially feasible and/or sustainable are eligible for BIP awards under this NOFA. Specifically, for loans or loan/grant combinations, applicants must show sufficient revenue to cover expenses, sufficient cash flow to service debts and obligations and the ability to meet the minimum Times Interest Earned Ratio (TIER) requirement of one by the end of a forecast period of five years (TIER is the ratio of net income after taxes plus interest expense, all divided by interest expense.). For grants, applicants must show they can generate a minimum current ratio (i.e., assets divided by liabilities) of one by the end of the forecast period of five years and demonstrate a cash balance for each year of the forecast period.

Third, between the requested BIP funding and other funding sources, the project must be fully funded. Applicants must submit evidence that all of the other funding necessary to support the project has been secured.

Fourth, no geographic area may be served by more than one BIP-funded project. If more than one application proposes to serve geographic areas with more than a de minimis overlap, the application receiving the highest evaluation score will be funded.

In addition, with respect to Last Mile Remote projects only, applicants may receive grants for more than 80 percent of eligible costs only if RUS determines that the awardee has a specific financial need justifying funding greater than 80 percent.

The following terms will be applicable to BIP loans:

- **Interest Rate.** The interest rate for BIP loans will be set at the time funds are advanced and will be equal to the cost of borrowing to the Department of the Treasury for obligations of comparable maturity.

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[7] Although entirely private, closed networks will not be funded. Applicants may propose to offer managed broadband services that use private network connections—such as telemedicine, public safety communications and distance learning—for enhanced quality of service rather than traversing the public Internet, provided that the services also offer the ability to interconnect with the public Internet.

[8] Awardees must negotiate in good faith with parties requesting interconnection for at least 90 days. If no agreement is reached, the requesting party may notify RUS or NTIA, as applicable. Also, parties may seek rule interpretations from the FCC with respect to any implicated FCC rules. Interconnection may not result in a BIP-funded facility being used for ineligible purposes under the Recovery Act.

[9] Applications proposing projects that will serve areas that are at least 75 percent Rural **must** be submitted to RUS for consideration under BIP ("BIP Application"). If a BIP Application is rejected by RUS, NTIA will review the applications for BTOP funding provided that the application also contains information demonstrating compliance with BTOP requirements.

- **Repayment Period.** Loans must be repaid with interest within a period roughly equal to the expected Composite Economic Life of the assets to be financed.

- **Amortization Period.** Interest begins accruing on the date of each loan advance, and interest payments are due monthly.

- **Fidelity Bonding.** Applicants must agree to obtain a fidelity bond for 15 percent of the loan amount, unless RUS agrees to reduce this percentage.

- **Security.** The loan portion of the award must be adequately secured, as determined by RUS.

A comprehensive description of the terms and conditions applicable to BIP loans is set forth at http://www.broadbandusa.gov.

Project Eligibility and Funding Conditions Applicable Only to BTOP

To qualify for BTOP funding, an application also must meet the eligibility and funding conditions described below in addition to the conditions specified above that are applicable to both BIP and BTOP funding. First, each of the four categories of BTOP grants must meet certain gating requirements. Last Mile and Middle Mile Broadband Infrastructure grants only will be awarded for projects that serve Unserved or Underserved areas. Public Computer Center grants only will be awarded for projects that create or expand a Public Computer Center. Sustainable Broadband Adoption projects "should demonstrate a sustainable increase in demand for and subscribership" to broadband services. Both Public Computer Center and Sustainable Broadband Adoption projects should "meet a specific public need for broadband service, including but not limited to education, employment, economic development, and enhanced service for health-care delivery, children, and vulnerable populations."

Second, all BTOP projects must advance one or more of five purposes described in the Recovery Act. These statutory purposes are (i) providing access to broadband for consumers in Unserved areas; (ii) improving access for consumers in Underserved areas; (iii) providing access, education, awareness, training, equipment and support to community anchor institutions, organizations serving vulnerable populations, and job-creating strategic facilities in economic development areas; (iv) improving access to, and use of, broadband by public safety agencies; and (v) stimulating demand for broadband, economic growth and job creation.

Third, BTOP applicants are required to document their capacity to provide matching funds of at least 20 percent of their requested funding amount, although they may seek a waiver of this requirement based on financial need. Other federal funding generally may not be used to meet this requirement, although in-kind contributions provided by the applicant and third-party cash donations and in-kind contributions may be used, provided that such contributions meet certain legal requirements.

Fourth, applicants must provide documentation demonstrating that their proposed project would not have been implemented during the grant period without BTOP funding assistance.

Fifth, applicants must demonstrate that their proposed budget is adequate and that the combination of requested BTOP funding and available funds will be sufficient to satisfy the budget and complete the project.

Eligible and Ineligible Costs

Eligible Costs

BIP and BTOP funding may be used to fund the following expenses—

- construction or improvement of facilities required to provide broadband services (and for BIP projects only, facilities required for providing other, non-BIP services using the BIP-funded facilities)

- capital leases with terms of no more than five years for facilities required to provide broadband services

- reasonable pre-application expenses, including professional fees, up to 5 percent of the award

- with respect to Public Computer Center and Sustainable Broadband Adoption BTOP grants, costs that can be demonstrated to serve the following purposes—

  (i) providing broadband education, awareness, training, access, equipment and support to community anchor institutions (e.g., schools, libraries, medical and health care providers, institutions of higher education and community support

organizations), organizations and agencies serving vulnerable populations, or job-creating strategic facilities located in state or federally designated economic development areas

(ii) improving access to, and use of, broadband service by public safety agencies

(iii) stimulating demand for broadband, economic growth, and job creation

- with respect to Public Computer Center BTOP grants, costs of expanding computer center capacity by (i) acquiring broadband equipment and facilities, including hardware and software; (ii) developing and providing training, education and support; and (iii) facilitating access to broadband services

- with respect to Sustainable Broadband Adoption BTOP grants, costs of encouraging sustainable adoption of broadband services by (i) acquiring broadband equipment and facilities, including hardware and software; (ii) developing and providing training, education and support; (iii) conducting broadband-related public education and outreach initiatives; and (iv) implementing innovative programs to facilitate greater broadband access.

Ineligible Costs

BIP and BTOP funding may not be used to fund the following expenses—

- operating expenses of the project, including fixed and recurring costs

- expenses (other than pre-application expenses) incurred prior to filing the Initial Application (as defined below)

- acquisitions, including the acquisition of the stock of, or facilities or equipment purchased from, an affiliate, and mergers or consolidations of entities

- the purchase or lease of a vehicle other than a vehicle used primarily in construction or system improvements

- broadband facilities leased under an operating lease

- the costs of acquiring spectrum.

Application Procedures

General Processing Procedures

BIP and BTOP will use a two-step application process. Initial applications ("Initial Applications") will be accepted between July 14, 2009, and August 14, 2009. Applications and application guidelines are available at http://www.broadbandusa.gov. Applications generally must be submitted electronically, although paper applications may be submitted by applicants (i) with disabilities or (ii) seeking less than $1 million that can demonstrate that electronic filing would be a hardship. Applicants are not permitted to submit material revisions to their applications after the submission deadline, unless requested to do so by RUS or NTIA.

After undergoing a threshold review during which ineligible and incomplete applications will be rejected, each Initial Application will be evaluated and ranked using a point system described below. In addition, NTIA and RUS will issue a public notice listing the funding areas proposed in each application. This will enable existing broadband providers serving such funding areas to report as much to the agencies. The information provided by the existing broadband providers will assist NTIA and RUS to determine whether proposed funding areas qualify as Unserved or Underserved.

Starting on September 14, 2009, and on a rolling basis thereafter, the highest-scoring applicants will be invited to submit a second, more-detailed application ("Second Application") within 30 days of being selected. The agencies expect to begin announcing funding awards on or about November 7, 2009, and all funding under the NOFA will be issued no later than September 30, 2010. Winning applicants will be provided with funding documentation within 30 days of approval of their applications and will be expected to complete and execute the documentation within 30 days thereafter.

Evaluation Criteria

BIP and BTOP Initial Applications are evaluated using scoring criteria that fall into four general categories: Project Purpose, Project Benefits, Project Viability and Project Budget and Sustainability, each of which is described below for each funding program. Each Initial Application will be scored against objective criteria and not against other applications, which enables a rolling review of Initial Applications.

BIP Evaluation Criteria

The Recovery Act requires the RUS to prioritize BIP projects that give end-users a choice of providers, serve the highest proportion of rural residents without current access to broadband, are submitted by current or former RUS borrowers and are fully funded and ready to start when funding is awarded. In addition, RUS will favor BIP applicants that request a higher percentage of loans and demonstrate technological and financial feasibility, organizational capacity and compliance with other priorities of the Obama administration. RUS highly encourages applicants to coordinate with other federal, state and local programs, including Recovery Act programs, in order to efficiently and effectively achieve BIP objectives.

After an initial threshold review for eligibility and completeness of the Initial Application, RUS will evaluate and rank Initial Applications based on the following scoring criteria—

- **Project Purpose.** Up to five points each will be awarded for (i) proportion of rural residents served in Unserved areas; (ii) Rural area targeting; (iii) Remote area targeting; (iv) borrowers that previously received Title II loans from RUS; and (v) Recovery Act and other governmental collaboration.

- **Project Benefits.** Up to 10 points will be awarded based on whether the project's broadband transmission rates meet certain minimums based on the type of technology used and whether the project is a Last Mile or Middle Mile project. Up to five points will be awarded for each of the following Project Benefit criteria: (i) affordability, (ii) whether the project will "allow more than one provider to serve end users in the proposed funding area," and (iii) whether the project offers critical community facilities.

- **Project Viability.** Varying point values will be awarded for an applicant's: organization capability (12 points); community support (2 points); ability to promptly start project as measured by specified criteria (10 points); and disadvantaged small business status (1 point).

- **Project Budget and Sustainability.** Up to five points will be awarded for the clarity and reasonableness of the project budget, and up to 10 points each will be awarded on a sliding scale favoring (i) projects utilizing substantial outside resources and (ii) applications requesting a higher percentage of loans than grants.

Applicants filing the highest ranking Initial Applications will be invited to submit Second Applications. RUS will confirm that the information provided in the Second Application is consistent with the Initial Application. However, the NOFA does not contain a description of how RUS will process the Second Applications.

BTOP Evaluation Criteria

Each BTOP Initial Application will be evaluated by three different volunteer peer reviewers with technical and project management experience in the broadband field. Each reviewer will assign a score to the Initial Application based on the following criteria—

- **Project Purpose.** Up to 30 points will be awarded for (i) a project's "fit" with statutory purposes; (ii) Recovery Act and other governmental collaboration; and (iii) enhanced service for health care delivery, education and children, and socially and economically disadvantaged small businesses.

- **Project Benefits.** Up to 25 points will be awarded with specific criteria that vary based on the type of BTOP grant requested. For Broadband Infrastructure Last Mile projects, reviewers will consider cost-effectiveness; broadband transmission rates; whether the applicant commits to exceeding the nondiscrimination and interconnection obligations; and whether the project will "allow more than one provider to serve end users in the proposed funding area." For Broadband Infrastructure Middle Mile projects, reviewers will consider the impact of the project on the area, including the number of end-points and points of interconnection; the level of need in the area; network capacity; affordability; whether the applicant commits to exceeding the nondiscrimination and interconnection obligations; and whether the project will "allow more than one provider to serve end users in the proposed funding area." For Public Computer Center projects, reviewers will consider the availability of the computer center to the public; any training and educational programs that will be offered; and the availability and qualifications of consulting and teaching

staff. For Sustainable Broadband Adoption projects, reviewers will consider the number of new users the project will generate, the cost per new user and whether the project generates replicable new ideas, approaches and methods to encourage sustainable broadband adoption.

- **Project Viability.** Up to 25 points will be awarded for the technical feasibility of the proposed project, applicant's organizational capability, the level of community involvement in the project and the applicant's ability to promptly start the project.

- **Project Budget and Sustainability.** Up to 20 points will be awarded based on the reasonableness of the budget, the sustainability of the project and the degree to which the applicant will leverage outside resources.

The reviewers' scores will be averaged, and the highest-scoring applicants will be asked to submit a Second Application. NTIA staff will review the Second Application to determine its consistency with the Initial Application. In addition, all state governors will be provided an opportunity to rank the Second Applications. Thereafter, NTIA may request applicants to modify their proposed projects "to resolve any differences between the applicant's original request and what NTIA is willing to fund." Based on the ratings by the NTIA staff and the governors' rankings, the director of BTOP will prepare a recommendation as to which applications should be granted and the recommendation will be reviewed for approval by the associate administrator for the NTIA's Office of Telecommunications and Information Applications. The director and administrator will consider, inter alia, the three peer reviews, the NTIA staff's consistency review, whether the applications satisfy the BTOP objectives (discussed above), the geographic distribution of the proposed projects, the range of proposed technologies, whether the projects are redundant to initiatives of other federal agencies (including BIP-funded projects), remaining funding availability and state recommendations. The director and administrator's recommendations will then be provided to the assistant secretary of NTIA for review and approval.

Post Award Obligations

Reporting Obligations

Following the award of BIP or BTOP funding, the awardee is subject to various periodic reporting and audit requirements. These include the following—

- **OMB Reporting Requirements.** Both BIP and BTOP awardees must submit quarterly electronic reports to RUS and NTIA, respectively, via http://www.federalreporting.gov. The OMB reports must describe the total amount of BIP and BTOP funds expended, evaluate the project's completion status and report the number of jobs created and the infrastructure investments made by state and local governments.

- **BTOP-Specific Reporting Requirements.** BTOP awardees must report quarterly on their progress in achieving project goals, including the number and type of entities receiving improved and new access to broadband services. BTOP awardees must also provide additional reporting information dependent on the specific type of award.

- **BIP-Specific Reporting Requirements.** BIP awardees must submit to RUS, on a quarterly basis, balance sheets, income statements, cash flow statements and other financial information. Further, once their funded project is completed, BIP awardees must provide RUS with an annual report of the number of households and businesses subscribing to the broadband service and receiving improved access.

- **Financial and Audit Requirements.** Recipients that expend $500,000 or more of federal funds during a fiscal year are required to submit a financial and compliance audit report.

- **Monitoring and Site Visits.** Both BTOP and BIP awardees must afford RUS and NTIA representatives access to the broadband system and any other property encumbered by the mortgage or security agreement and any or all books, records, accounts, invoices, contracts, leases, etc.

Federal and State Law Compliance

Any recipient of BIP or BTOP funding must comply with all applicable federal and state laws. Among others, this includes the Communications Act, which regulates the provision of telecommunications services generally, and a variety of employment-related and antidiscrimination laws, including the Age Discrimination Act of 1975, Title VI of the Civil Rights Act of 1964 and the Davis-Bacon wage requirements. In addition, applicants must obtain all necessary federal, state and local governmental permits and approvals required for a funded project.

Buy American Waiver

The Recovery Act contains a "Buy American" provision requiring that all project materials purchased with loan or grant funds be produced in the United States. The Recovery Act, however, also authorizes NTIA and RUS to waive the Buy American requirement if its application would be inconsistent with the public interest. Both NTIA and RUS granted a limited waiver of the Buy American provision for various essential components of a modern broadband infrastructure. As a result, BIP and BTOP project materials for many broadband network components are not required to be produced in the United States. However, the "Buy American" limited waiver does not apply to fiber optic cables, coaxial cables, cell towers and other facilities that are produced in the United States in sufficient quantities. If an applicant wishes to use equipment not covered by this blanket waiver, the applicant may seek a further waiver on a case-by-case basis.

For more information, please contact—

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