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Broadband NOFA Requires Immediate Action by Clients Interested in Stimulus Grants or Loans

The purpose of this memorandum is to highlight for our clients the procedures for seeking broadband stimulus grants and loans, and related policy decisions as announced in the Notice of Funds Availability (NOFA) for the Broadband Initiatives Program (BIP) and Broadband Technology Opportunities Program (BTOP). The NOFA itself is a lengthy (120 pages) and complicated document, and this memorandum is not designed to encompass every nuance of the pending application process, but rather to act as a quick-start summary for clients evaluating whether to file an application. It will be necessary to consult the NOFA itself, and the related Fact Sheet and application instructions, in developing your detailed proposal.

As discussed below, immediate action is necessary, with the application deadline falling a mere 6 weeks from now.

I. Key Points

The following key points should be remembered during your evaluation.

1. Applications must be submitted **by 5:00 pm ET on August 14, 2009**.

2. The NOFA specifically lists for profit corporations, as well as cooperative or mutual organizations, as being eligible to apply for assistance.

3. Applications to fund broadband infrastructure in proposed funded service areas which are at least 75% rural are required to be submitted to RUS for consideration under BIP. While such applicants also can choose to be considered for NTIA BTOP funding at the same time, NTIA may make awards for such projects only after RUS has reviewed the application and determined not to fund it.

a. Broadband means providing two-way data transmission with advertised speeds of at least 768 kilobits per second (kbps) downstream and at least 200 kbps upstream, or providing sufficient capacity in a middle mile project to support the provision of broadband service to end users.

b. Rural area means any area, as confirmed by the latest decennial census of the Bureau of the Census, which is not located within: 1. a city, town, or incorporated area that has a population of greater than 20,000 inhabitants; or 2. an urbanized area contiguous and adjacent to a city or town that has a population of greater than 50,000 inhabitants. For purposes of the definition of rural area, an urbanized area means a densely populated territory as defined in the latest decennial census of the U.S. Census Bureau.

4. RUS has determined that only rural areas which are "unserved" or "underserved" qualify for funding. Thus, a project is eligible for RUS BIP funds only if it serves at least 75 percent unserved or underserved rural areas.

Applications for NTIA BTOP Broadband Infrastructure grants also must be for unserved or underserved areas.

a. Underserved area means a proposed funded service area, composed of one or more contiguous census blocks meeting certain criteria that measure the availability of broadband service and the level of advertised broadband speeds. These criteria conform to the two distinct components of the Broadband Infrastructure category of eligible projects—Last Mile and Middle Mile. Specifically, a proposed funded service area may qualify as underserved for last mile projects if at least one of the following factors is met, though the presumption will be that more than one factor is present: (1) No more than 50 percent of the households in the proposed funded service area have access to facilities-based, terrestrial broadband service at greater than the minimum broadband transmission speed (set forth in the definition of broadband above); (2) No fixed or mobile broadband service provider advertises broadband transmission speeds of at least three megabits per second ("mbps") downstream in the proposed funded service area; or (3) The rate of broadband subscribership for the proposed funded service area is 40 percent of households or less. A proposed funded service area may qualify as underserved for Middle Mile projects if one interconnection point terminates in a proposed funded service area that qualifies as unserved or underserved for Last Mile projects.

b. Unserved area means a proposed funded service area, composed of one or more contiguous census blocks, where at least 90 percent of households in the proposed funded service area lack access to facilities-based, terrestrial broadband service, either fixed or mobile, at the minimum broadband transmission speed (set forth in the definition of broadband above). A household has access to broadband service if the household can readily subscribe to that service upon request.

5. "Scoring criteria" will be used to review BIP and BTOP applications. Each application will be scored against objective criteria and not against other applications. Awardees will be selected from a group of the highest scoring applications.

BIP applications will receive points for, among other things:

a. the proportion of rural residents served in unserved areas.
b. applications that exceed 75 percent rural area.
c. applications that target remote areas (Remote area means an unserved, rural area 50 miles from the limits of a non-rural area).

d. Last mile, wireline projects that are constructed to deliver a minimum of 20 megabit per second service to households (upstream plus downstream).

e. Last mile, wireless projects that are constructed to deliver a minimum of two megabits per second service to the end user (upstream plus downstream).

f. Middle mile projects that are constructed to deliver 100 megabits per second service to all end points in their network.

BTOP Broadband Infrastructure applications will receive points for, among other things:

a. Last mile applications will be scored on the project's cost-efficiency based on the ratio of the total cost of the project to households passed.

b. Last mile applications will be scored for the extent to which the advertised speed for the network's highest offered speed tier exceeds the minimum speed requirements for broadband service.

c. Middle mile projects will be evaluated on the capacity of the network

6. For BTOP applications, NTIA will also provide the government of affected states an opportunity to make recommendations concerning the allocation of funds to qualifying projects.

7. ***Incumbents can oppose projects claiming unserved status***: RUS and NTIA will post a Public Notice of the proposed funded service areas of each Broadband Infrastructure application for a 30 day period to provide existing service providers an opportunity to submit to the agencies information regarding their service offerings. If the information submitted by an existing service provider demonstrates that the applicant's proposed funded service area is not unserved, both RUS and NTIA reserve the right to reclassify the application and consider the proposed area as underserved if the application meets that definition. If the information submitted establishes that the applicant's proposed funded service area is not underserved, both RUS and NTIA may reject the application.

II. General Overview of the Programs

BIP and BTOP are two separate programs. Under BIP, the Recovery Act appropriates $2.5 billion of budget authority for Rural Utilities Service (RUS) to extend loans, loan/grant combinations, and grants to projects where at least 75 percent of an RUS-funded area is in a rural area that lacks sufficient access to high speed broadband service to facilitate rural economic development. Under BTOP, the Recovery Act also appropriates $4.7 billion to NTIA to provide grants for broadband initiatives throughout the United States, including unserved and underserved areas.

The NOFA issued on July 1 represents the first of potentially three rounds of funds distribution; therefore, not all of the funding is available in this round. $2.4 billion out of the total $2.5 billion for the BIP has been set aside under this NOFA, and $1.6 billion of the total $4.7 billion for the BTOP has been set aside under this NOFA.

a. BIP

Of the $2.4 billion BIP amount, $1.2 billion is available for Last Mile projects, with $400 million to go toward grants for Remote Area projects and up to $800 million available for loans

or loan/grant combinations for Non-Remote projects. Up to $800 million is available for loans or loan/grant combinations for Middle Mile projects.

Grants under BIP are to be used to fund applications proposing to exclusively serve remote, unserved, rural areas. BIP *loan and loan/grant combination funds* are to be used to provide funding to applications proposing to serve non-remote and underserved rural areas. Projects which include non-remote and remote areas will be funded by loans or loan/grant combinations. While the size of the grant portion of any loan/grant combination is determined by the applicant, it cannot exceed the amount of the loan portion and RUS will favor applications that propose a higher percentage of loan funds.

Loans shall bear interest at a rate equal to the cost of borrowing to the Department of Treasury for obligations of comparable maturity. The applicable interest rate will be set at the time of each advance. Loans must be repaid with interest within a period equal to the expected Composite Economic Life of the assets to be financed, as determined by RUS. Interest begins accruing on the date of each loan advance and interest payments are due monthly. Upon completion of the build-out or a date certain determined at closing, monthly principle payments will be established in an amount that amortizes the outstanding balance over the remaining term of the loan.

Awardees must follow RUS's accounting, monitoring, and reporting requirements which are specified in the award documents. Sample award documents are not yet available for viewing.

BIP projects will be given priority to the extent they:

(a) give end users a choice of providers;
(b) serve the highest proportion of rural residents that lack access to broadband service;
(c) are projects of current or former RUS borrowers; and
(d) are fully funded and ready to start once Recovery Act funding is received.

b. BTOP

Of the $1.6 billion BTOP amount, up to $1.2 billion will be awarded to Broadband Infrastructure projects, up to $50 million for "Public Computer Centers", and up to $150 million for Sustainable Broadband Adoption projects.

BTOP projects must promote five core purposes:

(a) To provide access to broadband service to consumers residing in unserved areas of the country;
(b) To provide improved access to broadband service to consumers residing in underserved areas of the country;
(c) To provide broadband access, education, awareness, training, equipment, and support to community anchor institutions (*e.g.*, schools, libraries, medical facilities), or organizations and agencies serving vulnerable populations (*e.g.*, low-income, unemployed, aged), or job-creating strategic facilities located in state- or federally-designated economic development areas;
(d) To improve access to, and use of, broadband service by public safety agencies; and
(e) To stimulate the demand for broadband, economic growth, and job creation.

BTOP funds are available through three categories of eligible projects: Broadband Infrastructure, Public Computer Centers, and Sustainable Broadband Adoption. The Broadband Infrastructure category consists of two components—Last Mile and Middle Mile—and will fund projects to deliver broadband access to unserved and underserved areas. The Public Computer Center category will fund projects that expand public access to broadband service and enhance broadband capacity at entities, such as community colleges and public libraries, that permit the public to use these computing centers. The Sustainable Broadband Adoption category will fund innovative projects that promote broadband demand, including projects focused on providing broadband education, awareness, training, access, equipment or support, particularly among vulnerable population groups where broadband technology has traditionally been underutilized

All projects funded under BTOP must advance one or more of the five statutory purposes outlined above. The program is designed to extend broadband access to unserved areas, improve access to underserved areas, and expand broadband access to a wide range of institutions and individuals, including "vulnerable populations".

III. Application Selection and Awarding Funds

The application selection will take place via a two-part review process for both BIP and BTOP applications. After an initial screen eliminates any incomplete applications, the remaining applications will be reviewed and scored in light of the applicable evaluation criteria, and the highest ranking applications will move on to the second phase. For its part, NTIA has indicated that each application will receive at least three independent reviews by a panel of three members who have demonstrated subject-matter expertise to evaluate the first phase BTOP applications. Each reviewer will independently score the application without input from the others. During the second phase, called the 'due diligence' phase, scheduled to begin in October, the remaining applicants will submit additional information to provide further detail and corroborate representations made in the initial phase. Applications with the greatest consistency between the first phase information and the more detailed second phase information will be rated on a scale of one to five.

For BTOP applications, NTIA will also provide states an opportunity to make recommendations concerning the allocation of funds to qualifying projects. In light of that input, the director of BTOP will prepare and present a package of recommended grant awards to the Associate Administrator for the Office of Telecommunications and Information Applications for review and approval. These grant awards will take into account, among other things, the scores of the applications from the two phases, geographic distribution, range of technologies employed, and avoidance of redundancy and conflicts with other federal initiatives.

Upon approval of the Associate Administrator, the Assistant Secretary of NTIA will select the applications for grant awards from the package, taking into account the BTOP director's recommendations.

Awards will be made on a rolling basis subject to the availability of funds.

IV. Key Eligibility Criteria

a. Eligibility of Entities

NTIA and RUS have opened the funding opportunities to a wide variety of entities, including government, non-profit, and most importantly, for-profit corporations, limited liability companies, and cooperative or mutual organizations.

b. Universal Factors

- Every applicant must submit a complete application and provide all supporting documentation.
- All projects must be "substantially completed" within two years, and completely finished within three.

c. BIP and BOTP–Broadband Infrastructure Common Factors

- All service offerings must meet the definition of broadband, as defined above.
- All applications must be technically feasible; projects asking for more than $1 million will require **a system design and project timeline certified by a professional engineer**.
- All applicants must adhere to the principles contained in the FCC's internet policy statement, maintain **neutrality to all lawful internet applications and content**, display all network management policies in prominent locations, connect the public to the internet directly or indirectly (projects must not be on entirely private closed networks), and offer interconnection where technically feasible without exceeding capacity limitations, on reasonable rates and terms.
- Applicants must provide service to the entire territory of each census block applied for, unless applicant files a waiver. (Applicants may be permitted to serve less than an entire census block if, for example, it splits a rural ILEC's study area or exceeds a wireless carrier's license area).

d. Additional BIP Factors

- Applicants must demonstrate the **minimum 75% rural area** requirement, discussed above.
- Projects **must not overlap**; where geographic overlap occurs, the higher scoring application wins.
- Projects must be shown to be **'fully funded'** after RUS award.
- Projects must be shown to be **financially feasible and sustainable**; i.e., applicants must show they are able to generate sufficient revenues to cover expenses and pay back debt obligations as they come due.

e. Additional BTOP Factors

- Projects must advance at least one of the five statutory BTOP purposes discussed above.
- Awardees must provide at least 20 percent in matching funds toward the total eligible project cost (and applicants must provide documentation supporting their ability to match

funds, but waivers may be granted by the Assistant Secretary at NTIA based on financial need).
- Applicants must demonstrate that, but for a BTOP grant, the project could not be implemented.
- Applicants must demonstrate that its budget is appropriate to the proposed technological and programmatic solutions, and that its costs are reasonable and consistent with the same, and that the allocations of funds are sufficient.

f. Eligible/Ineligible Purposes

Not all costs are eligible to be covered by funds awarded under these programs. Under the BIP and BOTP–Infrastructure Project category, funds may be used for:
- The construction of improvement of all facilities required to provide broadband service. (BIP Infrastructure Projects may construct or improve facilities required for providing other services over the same facilities).
- Facility leasing costs, if such lease qualifies as capital under generally accepted accounting principles, may also be covered with award money, as long as the facilities are necessary to provide broadband service.
- Reasonable pre-application expenses in the amount of not more than 5% of the award.
- For BOTP projects only, undertaking other projects and activities as the Assistant Secretary finds consistent with the purposes of the program may also be eligible.

Ineligible costs include: Operating expenses, costs incurred prior to the date on which the application is submitted, acquisition of stock, facilities, or equipment of any affiliate, the purchase or lease of any vehicle used primarily in construction or system improvements; to fund leased broadband facilities; to fund merger or consolidation of entities; to fund costs incurred acquiring spectrum.

V. Preparing to Apply

a. Obtaining the Necessary Registrations

In order to apply for either program, clients will need to obtain a Dun and Bradstreet Data Universal Numbering System (DUNS) number and a Central Contractor Registration (CCR) number. A DUNS number may be obtained from www.dunandbradstreet.com and typically takes about one to three days. Once a DUNS number is obtained, a CCR number may be obtained from www.ccr.gov, usually in two or three business days. However, due to the increased volume of DUNS and CCR number requests that may result from this NOFA, the turnaround time may be significantly higher than usual.

b. Choosing the Program For Which You Will Apply

If you are applying to fund broadband infrastructure in proposed funded service areas which are at least 75 percent rural, the application is required to be submitted to RUS for consideration under BIP. Otherwise, the application should be submitted to BTOP.

BIP applicants may also choose to be considered under BTOP. Such applicants must complete the additional elements required of BTOP infrastructure applicants. NTIA will review these

applications using its own objective evaluation criteria and in accordance with the BTOP procedures, but only if RUS first declines to fund the application under BIP.

c. Information to be Included in the Application

The bullet points below provide a general outline of the information that will need to be included with your application. The NOFA itself contains a more detailed descriptions of the items that must be included, and should be consulted.

For the first phase of consideration, all applicants will prepare:

- A description of the project indicating how it meets the requirements of the Recovery Act.
- The Congressional Districts affected by the project.
- The estimated dollar amount of the project.
- Verification that the application meets certain eligibility factors, including but not limited to
    - submission of a complete application with all supplemental documentation,
    - commitment to substantial completion of the project within two years and final project completion within three years of the award date,
    - demonstration that the project is technically feasible,
    - confirmation that the applicant will provide broadband service meeting the definition in this NOFA,
    - confirmation that the applicant agrees to comply with the nondiscrimination and interconnection obligations in this NOFA
- An executive summary of the project, its goals, the number of households and businesses passed how requirements and obligations will be met, and other such information.
- Geographic information, including a detailed description of the proposed funded service area and an indication on whether the areas are rural or non-rural, remote and unserved, underserved or served.
- Pricing information, including a description of the proposed service offerings, and the associated pricing plan, that the applicant proposes to offer.
- Technology information, including a description of the system design used to deliver the broadband service and a certified network diagram.
- A timeline including key milestones for implementation of the project and any potential challenges.
- Managerial information, including resumes of key management personnel and a description of the organization's readiness to manage a broadband services network.
- A legal opinion addressing applicant's ability to enter into binding award documents and describing any pending litigation.
- Information on any partnerships in which the applicant is a partner.
- An itemized budget of the infrastructure costs of the proposed project.
- Pro Forma financial analysis related to the sustainability of the project.
- Two years worth of historical financial statements or Certified Public Accountant (CPA) audits.
- Certifications as required in the application itself.

BIP- applicants will also need to prepare a self-scoring sheet showing how the proposal would rate under the scoring criteria included in the NOFA, a pricing package to be offered to critical community facilities (if any), and evidence that the applicant is a socially and economically disadvantaged small business concern.

BTOP- applicants will need to include a description of how the project advances the objectives of the Recovery Act, including the five major objectives outlined, a demonstration of need (including a showing that the project would be impossible without funding), a description of how the applicant will enhance services for health-care delivery, education, and children, the percentage of matching funds the applicant will contribute, and whether the applicant receives other federal support for non-recurring costs in the proposed funded service area.

Again, applications for consideration under both programs will be considered by RUS first under the BIP and if not chosen will be passed on to NTIA for consideration.

No earlier than September 14, 2009, RUS and NTIA will announce the second phase of the application process, whereupon further and more detailed information will need to be submitted by the applications considered most highly qualified based on the agencies' analysis of the above information.

Applicants that proceed to Phase Two will be required to submit:

- a list of all its outstanding and contingent obligations, including copies of existing notes, loan and security agreements, and guarantees;
- A detailed description of working capital requirements and the source of these funds;
- A detailed description of the proposed technology that will be used to provide service at the proposed broadband speed. This description must clearly demonstrate that all households and businesses in the proposed funded service area will be offered service at the proposed broadband speed;
- A detailed construction build-out schedule that includes a description of the necessary work force, a timeline demonstrating project completion within the required timeframe, a depreciation schedule for the proposed facilities;
- A completed Environmental Questionnaire, other documentation requests, and required environmental authorizations and permits, including those required by the National Environmental Policy Act of 1969, as amended (42 U.S.C. § 4321 *et seq.*) (NEPA), the National Historic Preservation Act of 1966, as amended (16 U.S.C. § 470 *et seq.*) (NHPA), and the Endangered Species Act of 1973, as amended (16 U.S.C. § 1534 *et seq.*) (ESA) as applicable;

Applicants will need to be prepared to provide any of the underlying documentation that is referenced in the application, as appropriate; and for BIP only**,** a description of measurable service metrics and target service level objectives (SLOs) (*e.g.*, the speed with which new service will be established, service availability, and response time for reports of system failure at a residence) that will be provided to the customer, and a description of the approach and methodology for monitoring ongoing service delivery and service quality for the services being employed.

Applicants proposing projects that fall into the BTOP–Public Computer Center and BTOP–Sustainable Broadband Adoption categories are subject to an additional, though similar, requirements that are specific to the respective categories. For example, Public Computer Center projects will need to include specifics on the facility, such as the capacity of the proposed public computer center, and Sustainable Broadband Adoption projects will need to include a description of the problem and the innovative way the proposed project seeks to resolve it. More information can be found in the NOFA at pages 49 et. seq.

VI. Application Review Criteria

NTIA and RUS included a detailed list of criteria by which BTOP and BIP projects will be evaluated and scored, including specific point values in the NOFA. Due to the exacting nature of the language provided and since, the case of BIP projects, the applicant must include a self-evaluation under these criteria (with point calculations), they are reproduced in full in a separate Application Criteria Document, attached to this memorandum.

VII. Award Dates, Notifications, and Major Requirements

RUS and NTIA intend to announce the awards starting on or about November 7, 2009. Grant, loan, and loan/grant combination documentation is intended to be made available within 30 days of the award announcement, and awardees must be in full compliance within 60 days of the announcement.

Successful applicants will receive award notices from the appropriate agency. No funding will be disbursed until pre-award conditions are met, and failure to comply with award requirements can result in the exercise of relevant rights and remedies by NTIA and RUS, as applicable.

The NOFA contains specific pre-award requirements which should be reviewed in the event an applicant is selected for an award. BTOP applicants should be aware that, as a condition of award, NTIA and the Inspector General of the DOC, or any duly authorized representative, is entitled to access and inspect all books, records, contracts, etc., in order to make audits and inspections at any time. In fact, any recipient that expends more than $500,000 of federal funds during their fiscal year are required to submit to an organization-wide financial and compliance audit repot, performed in accordance with the US General Accountability Office and Government Auditing Standards.

Awardees must also submit to certain reporting requirements, including obligations under the OMB Reporting Requirements Implementing the Recovery Act, RUS's Broadband Collection and Analysis System, to provide continuing updates on the project and its progression.

VIII. Buy American Provision

None of the funds appropriated or otherwise made available by the Recovery Act may be used for the construction, alteration, maintenance, or repair of a public building or public work (as such terms are defined in 2 CFR § 176.140) unless all of the iron, steel, and manufacturing goods used in the project are produced in the United States. However, as reported in the Blooston Telecom Update, NTIA and RUS have granted limited waivers for the following essential components of a modern broadband infrastructure:

• *Broadband Switching Equipment* – Equipment necessary to establish a broadband communications path between two points.
• *Broadband Routing Equipment* – Equipment that routes data packets throughout a broadband network.
• *Broadband Transport Equipment* – Equipment for providing interconnection within the broadband provider's network.
• *Broadband Access Equipment* – Equipment facilitating the last mile connection to a broadband subscriber.
• *Broadband Customer Premises Equipment and End-User Devices* – End-user equipment that connects to a broadband network.
• *Billing/Operations Systems* – Equipment that is used to manage and operate a broadband network or offer a broadband service.

Note that this list does not include fiber optic cables, coaxial cables, cell towers, and other facilities that are produced in the United States in sufficient quantities to be reasonably available as end products. To the extent that an applicant wishes to use equipment that is not covered by this waiver, it may seek a waiver on a case-by-case basis as part of its application for BTOP/BIP funds, stating the statutory exemption upon which it is relying and its rationale for receiving a waiver.

Conclusion

As described above, the stimulus funding application process is complex and will require a great deal of work over the next six weeks. This is especially true for applicants that wish to apply for both BTOP and BIP funding at the same time, in the hope of increasing their chances of getting one or the other (since overlapping funding will not be granted). Once the application is prepared and submitted, the applicant must move ahead quickly with the gathering of documents needed for the due diligence phase; however, this due diligence process must progress far enough before the initial application is submitted so that the applicant will know that they can deliver documentation for the proposal contained in the application, since consistency between the initial proposal and the due diligence documents will be a grading factor.

We will be glad to answer any questions you may have, or otherwise assist with your application. Please contact Ben Dickens, Gerry Duffy or Mary Sisak with any questions.