

ACCESSING BROADBAND FUNDS UNDER THE STIMULUS PACKAGE

March 10, 2009

On February 17, President Obama signed the American Recovery and Reinvestment Act of 2009, commonly referred to as the economic stimulus bill (“ARRA”). Among its many provisions, ARRA provides over \$7 billion to expand access to broadband in rural areas and other unserved communities. This memorandum summarizes the two programs that will provide broadband expansion funds, the known requirements for receiving funding, the likely path for the funding process and open issues under both programs. It is based on the terms of the ARRA and information provided at a joint meeting held today by the Department of Agriculture’s Rural Utilities Service (“RUS”), the National Telecommunications and Information Administration (“NTIA”) and the Federal Communications Commission. These are the key facts:

- \$2.5 billion will be made available under the RUS program, partly as loans and partly as grants, for use in rural areas.
- \$4.35 billion in grants will be made available by the NTIA under a new Broadband Technology Opportunities Program (“BTOP”).
- Eligibility for RUS funding is limited to projects that will serve rural communities. ARRA specifies that governments and non-profits will be eligible for BTOP funding, but it appears likely that commercial entities will be eligible as well.
- There are no specific deadlines for spending the money allocated to RUS, but BTOP grants must be awarded by September 30, 2010 and all money must be spent by grantees within two years of the time their grants are awarded.
- Both NTIA and RUS plan to issue multiple notices of funding availability, with the first notices likely to be released in the April to June time frame.
- BTOP funding will be subject to compliance with network neutrality requirements that must, at a minimum, include the standards in the FCC’s 2005 Internet Policy Statement.
- RUS is likely to use existing processes for awarding loans and grants, but NTIA will have to design an application process, define eligibility requirements and create other new rules before it can act. NTIA has started the process, but has not announced a specific time frame for formally proposing or adopting those rules.

The Programs

ARRA splits the broadband expansion funds between two departments. First, ARRA provides \$2.5 billion to the Department of Agriculture’s RUS. ARRA gives RUS authority to distribute the appropriated funds through two existing programs for expanding the accessibility and usage of broadband in rural communities. The RUS funds can be distributed as either grants, loans, or loan guarantees.

Second, ARRA provides \$4.7 billion to the NTIA, within the Commerce Department, for the new Broadband Technology Opportunities Program . While \$350 million of this money will stay within NTIA for the purpose of creating a national broadband map, ARRA directs NTIA to issue the remaining funds as grants to improve access to broadband in unserved and underserved areas, increase the utilization of broadband by schools, health care providers, public safety agencies, and other community support organizations, and to stimulate job creation.

Rural Utilities Service

Overview

RUS announced today that it will create a separate, new program for distribution of ARRA funds. However, it is likely that RUS will use its existing programs as a model for how it will distribute funding under ARRA. ARRA does not dictate how RUS must distribute its broadband funds between loans and grants, which should give the RUS Administrator discretion to allocate the funding to either program. Early indications suggest that RUS intends to distribute the majority of the funds via grants, though a final decision has yet to be announced.

Today, RUS administers two programs for providing funds for broadband expansion. The first, the Broadband Loan and Loan Guarantee Program (“Loan Program”), lends funds for the costs of construction, improvement, and/or acquisition of facilities and equipment to expand broadband access to rural areas. The second, the Community Connect Grant Program (“Grant Program”), provides grants for the same general purpose.

The Loan Program will not consider applications for loans or guarantees for less than \$100,000. Except for certain, special-term loans for very small rural communities, the Loan Program does not limit applicants to a maximum loan amount. From 2003 to 2007, the average successful application received a loan or guarantee worth nearly \$20 million.

The Grant Program deals with proposals for significantly less money. While neither ARRA nor the existing laws and regulations governing RUS establish either a minimum or maximum grant amount, awards issued by the Grant Program since 2005 have averaged about \$500,000, with the largest grant worth just over \$1 million.

Eligibility

To be eligible for either of the existing RUS programs, an applicant must have the ability to furnish, improve, or extend broadband service to an eligible rural community (*i.e.*, any area of the United States not within an incorporated city or town with a population greater than 20,000). Applicants under the Loan Program also cannot provide more than two percent of telephone subscriber lines nationwide. Loan Program applicants can propose projects that would extend broadband service in areas that already have broadband access, though more favorable loan terms are available for projects that expand service to currently unserved small rural communities.

Applicants for the Grant Program must meet more stringent requirements. Grant applicants must propose to expand broadband to communities lacking such service at the time the grant is issued, and must offer broadband service to all residential and business customers in their proposed service area. Further, applicant projects must provide broadband service to all “critical community facilities” (including public schools, libraries, medical clinics, and police and fire stations) in the proposed service area, and provide such service free of charge for at least

two years. Finally, applicant projects must plan provide a publicly accessible computer center (with at least 10 available computers) free of charge to the community for at least two years.

Application Process

RUS makes funds available for the Grant Program by publishing notices of funds availability in the Federal Register. At today's meeting, RUS indicated that it expects to issue at least three notices and to allocate the available funding among the notices. Applicants to the Grant Program must submit detailed applications by the deadline listed in those notices.

RUS is updating its application process for the Loan Program in accordance with the 2008 Farm Bill, but the requirements will likely be similar, if not identical, to those of the Grant Program. In addition to those application requirements, Loan Applicants must provide evidence of collateral or credit equal to 20 percent of the loan requested, including cash equal to the first year's operating expenses.

Priority in Awarding Funds

Existing law gives RUS some criteria by which to score the applications received for each program. Under the Loan Program, RUS must give priority to applications proposing to provide broadband access to areas currently lacking residential access, then to applications that propose to expand broadband to areas where residential access exists, but where either the quality or cost of the access is not comparable to similar services in neighboring urban and suburban areas.

For the Grant Program, project applications are scored across three criteria: the rurality of the project (worth 40 percent of the application's score), the economic need in the proposed service area (30 percent), and the estimated benefits the service area will derive from the project (30 percent). RUS then provides funds to projects in descending score order, fully funding a project before providing funds for the next lowest score.

In addition to these existing criteria, ARRA gives RUS three additional criteria for determining the funding priority for projects:

1. *Choice of Provider* - RUS must give priority to any project that would offer end users the choice of more than one broadband service provider. ARRA does not specify, however, whether RUS must give priority to projects that are themselves provider-neutral (e.g. infrastructure projects from which multiple providers could provide service) or to projects that would offer a second choice of provider.
2. *Expansion to Unserved Areas* – RUS must give priority to projects that “provide service to the highest proportion of rural residents that do not have access to broadband service”. This appears to match the existing priority for unserved areas in the Grant Program.
3. *Prior RUS Borrowers* – Finally, RUS must give priority for broadband expansion funds to any application from, or including, an entity that previously borrowed money from RUS for the Rural Telephone Service.

NTIA Broadband Technology Opportunities Program

Overview

NTIA lacks an existing grant program through which it can distribute ARRA's broadband funds. ARRA directs NTIA to create BTOP, charged with distributing competitive grants towards four policy goals:

1. Extending broadband access to consumers in unserved and underserved areas;
2. Providing broadband awareness, access, equipment and support for crucial public services;
3. Assisting outreach organizations that facilitate greater use of broadband by low-income, unemployed, elderly, and other vulnerable populations; and
4. Stimulating economic growth and job creation through providing broadband access for job creating facilities in areas targeted for economic investment.

Currently, the only guidance on how NTIA will administer BTOP is the statutory language in ARRA. However, NTIA officials suggested that the agency would soon release a public notice to gather ideas for program design, but that the agency likely will model BTOP after two existing grant programs operated by NTIA – the Public Safety Interoperable Communications Grant Program (PSIC) that funds interoperable communications projects for public safety agencies and the Technology Opportunities Program (TOP) that promoted access and use of digital network technologies in the public and non-profit sectors.

BTOP must award all of appropriated funds by September 30, 2010, giving NTIA a short window in which to design the program, review applications, and distribute grants. ARRA does not set either a statutory minimum or maximum for BTOP grants, though NTIA may adopt limits, and at today's meeting NTIA indicated that limits are under consideration. If NTIA does not set grant limits, would-be BTOP applicants could feasibly request large sums of money with some likelihood of success, given NTIA's obligation to spend such a large sum in such a short time frame. At today's meeting, NTIA indicated that it intends to award funds separately under the four major components of BTOP – general broadband funding, broadband mapping, community computing and innovative applications.

Eligibility

Under ARRA, any state, local, territorial, or tribal government or non-profit organization is eligible to receive a BTOP grant. Private, for-profit entities, including broadband service providers and broadband infrastructure firms, also may be eligible for BTOP grants, but NTIA must determine by rule that grants to such entities are "in the public interest".

There is little guidance on how NTIA may define "the public interest." ARRA only requires NTIA to promote the purposes of BTOP in a technologically neutral manner, but only "to the extent practicable.. Beyond that limited requirement, NTIA must engage in rulemaking to establish eligibility criteria for private entities seeking to apply for BTOP grants. Further, the PSIC and TOP grant programs that NTIA may follow, in whole or in part, in developing the BTOP grants, provide little useful guidance for the criteria NTIA may establish, as both programs provided grants only to public and non-profit agencies. (It is worth noting, however, that in issuing TOP grants, NTIA targeted grants towards many of the same policy purposes for which ARRA calls for BTOP grants, including expansion of broadband to currently unserved

communities, job creation, network improvement for health care and education, and broadband access at community centers.)

ARRA provides slightly more information regarding the types of projects that will be eligible for BTOP grants. Specifically, NTIA may award grants to any project that would acquire, construct, or install broadband equipment, networking capability, or infrastructure, or that would ensure broadband access for “community anchor institutions” (though ARRA does not define such institutions).

ARRA also provides some contours for the timetables and financial limits for BTOP-funded projects. First, the federal share of any project awarded a BTOP grant cannot exceed 80 percent of the project’s total costs, unless the applicant seeks (and NTIA grants) a waiver for financial need. Second, applications must include proposed completion timelines for each project that can be no longer than two years after the grant is awarded.

Finally, ARRA requires that NTIA, in coordination with the FCC, publish a list of “non-discrimination and network interconnection obligations” to be contractual conditions of any BTOP grant. At a minimum, these obligations must include adherence to the 2005 FCC Internet Policy Statement. Under the Internet Policy Statement, service providers must allow end users to access lawful content; connect lawful devices; and use the applications and services of their choice over such network, subject to reasonable, protocol-agnostic network management practices.

Application Process

The ARRA requires applicants to include the following information in their applications:

- Detailed explanation of how the applicant will use the funds “in an efficient and expeditious manner” to achieve the goals of the program;
- Evidence to show that the project would not be pursued before September 2010 without a BTOP grant;
- Evidence to demonstrate that the applicant is capable of carrying out the project; and
- Proof that the applicant can provide at least 20 percent of the project’s costs in accordance with the funding requirement described above, and disclosure of the source of outside funding.

NTIA may require applicants to provide additional information as well. For instance, under the PSIC program, NTIA requires applicants to submit the OMB Standard Form 424 (also required for the RUS Grant Program described above) and related forms that require applicants to provide budget details and assurances that proposed projects will adhere to statutory requirements, as well as OMB Standard Form LLL disclosing lobbying activity. A PSIC applicant also must certify that it will comply with the federal government’s requirements regarding debarment, suspension, lobbying and drug-free workplaces; and that the PSIC grant will not supplant non-federal funding. It is likely that NTIA will require BTOP applicants to complete some, if not all, of these same forms.

At today’s meeting, NTIA indicated that it anticipates accepting applications in several distinct windows, with separate applications in each window for each of the programs under

BTOP. As of now, the first window is expected to be opened somewhere from April to June, the second window will open in the fall and the third window will open in the spring of 2010.

Priority in Awarding Funds

ARRA provides specific minimum funding amounts for two categories of projects, creating a *de facto* priority for qualifying proposals. First, ARRA requires NTIA to award at least \$200 million in competitive grants to projects that would expand public computing capacity (including computer centers at community colleges and libraries). Second, NTIA must award at least \$250 million in competitive grants to “innovative programs to encourage sustainable adoption of broadband service”, though NTIA has implied discretion to determine what constitutes both “innovative” and “sustainable”. Additionally, ARRA requires NTIA, to the extent practicable, to fund at least one project in each state with BTOP awards.

In awarding the remaining funds, NTIA will have wide discretion in determining which proposals should receive grants. ARRA does, however, require NTIA to consider whether a project, if approved, would:

- Increase the affordability or usage of broadband in the proposed service area;
- Provide the greatest broadband speed possible to the greatest population of users in the proposed service area; and
- Enhance service for health care, education, and/or children’s services.

NTIA also must consider whether a grant would unjustly enrich an applicant that already receives federal assistance for non-recurring costs to provide broadband access in the proposed service area, and whether the applicant qualifies as a “socially and economically disadvantaged small business concern” under the Small Business Act, a term that generally describes small business concerns owned and operated by either women or racial minorities.

Cooperation

During today’s meeting, NTIA, RUS and the FCC emphasized that they will be working cooperatively with each other and with other agencies and the states to implement the broadband provisions of the ARRA. This suggests that states may have a significant role in shaping the program, and NTIA also indicated that it would consider the possibility of “regranting” – permitting states to pass funds through to municipalities, counties or other local entities.

In addition, NTIA and RUS suggested that entities could apply for funding from both the RUS program and BTOP at the same time. While ARRA specifically prohibits an RUS beneficiary from receiving BTOP funding for any “area of a project funded with amounts made available” via the RUS provisions, that would not prevent an applicant from, for instance, seeking to use RUS funds for the rural portion of a service area and BTOP funding for the non-rural portions of the service area.

Next Steps

NTIA, RUS and the FCC are holding a series of additional public meetings to discuss specific aspects of the new programs. Those meetings will be held in Washington on March 16, March 19, March 23 and March 24, in Las Vegas on March 17 and in Flagstaff on March 18.

RUS does not need to adopt any new rules or policies to begin providing its funding, but based on the information provided at today's meeting, it appears likely that RUS will use a pending rulemaking on broadband funding under the 2008 farm bill to set the rules for ARRA funding. Regardless of whether RUS uses existing rules, relies on the 2008 farm bill rulemaking to adopt ARRA rules or creates brand new ARRA rules, it will need to announce the availability of funding and to set specific dates when applications can be filed. As noted above, RUS indicated that it intends to open the first filing window between April and June, with at least two others over the next fifteen to eighteen months.

NTIA, as noted above, will be required to adopt new rules before it can award BTOP funding. Although NTIA usually adopts rules via a notice and comment process, given the proposed timing of the initial application window it may be that it will not do so, and instead will rely on the comments it already is getting and the information it obtains at the scheduled public meetings. Any NTIA rules will have to be approved by the Office of Management and Budget, and the White House likely will be involved in the process. For entities that wish to apply for funding, this rulemaking process likely will be significant, particularly given the questions about eligibility and how to prioritize funding under the program. Applications will not be accepted before NTIA sets the grant criteria and adopts any rules it believes are necessary to guide the process.