

QUESTIONS FROM JULY 2009 WEBINARS

“THE BROADBAND STIMULUS: UNDERSTANDING THE NOTICE OF FUNDING AVAILABILITY”

Thanks to all who participated in our July webinars on the Notice of Funding Availability for the new broadband stimulus programs created by the Recovery Act: the Broadband Technology Opportunities Program (BTOP), administered by Commerce Department’s National Telecommunications and Information Administration (NTIA), and the Broadband Initiatives Program (BIP), administered by the Agriculture Department’s Rural Utilities Service (RUS).

We have compiled answers to the questions asked during the webinar below. Questions have been edited for clarity, and some similar questions have been combined to avoid redundancy.

The webinar presentation is available on our website: <http://www.dlallaw.com/stimulus/dl/>. Our website also hosts a copy of the NOFA (and the applications once available); these documents are also available from the joint NTIA/RUS site, <http://www.broadbandusa.gov>.

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PROGRAM ELIGIBILITY

1. What does Public Computing mean?

The NOFA contains a definition of public computing center on page 21 (line 444) – a place that provides broadband access to the general public or to specific vulnerable populations.

2. If your project is 75% rural, should you apply to RUS?

Yes. Parties seeking funding to provide broadband infrastructure to unserved or underserved areas that are 75% or more rural *must* apply to RUS/BIP. If an applicant also wants to be considered for BTOP funding, the application must include all information required by both RUS and NTIA. RUS will review all BIP-eligible projects for funding before NTIA.

3. Do either BTOP or BIP rules differentiate between wired and wireless proposals when determining “unserved” or “underserved” areas?

No. Emphasis is on providing terrestrial broadband service (at or above the NOFA-defined speed); otherwise programs are technology neutral. BTOP goes further to say that it actively seeks to fund a variety of technologies and uses of the technologies.

4. If your project is 75% rural, should you apply to RUS?

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No. Emphasis is on providing terrestrial broadband service (at or above the NOFA-defined speed); otherwise programs are technology neutral. BTOP goes further to say that it actively seeks to fund a variety of technologies and uses of the technologies.

6. Will hospitals qualify to receive money under the BTOP Public Computing Center program? Can they apply on their own, or do they need to apply as part of a consortium?

Yes. Both for-profit and non-profit hospitals qualify, and can apply either on their own or as part of a group application.

7. Can community colleges apply for both the Public Computer Center and Sustainable Broadband Adoption projects?

Yes. Moreover, seeking funds for both projects (in a thoughtful coordinated way) leverages Recovery Act funds, which scores you more points.

8. Would an application that proposes to enhance an existing network, rather than build new broadband access, be eligible for infrastructure funds?

Eligibility for such a project will depend on whether the proposed service area is underserved or unserved, and whether the existing network would qualify as broadband as defined in the NOFA. If the proposed service area cannot be classified as either unserved or underserved, the proposal would not be eligible for infrastructure funding under either BIP or BTOP. If the area is unserved or underserved, however, the project would be eligible so long as the existing network does not meet the NOFA definition of broadband.

It may be better to consider whether to seek funding under the BTOP Sustainable Broadband Adoption program, which has fewer limitations than the infrastructure programs and calls for innovative approaches to encourage broadband adoption. For example, an application could describe how the proposed system would demonstrate how public safety organizations can use broadband to better serve the public, and therefore encourage other public safety agencies to use broadband services in their communities.

9. Do applications need to allow for public access to proposed networks to qualify for funding under BTOP, or can applications request funds for private networks?

NTIA will consider applications for private networks that do not provide public access to the Internet, but generally only if those networks serve community anchor institutions (such as education, health care, and public safety facilities) or offer managed services (such as telemedicine, distance learning, and public safety networks) that require private network connections for improved performance. It should be noted, however, that one of the criteria that RUS and NTIA will consider will be the number of users served by a proposal, so any proposed network that would be available only to certain users, such as a private public safety network, might be disadvantaged when compared to proposals to serve the general public. Further, the NOFA makes clear that all networks – even those offering qualified managed services, such as private public safety network connections – must include at least some connection to the public Internet.

10. Do you think WIMAX (EBS licensees) will meet the speed requirements?

It should. For EBS licensees, the biggest hurdle will be meeting the rural, unserved or underserved requirements (as applicable to some or all of the EBS service area).

11. If you have a multistate project, will you be required to meet the criteria for each community located in different states?

Yes. Each community must be eligible as either underserved or unserved (if applying for infrastructure funding). Also, each state would have the opportunity to rank / provide input on the proposal. Moreover, you should be prepared to explain in some detail why the multistate approach makes the most sense.

12. Will state agencies be competing for these funds as well?

Yes. All eligible applicants (including state and local governments, non-profits, and for-profits) will apply for the same pool(s) of funding. As this is a competitive grant program, states should have no particular advantage or disadvantage compared to other grant applicants in scoring. However, applications for NTIA grants that make it to “Step Two” of the process will be ranked by the states. It is unclear how much weight NTIA will give to those rankings in making awards.

13. Who in the other states are making the applications?

States can apply for BIP or BTOP funds, but there is no way of knowing which states (or which entities within those states) will file for what, short of contacting the states and asking.

APPLICATION REQUIREMENTS

14. If an applicant has already registered at grants.gov, does it need to register again?

Applicants need a DUNS number and CCR registration. If you’ve already registered with grants.gov, as NTIA and RUS urged in the spring, you’ve probably already done that. The application guidelines should clarify registration procedures. See pages 39-40 of the NOFA.

15. What details are available on the interconnection requirement?

Interconnection must be offered wherever technically feasible without exceeding current or reasonably anticipated capacity limits at reasonable rates, and must include both ability to connect to Internet and physical interconnection for exchange of traffic. Applicants can satisfy this requirement by agreeing to negotiate in good faith with all parties making a bona fide request for interconnections. The order does not include any specific requirements for individual interconnection requests, but negotiations may include business arrangements, capacity limits, financial terms, and technical conditions. If the parties cannot reach agreement within 90 days, the party requesting interconnection can notify RUS/NTIA in writing of failure; the agencies intend this tight timeline to encourage resolution of requests via negotiation. See lines 625-645 of NOFA.

16. Is there a central data source for determining if a region meets the criteria for unserved/underserved?

No. Some, but not all, states have broadband maps which would be useful (in varying degrees), The burden is on the applicant to show that the proposed service areas qualify as unserved or underserved, in the absence of state or nationwide mapping.

17. Can you provide examples of what would constitute documentation for whether areas are unserved or underserved?

The NOFA gives no real guidance on how to document existing service, other than to say that it is required. The best documentation is state-produced data, if the state has completed a broadband map. FCC mapping data is available (at <http://www.fcc.gov/wcb/iatd/comp.html>), but is widely deemed to be out of date and not fully reliable. NTIA and RUS officials have suggested that applicants consider developing their own data via consumer or marketing surveys, including a door-to-door approach if necessary. Alternately, applicants may use advertisements (or lack thereof) in the community by incumbent broadband providers or engineering reports. A negative response from a service provider to a request to provide service, especially if in writing, would likely be persuasive evidence – especially if the entity requesting service is a “community anchor institution” as defined in the NOFA (See line 394).

18. Will multicast capability be required for networks developed under this program?

No. The definition of broadband requires a connection to the public Internet and two-way capability. Multicasting (or any other provision of a separate private stream of content over a funded network) may also run afoul of nondiscrimination rules, so applicants should be careful in designing or proposing such systems.

19. What are the criteria for consulting engineers (required for projects asking for more than \$1 million in funding)?

The professionals need to be certified as a professional engineers in the state of the applicant. The engineer can be an employee of the applicant, but the opinion of an outside engineer will likely be given more weight.

20. For which program is state support required?

Under this NOFA, states will have input into NTIA awards; RUS doesn't specifically allow for state input. Support from state and local governments for a grant application, however, will be very helpful under both programs.

21. Do congressional representative letters of support help or hinder an application?

They absolutely help. The application will require applicants to indicate the Congressional district(s) included in their proposed service area, so support from those members of Congress would be a significant boost.

APPLICATION REVIEW

22. The NOFA states that governors will be asked to review all BTOP applications affecting their states that reach “Step Two” of the application process, and prioritize the applications (with explanations). How binding will these priority lists will be on NTIA?

The Governors’ ranking of applications will carry weight, but at the end of the day, the best evidence suggests that these are advisory opinions and that the strongest, highest scoring application(s) will be selected within a state.

23. Will governors also be required / allowed to rank projects proposed by tribal governments or on tribal land?

Yes. The NOFA says Governors will have input “for qualifying projects in or affecting the individual states...,” which would include projects on tribal land.

24. Will “Step Two” of the application process include clearance requirements, such as those imposed by the National Environmental Protection Act and the Native American Graves Protection Act?

Yes. RUS and NTIA are required to assess environmental impact and effects on historic sites. Thus, all applicants must complete an environmental questionnaire and submit documentation during Step Two. See page 88 of the NOFA.

25. Will either BTOP or BIP fund more than one project in a specific geographic area?

RUS specifically says it will fund only one project in any given service area; no service overlap will be allowed. Although it did not adopt an explicit limitation on how many projects will be funded in a specific area, NTIA likely will follow similar rules for infrastructure funding, and it is likely that NTIA will not award grants to public computing or broadband adoption proposals that appear to overlap with other proposals that are granted.

APPLICATION STRATEGY

26. How should public safety entities approach the application process?

The public safety approach isn't discussed in detail in the NOFA, except to say that public safety is one of the statutory purposes for BTOP and that agencies would qualify as applicants or beneficiaries of applicant projects. The NOFA notes that nondiscrimination doesn't apply to public safety uses.

27. Can BTOP applicants apply under several categories (*i.e.*, infrastructure and public computing centers)? How do applicants respond to more than one category, since the application requirements (and scoring criteria) are different for each BTOP category, especially infrastructure vs. PCC and SBA?

Yes; in fact, NTIA officials have indicated that multipurpose applications – both those that propose to address more than one priority (e.g., education, health care, public safety, and vulnerable populations) and those that would fall into more than one BTOP funding program – will be viewed favorably. It is not yet clear, however, whether NTIA expects applicants to submit a “combo” application or two separate applications; it will depend on guidance in the application form, which NTIA has yet to release while it fine tunes the application requirements.

28. For infrastructure applicants looking to partner with public computing and/or sustainable broadband adoption applicants - would it be best to roll all components into one application or for each category of partner (infrastructure, public, adoption) to apply separately and reference the others?

This is a strategic question and depends on the extent of the partnership, the strength of each partner's contribution (and that partner's ability to put together a compelling grant application) and the overall “fit” of each entities objectives. In some situations, rolling it all into one application makes the most sense. In other situations, collaborating but filing separately makes most sense. The key is to set up the applications in the way that presents the strongest possible case for funding.

29. Can a community college apply for public computing center funding to build for disaster (recovery) purposes?

Perhaps, although this is not likely to receive a high score, unless it is coupled with some direct expansion of computing center capacity. See pages 49-52 of NOFA (and lines 1105-1113 in particular). The goal for public computing centers is to expand access to broadband through facilities, training, and education. Depending on your objectives, this might fit better as an infrastructure project (if your area qualifies).

30. Given the restrictive definition of “underserved,” do you believe there will be many proposals for service in urban regions that clearly meet that definition?

The definitions are fairly restrictive, so there may not be many projects in urban areas that can meet the definition. This could actually be to the advantage of eligible applicants since Congress has specifically pressured NTIA to consider underserved urban areas. The ability of incumbent providers to provide data refuting claims that areas are underserved or unserved, however, may limit the number of *successful* applications from such areas. You also could consider filing under public computing centers or sustainable adoption.

31. Would broadcasting qualify as “managed services” exempt from nondiscrimination and interconnection requirements?

Probably not, based on the examples given for managed services in the NOFA (telemedicine, public safety, distance learning, and broadband via “private network connections”). Significantly, the NOFA defines broadband as a two-way service.

32. Can an applicant supplement an application if the application gets initially bounced? If so, how much time will applicant have to supplement?

Under BTOP, incomplete applications are rejected at the mandatory threshold review stage. No supplementary filings are allowed for RUS. No elective supplementary filings are allowed for NTIA, either. However, NTIA reserves the right to request supplemental information from applicants. The NOFA also states that NTIA will inform rejected applicants of the shortcomings in their application, which may enable applying in future rounds.

33. Is each funding source totally discrete? In other words, will success or failure with an application to one program influence another?

It depends. If an applicant seeks RUS funds and their application qualifies but fails to receive funds, RUS will forward the application to NTIA for further consideration – so there is no influence there. Within BTOP, if an application seeks funds from more than one project area, NTIA reserves the right to fund certain parts of an application while rejecting others. Finally, if an application seeks funding from multiple programs, and states in the application that the entire project is dependent on each part, it is possible that a low score for one program could make it less likely that any part of the project will be funded.

OTHER ISSUES

34. Any idea how the mapping will be handled?

NTIA issued a separate NOFA on July 2 creating the State Broadband Data Program to provide grants for both mapping and planning programs at the state level. Mapping conducted under this program is unlikely to impact projects funded under the current BTOP/BIP NOFA, if only because NTIA will not yet have access to the data by the time it decides on the awardees under this NOFA. (The mapping NOFA says that while NTIA will give preference to projects that can provide data by November of this year, awardees under that NOFA are not required to submit their complete data sets until February 2010.) NTIA has indicated, however, that data collected via funded mapping projects may well have a significant impact for future NOFAs.

35. Who determines the “useful life” of a funded facility (which determines, for example, how long nondiscrimination requirements apply)? Do IRS depreciation rules apply?

For BTOP, the NOFA only says that the restrictions apply “for the life of the awardee’s facilities” (lines 655, 1730). (This unclear standard also applies to the nondiscrimination restrictions for both BTOP and BIP, also.) Using past NTIA grant projects as a guide, the life of the facilities might well mean “as long as the pieces of equipment funded by the agency are still in use.”

For BIP (besides nondiscrimination), however, repayment terms and other restrictions are determined by composite economic life (defined at line 392) “as determined by RUS based upon acceptable depreciation rates” (line 1696-1697).

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Dow Lohnes and Dow Lohnes Government Strategies will promptly post notices of important developments for both programs on the Stimulus Update pages on our web sites:

- Dow Lohnes – <http://www.dowlohnesc.com/stimulus/dl/>
- Dow Lohnes Government Strategies – <http://www.dowlohnesc.com/News/Detail.aspx?newsid=151>

You also can check our home pages at www.dowlohnesc.com and www.dowlohnescgov.com.