

NTIA AND RUS START 2ND ROUND PROCESS FOR BROADBAND STIMULUS

The National Information and Telecommunications Administration (“NTIA”) and the Rural Utilities Service (“RUS”) have announced that they had started the process for the next round of broadband stimulus funding by issuing a request for information that asks for comments on issues that will affect second round applications. The two agencies also formally announced that there will be only one more round of funding, rather than the two additional rounds that previously had been planned. The short time frame for the comments suggests that the two agencies hope to open the application window early in 2010. However, as of this writing the request had not been published in the *Federal Register*, and consequently the comment period has yet to begin. The press release is available at http://www.ntia.doc.gov/press/2009/BTOP_BIP_RFI_091110.pdf and the request is at http://www.ntia.doc.gov/frnotices/2009/FR_BIP_BTOP_RFI_091109.pdf.

OVERVIEW

It has been expected for several weeks that NTIA and RUS would issue a new request for information for the next round of the broadband stimulus program and the change from three rounds of funding to two also has been widely anticipated. As a result, this request is of more interest because of the questions it asks, which may provide some clues as to how the program will change in the second round.

Much of what is included in the request echoes concerns that have been aired by

applicants and politicians since the rules for the first round of applications were announced. For instance, the request asks for comments on how to simplify the applications, on whether to modify the rules that limit the ability of a grant recipient to sell its business and on whether to change the definition of “remote” areas, a point that was of great interest to Congressman Boucher, the chair of the Communications Subcommittee of the House Energy and Commerce Committee.

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The request also suggests, however, that the two agencies are considering changes that are not specifically responsive to complaints about the process. Most notably, the request asks whether the next round of infrastructure funding should focus on “middle mile” infrastructure that would serve multiple communities “and connect key anchor institutions within those communities[.]” An emphasis on infrastructure that does not directly reach end users would be a significant shift from the first round, and likely would change the profile of potential applicants.

QUESTIONS ABOUT THE PROCESS

The request starts by asking whether the application and review process should be modified. It focuses on four basic issues: streamlining the application process, transparency and confidentiality, outreach and support, and application review.

Streamlining

NTIA and RUS “tentatively conclude that the application process should be streamlined.” The request does not propose any particular type of streamlining, but suggests that it could occur by adopting a one-step review process (rather than the two steps used in the first round) or by reducing the number of attachments.

The request also asks for suggestions on how to treat consortiums, public-private partnerships and new entities formed for the purpose of applying for funding. One consideration for consortiums and partnerships is whether applications should contain information concerning all participants, and not just the lead applicant,

although adding that information would increase the complexity of the application.

Responding to a concern raised by some applicants, the request also seeks comments on whether the current requirement to submit data on a census block level should be modified. It is likely that any change would allow applicants to use larger service areas, perhaps following municipal or county boundaries.

Finally, the request asks if the current requirement that rural infrastructure applications be submitted to RUS should be changed. The most obvious concern with the current process is that RUS will not award grants to providers that are not in remote areas. As a result, requiring applicants to start with RUS may force them to accept loans or loan guarantees and prevent them from receiving grants.

Transparency and Confidentiality

Many non-applicants expressed concern that there has been very little information made public about first round applications. In response to that concern, the request indicates that the NTIA and RUS have tentatively concluded that the executive summary of each application should be made public. The request also asks broader questions about the availability of application information, including how to draw the line between public and proprietary information.

Outreach and Support

This section of the request deals with the NTIA and RUS efforts to disseminate information on the broadband stimulus program and to provide assistance to potential applicants. It asks what approaches were most effective in the first

round and what the agencies could do better in the second round.

The Review Process

This section of the request addresses questions about the process used to review applications. In the first round, NTIA and RUS used panels of three or more independent, unpaid reviewers for each application. The request asks whether that approach should continue or if applications should be considered by NTIA and RUS staff and contractors instead.

SUBSTANTIVE ISSUES

The request seeks comments on a wide range of substantive questions, ranging from how funding should be prioritized to whether the speed threshold for broadband service should be changed. The answers to these questions will have a much more significant effect on the application process than the procedural issues discussed above.

Funding Priorities

The key question in this area is the extent to which the second round of funding should be more targeted than the first round. The first round application did not target specific priorities, but instead asked applicants to demonstrate how their proposals would meet the underlying criteria in the American Recovery and Reinvestment Act. The request identifies several ways in which the second round could target funding, and asks for comment on those ideas.

The most significant of the targeting proposals is a focus on what the request describes as “middle mile ‘comprehensive community’ projects.” These projects would connect multiple communities and “key anchor institutions” but would not

connect traditional end users. The request asks a series of questions about how such targeting could work, including whether higher priority should be given to projects that connect anchor institutions and whether certain entities (such as educational institutions) should be given priority. If this type of targeting were adopted, it would be a significant change from the first round, both because it would give priority to specific types of projects and because it would shift the focus of funding from end users to within the network.

The request also asks whether some of the second round funding should be dedicated “to promote a regional economic development approach to broadband deployment[.]” This approach would consider applications in light of how they are integrated into broader economic development plans and whether they “systematically link broadband deployment to . . . complementary economic actions[.]” The request also asks if areas with high unemployment should be targeted for funding.

Like the proposal to fund community-focused middle mile projects, adoption of an economic development approach to funding likely would shift funding away from private applicants and towards not-for-profit and government institutions. Private applicants would have difficulty meeting any requirement for integration into economic development plans unless they were acting in cooperation with public agencies. However, an effort to target funding towards high unemployment areas could provide opportunities for private applicants, particularly if they could

demonstrate that they would create jobs with the funding.

The request next asks whether funding should be targeted at specific populations. The groups identified in the request include Indian tribes and low-income populations. The request also asks if more funding should be allocated to the sustainable broadband adoption and public computing center elements of the program and specifically asks whether libraries and public housing authorities should be targeted for funding.

One potential effect of targeting specific populations would be to shift funding from rural to urban areas, particularly if NTIA decides to allocate more money to sustainable broadband adoption and public computing centers. Shifting infrastructure funding to urban areas, however, would require NTIA to change the rules for infrastructure grants, which currently disfavor grants to areas that have broadband service.

The request also seeks comment on the broader question of how the rules should be modified to “ensure that remaining funds have the broadest benefit.” The concepts mentioned include additional accommodations for applications for satellite-based providers, adjusting matching requirements based on the applicant’s proposed revenues and costs or adopting “an auction-like approach” for particular types of applications or regions.

Definitions

The request notes that some applicants and others expressed concern that the definitions adopted in the first round unnecessarily restricted the applications

that would be considered by NTIA and RUS. In particular, the request asks if it should adjust the definitions for urban areas to consider affordability or the economic status of the area that an application proposes to serve.

The request asks whether the definition of broadband encompassed services that were too slow and whether different speeds should be required for different types of projects. NTIA and RUS also ask whether actual speeds, as proposed to advertised speeds, should be used as the benchmark in evaluating applications. This inquiry may have been prompted by studies that show that some broadband providers fail to provide the speeds they advertise.

As mentioned above, the request also focuses on whether the definition of a “remote area” should be modified. It notes that “RUS heard from many parties, including members of Congress, on this definition,” and that many of those who contacted RUS believed that it was too restrictive.

Verification of Service Availability

The only opportunity provided for public comment on first round applications was a window during which existing providers could report on their actual service in areas that applicants claimed were unserved or underserved. The request asks for comment on this process, noting that some parties had suggested that it “may reduce incentives” to apply for funds because it is difficult to respond after existing providers submit their comments. The request also asks whether alternative verification methods could be established and whether the process could be eliminated once state broadband maps are completed.

Nondiscrimination and Interconnection

The request indicates that NTIA and RUS are unlikely to make significant changes to the existing nondiscrimination and interconnection requirements, which largely were mandated by the ARRA. However, it asks whether there are any “minor adjustments” that might be necessary. The request also asks if there is any need to “clarify the term ‘interconnection’ or the extent of the interconnection obligation[.]”

Sale of Assets Supported by Funding

One of the most controversial elements of the original requirements was a limitation on the sale of assets supported by funding under the broadband stimulus program. Although similar requirements have been included in nearly every previous NTIA grant program, those programs generally targeted non-profit and government entities that were unlikely to be involved in commercial transactions.

The request asks whether the requirement should be modified in some way and specifically whether “a more flexible approach toward awardee mergers” would be appropriate. Although RUS and NTIA are subject to some constraints in this area, it would not be surprising to see some changes in this requirement given the level of concern it created in the first notice of funds availability.

Cost Effectiveness

The last substantive questions that NTIA and RUS ask concern how to evaluate the cost effectiveness of a proposed project. They specifically ask for comment on how to balance concerns such as the cost per customer location passed with varying

conditions, including population density, terrain, climate and the technology used by the applicant. In addition, the request seeks comment on how to “ensure that unnecessary costs have not been added” to projects.

COMMENT PROCESS

This request is intended to have a very quick turnaround. Comments will be due 14 days after the request is published in the *Federal Register*, which had not occurred as of November 13. There will be no reply comments, and there is no formal provision for any filings or meetings after the comments are filed.

The request does not indicate any specific timing for the next notice of funds availability. However, it is likely that one reason for the short comment period is that NTIA and RUS hope to release the notice early in 2010.

IMPLICATIONS

To a certain extent, the request for information reflects a checklist of issues that were raised by various stakeholders since the first notice of funds availability was released. Merely allowing comment on these issues, however, does not guarantee that there will be changes.

The most likely changes are those that would retarget funds away from the most rural areas and towards somewhat more populated areas. It appears very likely, for instance, that the definition of “remote area” will be changed, particularly because Congressman Boucher is concerned about it. The discussion of targeting funding to lower-income communities also suggests that NTIA will shift funds towards broadband adoption and public computing

centers or will take a more expansive view of what constitutes an underserved area.

The very specific discussion of middle mile projects and the use of middle mile facilities to reach multiple communities and anchor institutions suggests that applications for such projects could be favored in the next round. However, that kind of application could be relatively complex to prepare, particularly if NTIA and RUS ask applicants to demonstrate community support or involvement.

The request also suggests that NTIA and RUS will try to make the application process at least somewhat less burdensome. The applications themselves may become less complicated, and there is a fairly clear signal that the agencies will modify the rules governing sales of assets to make them less troubling. However, there were other aspects of the application requirements, such as compliance with specific federal statutes, that were not mentioned in the request and are unlikely to change.

It also appears unlikely that there will be significant changes to the nondiscrimination and interconnection

requirements. It is possible, however, that NTIA and RUS will clarify how those requirements will apply.

Probably the most significant element of the request is the timing. Releasing the request now, particularly in conjunction with the announcement that there will be only one more round of funding, is a key element in setting the calendar for the rest of the broadband stimulus program. If the notice of funds availability is released as expected, perhaps in early February, the next round of applications could be due in March or April, with funding announced at the end of the second quarter or early in the third quarter.

As was the case for the first round of applications, potential participants that begin preparing early likely will have an advantage. In this case, it will be somewhat easier to do so because the general parameters of the application process are already known, and any changes are likely to be relatively minor. Moreover, because there will be only one more round, this will be the last opportunity for potential applicants to obtain funding under the broadband stimulus program.