

The Broadband Stimulus: What We Can Learn from the Notice of Funds Availability

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On July 1, the Rural Utilities Service (RUS) and the National Telecommunications and Information Administration (NTIA) released their first notice of funds availability for grants, loans, and loan guarantees made available under the American Recovery and Reinvestment Act (ARRA), better known as the stimulus package. RUS and NTIA are now evaluating applications for funding under the notice and are expected to announce the awards on November 8, 2009.

This article focuses on what the notice teaches us about the interaction between a law like the ARRA and the agencies that implement the law. Like many telecommunications laws, the ARRA gave the implementing agencies explicit direction in some areas and great discretion in others. Agency responses to new laws often are as much the result of the agency's own idea of its mission as the legal requirements created by Congress, and that is as true of the broadband stimulus as of any other congressional program. With those considerations in mind, the Notice of Funds Availability (NOFA) illustrates four key principles of agency action:

- The requirements of the statute matter but do not completely determine what the agency will do.
- Surprises always are possible.
- There can be more than one way to approach an issue, even within a specific framework.
- Politics matter.

The Impact of Statutory Requirements

The ARRA contains a series of requirements for both NTIA and RUS. Some of those requirements, such as the dates by which the two agencies must spend the funds and the minimum amounts to be spent on public computing and innovative broadband adoption programs by NTIA, are not subject to interpretation; they are part of the framework within which the agencies must operate. However, the language of the ARRA gives both NTIA and RUS considerable discretion in other areas, particularly in interpreting the language of Congress in the ARRA.

For instance, in awarding grants, NTIA is required to consider whether projects will increase the affordability or use of broadband; provide the greatest speed possible to the greatest number of users; and enhance service for healthcare, education, or children's services. RUS, when evaluating applications, is required to give priority to projects that offer customers a choice of broadband providers; that provide service to rural customers who do not have access to broadband today; and that are proposed by entities that have borrowed money from RUS for rural telephone service in the past. These are only minimum requirements, and the ARRA does not prevent either agency from adopting other rules to govern the application process.

In fact, in some ways, the ARRA encouraged NTIA and RUS to look beyond the minimum requirements. NTIA, for instance, was directed to work toward meeting four policy goals. RUS was not given

specific goals to meet in the ARRA, in large part because RUS already has a mission of ensuring the availability of service in rural areas.

Although the two agencies clearly cooperated, NTIA and RUS have responded to their mandates in different ways. RUS, with some important exceptions, has focused on the specific requirements of the ARRA: RUS will give funding only to applicants that propose to serve areas defined as “unserved” or “underserved.” It also will give higher scores to applications based on the number of rural residents that (1) would get new broadband service; (2) target rural and remote areas; (3) create infrastructure that can be used by more than one provider; and (4) come from companies that already have received RUS funding. All of these criteria are directly connected to the minimum requirements for RUS funding under the statute, and most of the other criteria RUS adopted are directly connected to the existing RUS funding mechanisms. The only significant application criteria that are not connected to requirements in the ARRA or preexisting RUS rules are that RUS will give higher scores to applicants that propose services with higher speeds and that RUS applicants will be required to meet the statutorily required nondiscrimination and interconnection mandates that apply to NTIA applications.

NTIA, on the other hand, has focused more on the purposes of the ARRA than on the limited number of requirements in the statute. Close to one-third of the total points available in NTIA’s scoring regime are related to statutory goals, rather than to specific requirements, and NTIA will consider factors that are not related to either the goals or the requirements, including the level of community involvement in a project.

Most significantly, even though the statute does not limit where NTIA can grant broadband infrastructure funding, NTIA will not consider any broadband infrastructure request that is not for an unserved or underserved area. This restriction greatly limits the areas where NTIA infrastructure funding will be available. This is a particularly interesting policy choice that seems to elevate one of the statutory goals over all of the others when NTIA considers infrastructure applications. However, it may be an attempt by NTIA to preserve more funds for the second and third application cycles for its other statutory mandates: expanding public computing centers and innovative sustainable broadband applications.

Surprises

The power of agencies to adopt rules that do not exactly mimic the requirements in a statute means that they can act in surprising ways, often based on their understanding of their missions or of the real purpose of the statute, as well as on White House direction. This principle is illustrated by at least three elements of the NOFA.

The first example is the definition of broadband. For years, advocates for broadband deployment have been concerned that policymakers at the Federal Communications Commission and NTIA had not been sufficiently aggressive in pressing for the availability of truly high-speed Internet access, and it was widely expected that broadband would be defined in a way that would address that concern. In fact, when Congress was debating the ARRA, one of the most significant questions was whether the broadband stimulus provisions would require a minimum speed and whether that speed might be as high as 20 Mbps.

Rather than defining broadband in a way that recognized current technology, however, NTIA and RUS decided to define broadband as any service with a downstream speed of 768 kbps or more and an upstream speed of 200 kbps or more. At first glance, this would seem to be an endorsement of services that almost no observer would consider to be broadband. However, NTIA and RUS did not make funding available to anyone who was willing to offer 768 kbps service. Instead, they used the definition to limit funding to areas that do not have at least 768 kbps speeds available (called “unserved areas”) and areas where there is only limited 768 kbps or faster service available (called “underserved areas”). As a result, this very liberal definition of “broadband” actually makes funding for infrastructure projects unavailable to areas where the vast majority of the population lives and works; it will have the effect of pushing infrastructure funding to places that have no broadband service today.

The NTIA and RUS decision to limit infrastructure funding to unserved and underserved areas also was surprising. This decision was not mandated by the statute; in fact, one of the criteria that RUS is supposed to consider is whether the funding would facilitate the availability of broadband service from multiple providers in a given location. While there are arguments that the best way to spend the infrastructure funding would be to focus on places where there is no service, this decision also means that this money will be spent on areas where there are relatively few people and where each additional connection will be relatively costly. As a practical matter, this decision also means that, at least for this first broadband stimulus funding cycle, the benefits



of broadband infrastructure funding will be concentrated in the most rural states in the country, with little or no funding going to urban or suburban areas, where demand is greatest. RUS and NTIA could revisit the broadband definition (and accordingly the funding focus) for the second and/or third funding cycles.

Third, while NTIA was required to adopt nondiscrimination and interconnection conditions for its infrastructure grants, RUS adopted the same conditions even though it was not required to do so. This decision may be particularly significant because the rural telephone companies that typically apply for RUS funding may be reluctant to do so if they have to comply with nondiscrimination requirements. However, given the cooperation between NTIA and RUS, and their interest in coordinating their efforts, it is understandable that they tried to harmonize their programs to the extent possible, perhaps reflecting President Obama's long support of network neutrality legislation.

As often is the case, there are reasonable explanations for each of the surprising elements of the NOFA described above. In fact, some of these surprises may be more consistent with the underlying intent of the ARRA than the rules that many parties expected. In practice, these kinds of surprises are an inevitable result of a process that is not conducted fully in the open, which is true of most agency deliberations. And surprises are particularly likely when, as with the ARRA, agencies must adopt rules quickly and without the time to ask for public comment on specific proposals.

Multiple Angles

The NOFA describes decisions made by two different agencies on the same topic. This is unusual, since in most cases a

single agency interprets the intent of a statute and implements the statute. As a result of this unusual circumstance, the NOFA also illustrates the differences in how NTIA and RUS viewed the goals and purposes of the ARRA. Although this is apparent in many areas, one of the best examples is how the two agencies approach the basic process of reviewing funding applications and awarding funds. Even though the ARRA sets out specific requirements and basic principles that both agencies are required to consider when they review applications, NTIA and RUS took very different approaches to doing so.

This is first evident when considering how RUS and NTIA score applications. RUS has a very specific scoring regime, describing the exact number of points to be awarded for meeting particular targets. Consequently, an RUS applicant can score significant parts of an application by itself (in fact, RUS requires applicants to submit a "self-scoring sheet" that tallies the points they earn in those parts of the application). NTIA, on the other hand, divides its scoring into four broad categories—purpose, benefits, viability, and sustainability—and allocates points only to those categories. Although both RUS and NTIA provide detailed information on what falls within each broad scoring category, only RUS allocates points within each category. As a consequence, NTIA has given itself much greater discretion in evaluating applications in the first instance.

The same distinction continues in the actual award process. RUS will make its awards based entirely on the scoring process—so, the higher an application scores, the more likely it is to receive funding. NTIA, on the other hand, will advance applications to step two of its process based on their scoring, and then

will consider a variety of factors, including the scores; the extent to which the application is consistent with information obtained during a follow-up documentation process; state prioritization in ranking individual applications; geographic distribution of proposed awards; and the range of technologies and how they are used. Thus, an application that scores very highly in the initial evaluation may not be funded, while other applications that do not score that highly may be funded in its place.

Neither RUS nor NTIA is required to adopt a specific approach to its grant process, and either could have adopted the same approach as the other. The differences reflect both differences in the specific parts of the statute that apply to each agency and in the agency's philosophies and past practices for their existing funding programs. For instance, NTIA is required to try to spread its grants among all 50 states, while RUS is not. This means that NTIA has reason to factor geography into its process, something that is less amenable to a standardized scoring system than, for instance, the speed of facilities or the percentage of loans and grants requested in an application. At the same time, NTIA could have adopted more specific scoring for providing service to vulnerable populations, for proposing to offer higher speeds, or for the percentage of funding coming from the applicant, but it chose not to do so.

Conversely, RUS could have been less specific in its scoring or could have added a level of discretionary review to ensure that its awards, as a whole, met the goals of the statute, but it chose to follow its existing model for previous grant programs. This not only is likely to be more administratively efficient, but also reinforces the RUS mission of serving tradi-

tional rural telephone companies, which already are familiar with how RUS scored applications in the past.

Politics

Even in cases where there seem to be objective criteria that an agency must apply, political considerations come into play when agencies implement statutes. Congress made this clear in setting up the NTIA grant program by requiring NTIA to attempt to issue grants in every state; but many other political factors influence the way applications will be processed.

Both NTIA and RUS ask for information from applicants that will help establish the extent to which those applications have political support. RUS actually makes this an explicit element of the scoring process, adding points if an applicant obtains letters of support from community leaders. NTIA will consult state governments to determine how to prioritize projects and will consider the level of community involvement in a proposed project. These factors create very strong incentives for applicants to obtain political support before and during the application process.

Congress also has a significant influence even after a statute is passed. Both Democrats and Republicans sought to have NTIA and RUS address specific concerns when setting up the funding process. Some of these concerns, such as an emphasis on infrastructure funding for unserved rural areas, were reflected in the decisions NTIA and RUS made. It also is no coincidence that one of the questions on the application form is what congressional districts are included in the area to be served if a project is given funding. While neither agency will decide to grant funding solely on the basis of this information, they both are likely to use this information to inform members of both houses of Congress about funding awards so that they can announce the funding to their constituents.

Conclusion

The path from enactment of a law to its implementation by the responsible agency is not straight and narrow. While the process that led to the NOFA was not entirely typical of federal agency rule makings, it does provide a window into

how decisions are made and what influences them. Agencies like NTIA and RUS, even when constrained by specific terms in a law, have significant flexibility and discretion in shaping the rules to meet not just the literal wording of the statute, but their understanding of the intent of the law, their own agency missions, and the goals of the administration and congressional desires that do not appear in the law itself. Understanding these factors can make it easier to understand how a new law will be applied.

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More information on the broadband stimulus is available on the Dow Lohnes website at www.dowlohnes.com/news/Detail.aspx?newsid=77109a1c-8ca6-4b05-9a6e-03280f25e9cf