

NTIA AND RUS SEEK COMMENT ON BROADBAND STIMULUS

The NTIA and RUS have released a joint request for information on how to implement the broadband provisions of the stimulus package enacted in late February. The agencies have asked for comment on a wide range of issues, including how to define broadband service and how to allocate money in response to funding requests. While the request does not include any proposed rules, it provides a good overview of the issues that NTIA and RUS believe must be resolved before funding can begin. The request is posted on the NTIA's web site at http://www.ntia.doc.gov/frnotices/2009/FR_BTOP_RFI_090312.pdf.

OVERVIEW

The American Recovery and Reinvestment Act of 2009, better known as the economic stimulus package, contains a total of \$7.2 billion in funding for the development of broadband services in the United States. Two agencies – the Department of Commerce's National Telecommunications and Information Administration ("NTIA") and the Department of Agriculture's Rural Utilities Service ("RUS") – are responsible for administering these funds. Both agencies are under pressure to begin funding new projects as soon as possible, and they are in the midst of a breakneck effort to adopt rules and policies to govern

the funding process, to accept applications and to start releasing funds.

Yesterday, both agencies announced that they hoped to accept the first round of applications between April and June. To that end, they have scheduled a series of public meetings and have released the request for information that is reviewed in this memo. However, if they are to meet their self-imposed deadlines, they will have to work very quickly.

The request for information covers a wide range of issues affecting implementation of the broadband stimulus provisions, and the specific questions cover eight single-spaced pages. The open issues include the basic

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purposes of the programs, eligibility, the standards to be used in selecting projects to be funded, the specific meaning of key terms in the statute and the conditions to be placed on recipients of funding. The ways that many of these issues are resolved could have a significant impact on what kinds of projects are given priority and what types of applications are funded

Although the request for information asks for comments within 30 days of Federal Register publication, it is likely that both NTIA and RUS already are working on the issues they have identified. If either agency wants to meet its self-imposed deadline for accepting applications, it will be necessary to complete the rules very soon after the comment deadline.

ISSUES RAISED BY NTIA

Most of the request focuses on issues relating to the NTIA's new Broadband Technology Opportunities Program (known as "BTOP"). The stimulus package allocates \$4.7 billion to BTOP, divided among four elements: general funding, funding for community computing, funding for innovative broadband applications and funding for creating a broadband map.

General Issues

NTIA asks a series of general questions about how the BTOP program should be implemented. These questions focus on how the funds should be allocated, how the specific purposes of BTOP can be achieved and how (or whether) BTOP should be coordinated with other provisions of the stimulus package.

One of the most significant questions in this area is whether NTIA should have specific

allocations for each funding category. This is particularly significant because two of the categories – community computing and innovative broadband applications – have specific funding floors, but no ceilings, while the general funding category has neither a floor nor a ceiling.

Eligibility

The statute makes government and non-profit entities eligible for grants and gives NTIA discretion to award grants to for-profit entities if it determines that doing so is in the public interest. The request asks for comment on the appropriate standard to apply in making that determination.

This is one of the most important parts of the request for comment. While there are no current indications that NTIA intends to make for-profit entities ineligible, NTIA could impose conditions on eligibility that would make it more difficult for those entities to obtain funding or that could force them to partner with government or not-for-profit entities in their applications. Moreover, because NTIA does not ask any questions about specific eligibility requirements, the potential range of those requirements is difficult to determine at this time.

Selection Criteria

Some of the most detailed questions in the request concern the selection criteria for grants. NTIA asks both general questions concerning the factors that should be considered in issuing grants and specific questions concerning issues such as how to compare applications that seek to serve unserved areas compared with those that seek to address underserved populations.

From a practical perspective, the most important issues in this area are whether NTIA will give priority to proposals that serve unserved areas (however those are defined) and the extent to which speed and similar characteristics will be considered in evaluating proposals. The speed-related question is as follows:

Should the fact that different technologies can provide different service characteristics, such as speed and use of dedicated or shared links, be considered given the statute’s direction that, to the extent practicable, the purposes of the statute should be promoted in a technologically neutral fashion?

This question has great significance because NTIA’s answer to it will affect what applicants are likely to succeed. While Congress decided not to include specific speed requirements in the legislation, an NTIA decision to, for instance, give priority based on the promised speed or to favor dedicated services over those that require shared facilities could have the effect of shutting some potential applicants out of the grant program.

Definitions

NTIA notes that many terms in the statute are not defined, and that it is required to consult with the FCC to define several key terms before it issues grants. Because many of these definitions will affect what kinds of projects are eligible for grants, NTIA’s determinations will be particularly significant. The specific terms that NTIA discusses are:

- Unserved area
- Underserved area

- Broadband service
- Nondiscrimination and network interconnection obligations

The request does not ask any specific questions concerning the definitions of unserved and underserved areas, but it asks several questions about the other terms.

In establishing the meaning of “broadband service,” NTIA asks whether it should establish threshold speeds; whether those speeds should be used in determining whether an area is underserved or unserved; whether the speeds should differ depending on the technology used; how those speeds should be calculated and whether they should be symmetrical or asymmetrical; and whether “the impacts of the use of shared facilities . . . and of network congestion” should be considered.

In establishing the nondiscrimination and network interconnection obligations, NTIA asks what elements of network management techniques should be permitted; whether the interconnection obligation should be based on existing statutory schemes, potentially those in the Communications Act; whether there should be different standards for different technologies; how NTIA should respond to violations of the requirements; and whether these requirements should extend through the usable life of the infrastructure funded by a grant. Surprisingly, NTIA does not ask any questions about the extent to which its requirements should be the same as or should exceed the terms of the FCC’s 2005 Internet policy statement, even though that statement is mentioned explicitly in the statute.

While the nondiscrimination requirements may have attracted the most attention, the definitions of broadband service, unserved area and underserved area are likely to have a much more significant impact on what proposals ultimately will be eligible for funding. The nondiscrimination requirements are, in essence, a codification of a policy the FCC already is trying to enforce, and thus may not have that much effect on what a provider can and cannot do, while the other definitions directly affect what kinds of proposals can receive funding.

It is particularly interesting that NTIA is considering defining unserved and underserved areas in relation to the availability of specific levels of service. If it adopts that approach, it may create opportunities for funding that were not apparent based on the text of the statute.

State Involvement

The statute allows NTIA to consult with the states and also requires that, “to the extent practical,” BTOP funds be awarded in every state. NTIA asks questions concerning the extent to which states should be involved in setting priorities for grants and in selecting grant recipients, and also as to how NTIA should resolve any conflicts among different agencies or constituencies within a state.

These issues are significant because there has been some discussion of, in essence, giving states the ability to direct grants, rather than having NTIA decide. In addition, to the extent that states are involved in the grantmaking process, that adds one additional layer of scrutiny that could affect the timing and award of grants.

Grant Applicants’ Financial Contributions

The statute limits the federal portion of the funding for any proposal under BTOP to 80 percent of the total cost, absent a finding that a higher percentage of federal funding is necessary. BTOP also requires that NTIA fund only those proposals that “would not have been implemented during the grant period” without the funding. The request seeks comment on how to implement both of these requirements and on the factors NTIA should consider in determining that it will fund less than 80 percent of the cost of a project.

The 80 percent requirement is likely to be most important to non-commercial applicants, particularly given current budget constraints. However, commercial applicants may need to consider how to demonstrate that specific projects would not be implemented without the funding. To the extent that NTIA adopts relatively stringent requirements for this showing, it could become more difficult for commercial applicants to receive BTOP grants.

Public Computing Centers

BTOP includes a minimum of \$200 million for “grants that expand public computer center capacity, including at community colleges and public libraries.” The request asks what selection criteria should be applied to this element of the program and what other institutions should be made eligible for this funding.

Innovative Programs for Sustainable Broadband

BTOP includes a minimum of \$250 million to fund “innovative programs to encourage sustainable adoption of broadband services,” but does not define what such programs might be. The request asks for

comment on how to select grantees for these funds and how to measure the success of these programs.

Broadband Mapping

Up to \$350 million of the \$4.7 billion allocated to NTIA is to be used to “establish a comprehensive nationwide inventory map” of broadband capabilities in the United States. The request seeks information on a series of detailed questions about this program, including the following:

- What information should be on the map
- The level of detail
- Whether different users should have access to different levels of information from the map
- Whether there are any existing programs that can serve as a model
- What requirements should be adopted for state-level grants under this program
- How NTIA can work with the FCC

The request does not, however, ask any questions about how information can or should be collected from service providers and, in particular, about the extent to which that information may be confidential or protected from disclosure. These are issues that may be of particular importance to service providers, particularly to the extent that the information requested is different from what the FCC requires under its existing broadband reporting program.

Coordination with RUS

The request indicates that NTIA is concerned about ensuring that BTOP and the RUS program operate effectively together. It asks for comment on approaches that the two agencies should

adopt to ensure effective and efficient use of grant funds and how to address proposals that cover both rural and non-rural areas.

Implementation Issues

The request also asks questions about grant mechanics, how NTIA can keep track of the use of funds, how to ensure that proposals are completed in a timely fashion and how NTIA can measure the success of the program. These issues generally are fairly straightforward. However, the request specifically asks if NTIA should use any mechanisms for distribution of funds other than “traditional” programs. It is not clear what this means, but it could, for instance, provide an opportunity for states to argue in favor of block grants or for non-profits to suggest that they, effectively, become granting agencies.

Deobligations

The request asks for comment on the standards for removing funding from programs that “demonstrate an insufficient level of performance, or wasteful or fraudulent spending.” NTIA specifically is interested in how to define wasteful and fraudulent spending, how to determine whether performance is sufficient and what actions it should take when it determines that its standards are not being met.

ISSUES RAISED BY RUS

RUS asks many fewer questions than NTIA. Some of those questions, however, are fundamental to the program. RUS focuses on how it can ensure that rural customers who do not have access to broadband service will be able to obtain appropriate levels of service, how to align its programs

with the NTIA program and evaluation of proposals and projects.

Appropriate Levels of Service

A large percentage of the RUS questions relate to how RUS can ensure that funding provides access to customers who do not have broadband today and how RUS can evaluate what level of service is necessary to facilitate economic development. RUS indicates that these issues are significant because it has “struggled to find an effective way” to use its current program to facilitate broadband service.

In reviewing how to provide access to unserved customers, RUS asks specifically for suggestions on how to bundle loans and grants to provide access “to areas that traditionally could not afford the investment;” how to leverage private investment; and to target funding to unserved areas that are likely to benefit most. These questions may provide an opportunity for applicants to suggest changes to the traditional RUS requirements for funding, including some of its rules governing security interests in property of borrowers.

RUS also seeks comment on how to determine that a project will serve areas that lack sufficient “high speed broadband service to facilitate rural economic development.” The issues RUS raises include how to define rural economic development; what transmission speeds are required for this purpose; how to define “high speed broadband;” and what factors to consider when facilities that serve rural areas are located in non-rural areas.

Coordination with NTIA

RUS, like NTIA, wants to coordinate the two programs. RUS is concerned about two issues: (1) How to reconcile the NTIA mandate to fund service in unserved and underserved areas with the RUS mandate to provide broadband access that will facilitate rural economic development; and (2) How to structure the two programs to avoid duplicative funding while permitting applications to both agencies.

Prioritization

RUS is required by the statute to consider four priorities: giving end users a choice of providers; service to the highest proportion of currently unserved rural residents; granting funds to current and former RUS recipients; and ability to begin work as soon as funding is available. The request asks for comments on how much value should be assigned to these priorities, individually and collectively and on what other priorities should be considered in evaluating applications.

RUS’s decisions about priorities will have a significant impact on what entities are likely to receive funding. In particular, to the extent that RUS gives much value to the requirement to prioritize current and past RUS recipients, new service providers, including cable companies and other competitive carriers, could be greatly disadvantaged. On the other hand, giving the highest priority to serving unserved users or creating competitive choice could make it easier for competitors to receive funding.

Evaluating Success

RUS asks for comments on the benchmarks it should use in evaluating the success of its

broadband funding. The request suggests factors that RUS might consider, including the number of customers with “first time” access, critical facilities served by new or upgraded facilities, businesses or jobs created or retained and state, local and community support.

NEXT STEPS

As noted above, the request has not yet been published in the Federal Register. It is likely to be published this week, and publication will start the formal 30-day comment period.

While the comment period is ongoing, NTIA and RUS will be holding a series of public meetings on how to implement these provisions. Four of those meetings, on March 16, 19, 23 and 24, will be held in Washington, DC, one will be held in Las Vegas on March 17 and one will be held in Flagstaff on March 18. The comments made at those meetings will be considered along with any written comments received by the agencies in response to the request.

Given the short time frames that confront the agencies, it is likely that they will not wait until the comment deadline to begin

structuring their rules and procedures. In fact, comments filed towards the end of the comment period may well be given very little weight because the process of drafting rules may be well advanced by that time. Thus, parties that are interested in commenting should try to file their comments early.

In addition, given the nature of this process, it may be advisable for some parties to have direct discussions with RUS and NTIA. This may be particularly important in addressing definitional issues, such as what constitutes a broadband service, where the opportunity to ask and answer questions could provide additional information.

It also should be noted that, because the request establishes a specific comment period, it does not appear that either NTIA or RUS will be able to issue rules or begin accepting applications before the end of that period, which likely will be in mid-April. It is possible, however, that the agencies could announce the initial dates for accepting applications before the rules are released.