

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

7 CFR Part 1738

RIN 0572-AC06

Rural Broadband Access Loans and Loan Guarantees

AGENCY: Rural Utilities Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Rural Utilities Service, an agency delivering the United States Department of Agriculture's (USDA) Rural Development Utilities Programs, hereinafter referred to as Rural Development, proposes to amend its regulation for the Rural Broadband Access Loan and Loan Guarantee Program (Broadband Loan Program). Since the Broadband Loan Program's inception, the Agency has faced and continues to face significant challenges in administering the program, including the fierce competitive nature of the broadband market, the fact that many companies proposing to offer broadband service are start-up organizations with limited resources, continually evolving technology, and economic factors such as the higher cost of serving rural communities. Because of these challenges, the Agency has been reviewing the characteristics of the Broadband Loan Program and has determined that modifications are required to accelerate the deployment of broadband service to the rural areas of the country. Therefore, this rulemaking proposes to implement changes on the following subject matter: funding in competitive markets and new eligibility requirements; new equity and market survey requirements; and new legal notice requirements to increase transparency.

DATES: Comments must be submitted on or before July 10, 2007.

ADDRESSES: Submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and, in the

lower "Search Regulations and Federal Actions" box, select "Rural Utilities Service" from the agency drop-down menu, then click on "Submit." In the Docket ID column, select RUS-06-Agency-0052 to submit or view public comments and to view supporting and related materials available electronically. Information on using Regulations.gov, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's "User Tips" link.

- *Postal Mail/Commercial Delivery:* Please send your comment addressed to Michele Brooks, Acting Director, Program Development and Regulatory Analysis, USDA Rural Development, 1400 Independence Avenue, STOP 1522, Room 5159, Washington, DC 20250-1522. Please state that your comment refers to Docket No. RUS-06-Agency-0052.

Other Information: Additional information about Rural Development and its programs is available on the Internet at <http://www.rurdev.usda.gov/index.html>.

FOR FURTHER INFORMATION CONTACT: Jonathan Claffey, Deputy Assistant Administrator, Telecommunications Program, Rural Development, U.S. Department of Agriculture, 1400 Independence Avenue, SW., STOP 1590, Room 4056, Washington, DC 20250-1590. Telephone number (202) 720-9554, Facsimile (202) 720-0810.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This proposed rule has been determined to be significant for purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget (OMB). In accordance with Executive Order 12866, an Economic Impact Analysis was completed, outlining the costs and benefits of implementing this program in rural America. The complete analysis is available from Rural Development upon request.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. Rural Development has determined that this rule meets the applicable standards provided in section 3 of that Executive Order. In

addition, all State and local laws and regulations that are in conflict with this rule will be preempted. No retroactive effect will be given to the rule and, in accordance with section 212(e) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. 6912(e)), administrative appeal procedures must be exhausted before an action against the Department or its agencies may be initiated.

Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is not applicable to this proposed rule because the Agency is not required by 5 U.S.C. 553 or any other law to publish a notice of proposed rulemaking for the subject matter of this rule.

Paperwork Reduction Act and E-Government Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended), Rural Development invites comments on this information collection for which approval from the Office of Management and Budget (OMB) will be requested.

Comments on this notice must be received by July 10, 2007.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumption used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques on other forms of information technology.

Comments may be sent to Michele Brooks, Acting Director, Program Development and Regulatory Analysis, Rural Development, U.S. Department of Agriculture, 1400 Independence Ave., SW., Stop 1522, Room 5159 South Building, Washington, DC 20250-1522.

Title: 7 CFR Part 1738, Rural Broadband Access Loans and Loan Guarantees.

OMB Control Number: 0572-0130.

Type of Request: Revision of a currently approved information collection package.

Abstract: Rural Development is authorized by Title VI, Rural Broadband Access, of the Rural Electrification Act of 1936, as amended (RE Act), to provide loans and loan guarantees to fund the cost of construction, improvement, or acquisition of facilities and equipment for the provision of broadband service in eligible rural communities in States and Territories of the United States. Title VI of the RE Act requires that Rural Development make or guarantee a loan only if there is reasonable assurance that the loan, together with all outstanding loans and obligations of the borrower will be repaid in full within the time agreed. The items covered by this collection include forms and related documentation to support a loan application, including Form 532 and supporting documentation.

Revisions to the information collection include: (1) Funding in competitive markets and new eligibility requirements (revisions will affect the details of an application, but not the difficulty of preparation or quantity of information provided; accordingly, the paperwork burden associated with these changes is not expected to be appreciably more or less than under the existing rule); (2) new equity requirements (revisions will affect the details of an application, but not the difficulty of preparation or quantity of information provided; accordingly, the paperwork burden associated with these changes is not expected to be appreciably more or less than under the existing rule); (3) new market survey requirements (the associated paperwork burden will be reduced by a small amount for some applicants as the requirement will be eliminated in certain instances); and (4) new legal notice requirements to increase transparency (the additional information required by the proposed modification of legal notice requirement will increase the paperwork burden of each application by a small amount).

Estimate of Burden: Public reporting for this collection of information is estimated to average 225 hours per response.

Respondents: Businesses and not-for-profit institutions.

Estimated Number of Respondents: 40.

Estimated Number of Responses per Respondent: 2.

Estimated Total Annual Burden on Respondents: 13,480 hours.

Copies of this information collection can be obtained from Michele Brooks,

Program Development and Regulatory Analysis, at (202) 690-1078.

All responses to this information collection and recordkeeping notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record. Rural Development is committed to the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

Catalog of Federal Domestic Assistance

The program described by this proposed rule is listed in the Catalog of Federal Domestic Assistance Programs under No. 10.886, Rural Broadband Access Loans and Loan Guarantees. This catalog is available on a subscription basis from the Superintendent of Documents, the United States Government Printing Office, Washington, DC 20402. Telephone: (202) 512-1800 or at <http://www.cfda.gov>.

Executive Order 12372

This proposed rule is excluded from the scope of Executive Order 12372, Intergovernmental Consultation, which may require consultation with State and local officials. See the final rule related notice entitled "Department Programs and Activities Excluded from Executive Order 12372," (50 FR 47034).

Unfunded Mandates

This proposed rule contains no Federal mandates (under the regulatory provision of Title II of the Unfunded Mandate Reform Act of 1995) for State, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the Unfunded Mandate Reform Act of 1995.

National Environmental Policy Act Certification

Rural Development has determined that this proposed rule will not significantly affect the quality of the human environment as defined by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Therefore, this action does not require an environmental impact statement or assessment.

Background

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A. Introduction: The Utilities Programs (the Agency) of USDA Rural Development improve the quality of life in rural America by providing investment capital for deployment of rural telecommunications infrastructure. Financial assistance is provided to rural utilities; municipalities; commercial corporations; limited liability companies; public utility districts; Indian tribes; and cooperative, nonprofit, limited-dividend, or mutual associations. In order to achieve the goal of increasing economic opportunity in rural America, USDA Rural Development finances infrastructure that enables access to a seamless, nation-wide telecommunications network. With access to the same advanced telecommunications networks as its urban counterparts, especially broadband networks designed to accommodate distance learning, telework and telemedicine, rural America will eventually see improving educational opportunities, health care, economies, safety and security, and ultimately higher employment. The Agency shares the assessment of Congress, State and local officials, industry representatives, and rural residents that broadband service is a critical component to the future of rural America. The Agency is committed to ensuring that rural America will have access to affordable, reliable, broadband services, and to provide a healthy, safe and prosperous place to live and work.

B. Regulatory History: On May 13, 2002, the Farm Security and Rural Investment Act of 2002, Public Law 107-171 "Farm Bill" was signed into law. The Farm Bill amended the Rural Electrification Act of 1936 to include Title VI, the Rural Broadband Access Loan and Loan Guarantee Program (Broadband Loan Program), to be administered by the Agency. Title VI authorized the Agency to approve loans and loan guarantees for the costs of construction, improvement, and acquisition of facilities and equipment for broadband service in eligible rural communities. Under the Farm Bill, the Agency was directed to promulgate regulations without public comment within 120 days from passage. Implementing the program required a different lending approach for the Agency than it employed in its earlier telephone program because of the unregulated, highly competitive, and technologically diverse nature of the broadband market. The current regulations were published on January 30, 2003.

C. Program Results: Despite the challenges in implementing this new program, significant progress has been made in facilitating rural broadband deployment. As of March 15, 2007, the Agency approved 68 loans totaling \$1.2 billion for broadband deployment projects headquartered in 36 states. Eight of those projects are completed in Kansas, Louisiana, Michigan, North Dakota, Nebraska, South Dakota, Texas and Washington. The remainder of the projects are in various stages of construction or planning. Through these loans, more than half a million households in more than 1,000 rural communities will receive broadband service. Approximately 40 percent of these communities had no broadband service at the time the loan was approved, and an additional 20 percent had limited access to broadband services.

As mandated by Congress, the program is to be administered in a technology neutral manner. As the results show below, the Agency has achieved that mandate by financing the deployment of a wide array of technologies capable of meeting the needs of rural communities:

Technology	Number of loans approved*
Broadband over Powerline	1
Digital Subscriber Line	15
Wireless	18
Hybrid Fiber Coax	12
Optical Fiber	27

* Applications deploying multiple technologies counted in each category.

In addition to the various types of technology deployments, loans have been made to a very diverse set of organizations using various business models. Nearly 90 percent of loans approved were made to private companies, 7 percent were made to cooperatives, 3 percent were made to

municipalities and 1 loan was awarded to a tribal authority.

D. Program Improvements: Since the Broadband Program's inception, many modifications have been made to improve the administration of the program. Specifically, the Agency has created a standardized loan application; a Broadband Credit Committee to evaluate risks in the program; a financial assessment model to measure loan feasibility; and new standardized loan documents to cover the unique attributes of the industry, as well as accommodate private lending from financial markets which were not traditional Agency lending partners.

Moreover, the Agency now encourages applicants to work with Agency local field representatives prior to submitting applications to increase loan processing efficiency. Program outreach efforts have been well received and are in high demand today. To date, the Agency has conducted nearly two dozen awareness sessions with 1,488 attendees nation-wide.

As a result of its efforts, the Agency has seen dramatic improvements in its application processing. The average processing time in 2006 was almost half of what it was in 2003. In addition, to increase program awareness and transparency, modifications have been made to the Agency's Web site to ensure that information is available to potential applicants, potential competitors, and the public.

E. Review of Rules and Processes: While the Agency is proud of the results achieved thus far, it is also aware that improvements to the Broadband Program are necessary. Over the course of the last four years, the Broadband Program has encountered challenges in administering the program and learned from them. The challenges include the competitive nature of the broadband communications industry, the fact that many applicants are start-up

organizations with limited resources to meet equity requirements, the rapid pace of technology advancement and increases in demand for bandwidth, and the need for increased transparency in providing communities and incumbent providers with information on new market entrants. Program participants and industry members have since raised concerns with the implementation of the program. The Agency's experience, coupled with input from industry representatives, state and regional associations, and other interested parties, has prompted the Agency to propose amendments to its regulations to address these challenges and other critical issues affecting the deployment of broadband service in rural America. The Agency is, however, still committed to Title VI's direction to give priority to eligible rural communities where broadband service is not available. Further, the Agency is seeking comment on the proposals, which as noted above, will be the first formal opportunity for public comment on the rules associated with the Broadband Program. Specifically, this proposed rule will address: (1) Funding in competitive markets and new eligibility requirements; (2) New equity and market survey requirements; and (3) New legal notice requirements to increase transparency. Further, the program proposes reordering the present rules to make them more user-friendly, and rewording certain rules, without substantively changing them, to clarify their meaning. In addition, the proposed changes codify processes and procedures currently published in Agency guides (*i.e.*, application submission procedures, competitive analysis, reporting requirements, etc.). In order to easily identify which sections have been modified, added, removed, or re-ordered, the following table summarizes the proposed changes:

BROADBAND LOAN AND LOAN GUARANTEE PROGRAM RULES—SUMMARY OF PROPOSED CHANGES

Existing section	Proposed new location	Action taken	Proposed content change
<i>Subpart A—</i>	1738.1	Modified	Revised 1738.1(c) to state that "RUS will not assess fees for any loan made under this part".
<i>General:</i>			
§ 1738.1 <i>General statement.</i>	.....	.....	Added reference to agency's web site in paragraph (b).
§ 1738.2 <i>Definitions</i>	1738.2	New and modified definition and additional language at 1738.2(b).	Current text designated (a) and new (b) added. <i>Modified Definitions—In most cases, definitions were modified for clarification purposes.</i> Acquisition. Eligible Rural Community. Financial Feasibility. Forecast Period. Interim Construction. Interim Financing. Release of Funds.

BROADBAND LOAN AND LOAN GUARANTEE PROGRAM RULES—SUMMARY OF PROPOSED CHANGES—Continued

Existing section	Proposed new location	Action taken	Proposed content change
			<p><i>Deleted Definitions.</i> Broadband pilot. Mortgage. Private Loan Guarantee. RUS Telecommunications borrower.</p> <p><i>New Definitions—The Agency has added definitions to clarify existing regulation and support proposed rule modifications.</i> Advance of Funds. Agency. Arm's Length Transaction. Broadband Loan. Census block. Census block group. Derivative. Eligible Entity. Equity or Net Worth. Existing Broadband Service Provider. Guaranteed Amount Debt Derivative. Guaranteed Amount Equity Derivative. Guaranteed Amount Equivalent. Guaranteed Loan Amount. Guaranteed Loan Note. Guaranteed Loan Portion. Guaranteed Loan Portion Amount. Guaranteed Loan Portion Note. Incumbent Service Provider. Indefeasible Right to Use Agreement (IRU). Loan Guarantee. Loan Guarantee Documents. Pre-Loan Expenses. Security Documents. Telecommunications Loan. Urban Area. Un-guaranteed Amount Equivalent. Un-guaranteed Loan Amount and Un-guaranteed Loan Portion Amount.</p>
<p><i>Subpart B—Loan Purposes and Basic Policies:</i></p> <p>§ 1738.10 <i>General</i></p>	<p>1738.1(a)</p> <p>1738.2(a)</p>	<p>Modified/relocated</p>	<p>Refinancing language in (b) was moved to 1738.22(e). Moved and modified text related to economic composite life to 1738.2(a).</p>
<p>§ 1738.11 <i>Availability of broadband service.</i></p>	<p>1738.33</p> <p>1738.61</p>	<p>Modified/relocated</p>	<p>Legal notice language moved to 1738.33. (a) and (b) (1) through (3) included in new prioritization scheme in 1738.61.</p>
<p>§ 1738.12 <i>Location of facilities.</i></p>	<p>1738.22(a)</p>	<p>Modified</p>	<p>Clarify eligible items for financing.</p>
<p>§ 1738.13 <i>Allocation of funds.</i></p>	<p>1738.62</p>	<p>Modified</p>	<p>Condensed original language by citing the RE Act as the guidance for allocating funds.</p>
<p>§ 1738.14 <i>One-time priority for unfunded applications from the broadband pilot program.</i></p>	<p>Deleted</p>	<p>Deleted</p>	<p>No longer relevant.</p>
<p>§ 1738.15 <i>Priorities</i></p>	<p>1738.61</p> <p>1738.62</p>	<p>Modified</p>	<p>Added new language regarding prioritization of applications in the following order: (1) Applications that include only households that have no broadband access or only one Existing Broadband Service Provider. (2) Applications that include only areas where at least 40 percent of households have no access to Broadband service or access to only one Existing Service provider; (3) All other applications. Relocated language regarding State and National reserves to 1738.62. Text is reworded to reference the Act.</p>
<p>§ 1738.16 <i>Eligible entities.</i></p>	<p>1738.2</p> <p>1738.20</p> <p>1738.21</p>	<p>Relocated/modified</p>	<p>Moved language regarding the types of entities eligible for loans to 1738.2(a). Moved language regarding eligible entities (existing 1738.16(a) and (b)) to 1738.2(a).</p>

BROADBAND LOAN AND LOAN GUARANTEE PROGRAM RULES—SUMMARY OF PROPOSED CHANGES—Continued

Existing section	Proposed new location	Action taken	Proposed content change
<p>§ 1738.17 <i>Civil rights ..</i> § 1738.18 <i>Minimum and maximum loan amount.</i></p>	<p>1738.64 1738.12</p>	<p>Relocated/unmodified Relocated/modified</p>	<p>Added new section, 1738.21, to detail requirements to serve areas with little or no service: —Start-up operations and new entrants—40% of proposed households in a proposed service area must have access to no or only one existing broadband provider. —Incumbent Service Providers proposing to extend service beyond their existing footprint—40% of proposed households in extended service areas must have access to no or only one existing broadband provider. —Incumbent Service Providers submitting applications solely for the purpose of upgrading existing facilities within Eligible Rural Communities must offer Broadband Service with enhanced features. Redesignated as 1738.64 but text is unchanged. Removed reference to plant costs. Moved language from 1738.30(b)(2) regarding annual publication of max/min to this section. Removed language “maximum loan amounts apply only to an applicant for a direct 4-percent broadband loan” and made a general statement that the maximum will be set in the NOFA published annually in the FEDERAL REGISTER. This allows the Agency the flexibility to set the maximum level based on current funding levels and portfolio concentration.</p>
<p>§ 1738.19 <i>Facilities financed.</i></p>	<p>1738.19</p>	<p>Modified/clarified</p>	<p>General reorganization to more clearly define for applicants what is and is not eligible for funding by dividing the two topics into separate sections. Old 1738.19(h) is now in 1738.19(b) and renamed ineligible areas.</p>
	<p>1738.22</p>		<p><i>1738.22 Items Eligible to be financed.</i> 1738.22(a)—new language regarding start-up and overhead costs is a further clarification that these costs are eligible for financing. Although not specified in the earlier rules, these costs were considered part of the construction costs and therefore have been routinely funding in the loan program. 1738.22(b)—new language regarding pre-loan expenses. 1738.22(c)—new language (replacing old 1738–19(b)) limiting the cost of the capital lease for the first 5 years of the loan amortization period. This language was added because the standard period for advancing all funds set in all RUS loan documents is 5 years. Any lease extending beyond that period should not have funds available at that time. 1738.22(d)—new language clarifies the definition of “necessary and incidental” that currently exists in 1738.21(c). The common practice of the agency is to interpret this clause as 50%. We have made this standard known in public workshops for several years.</p>
	<p>1738.23</p>	<p>Modified/clarified</p>	<p>1738.23(d)—clarification that funds cannot be used to purchase or acquire the equipment of an affiliate. 1738.23(e)—modified language regarding financing of CPE equipment; applicants often sell the CPE rather than lease it to the end-user. The original intent was that this equipment would be used as collateral; however, because CPE is often physically out of the control of the applicant and because the value of end-user equipment depreciates quickly, we have determined that other arrangements offer the Agency a similar level of security, while offering the applicant more flexibility under our rules. Eliminated old 1738.19(g)—This rule specifically addressed actions the Agency would take prior to October 2004. This rule is outdated and no longer valid.</p>

BROADBAND LOAN AND LOAN GUARANTEE PROGRAM RULES—SUMMARY OF PROPOSED CHANGES—Continued

Existing section	Proposed new location	Action taken	Proposed content change
§ 1738.20 <i>Credit support requirement.</i>	1738.31	Modified	Now called Equity Requirement and Additional cash requirement.
	1738.32 .....	.....	Added incentive to serve areas with little or no broadband service: reduced initial equity requirement to 10% for applications filing pursuant to 1738.31(a) or (b); 20% equity requirement remains for all other applications. Added clarification on the use of letters of credit and bonds to meet equity requirements. Added language to reserve the Administrator's right to modify or waive the requirements of this section as long as those modifications do not result in a projected negative cash position in any quarter throughout the forecast period and the modifications are required to provide Broadband Service in areas that are not capable of receiving Broadband Service or can receive Broadband Service from only one Existing Broadband Service Provider. Modified cash requirement language so that cash requirements are considered at time of feasibility determination rather than for eligibility.
§ 1738.21 <i>Interim financing.</i>	1738.60	Relocated/modified	Revised for clarification. No substantive change.
§ 1738.22 <i>Loan security.</i>	1738.41(b) (c) & (d)	Modified	1738.41(b), (c) and (d)—requirement unchanged, reworded to provide further clarity.
	1738.37(e) .....	.....	Old 1738.22(e) language regarding TIER was moved to financial analysis section—1738.37(e).
Subpart C—Types of Loans: § 1738.30 <i>Rural broadband access loans and loan guarantees.</i>	1738.11	Relocated/modified	Modified original language in 1738(b)(1)(i)(A) to increase the populations test for a 4% loan from 2,500 to 5,000.
	1738.43 .....	.....	Modified original language in 1738.30(b)(1)(i)(B) to be consistent with proposed rules. Language located in 1738.11b(1)(ii) now reads "is not capable of receiving broadband service or can receive service from only one existing broadband service provider." Deleting original language in 1738.30(b)(1)(ii)—This language was intended to promote service to outlying rural areas because these areas had less access to broadband service. The new proposed regulations will achieve this same goal by requiring most applicants to include a significant portion of service areas with little or no broadband service. Deleting original language in 1738.30(b)(1)(i)(C)—Our experience has demonstrated that this rule was too restrictive and prevented most applicants from qualifying for the 4% funding. The proposed regulations will require most applicants to include service to areas with little or no broadband service. These areas are likely to have lower population density and higher deployment costs. Removing the original restriction in 1738.30(b)(1)(i)(C) will better support deployment to these areas by allowing applicants access to lower cost financing.
§ 1738.31 <i>Full faith and credit.</i>	1738.11	Relocated/modified	Current 1738.30(b)(2) has been relocated to 1738.12.
	1738.43 .....	.....	Current rules specific to loan guarantees have been moved to 1738.43
§ 1738.31 <i>Full faith and credit.</i>	1738.43(f)	Relocated/unmodified	Moved to 1738.43(f) without substantial changes.
Subpart D—Terms of Loans: § 1738.40 <i>General</i>	1738.40(a)	Relocated/modified	Current text designated as paragraph (a) and revised to clarify for applicants.
	§ 1738.41 <i>Payments on Loans.</i>	1738.42	Relocated/modified .....	Added language regarding the Administrator's ability to modify requirements on a case-by-case basis for areas that are not capable of receiving or can only receive from one existing broadband provider.

BROADBAND LOAN AND LOAN GUARANTEE PROGRAM RULES—SUMMARY OF PROPOSED CHANGES

Proposed new sections	Subject matter	Proposed content
<i>Subpart D—Loan Application Requirements:</i> 1738.34	Market Survey	The rules proposed in this section codify existing requirements published in Bulletin 1738–1. Modification of Market Survey Requirement: 1738.34(b) now eliminates the requirement for a market survey if an applicant is projecting less than a 15 percent penetration of the households passed, by the end of the Forecast Period. A detailed competitive analysis is still required for all applications. We are proposing this modification in response to applicants' concerns that the cost of conducting a market survey is a barrier to filing. The Agency has relied more heavily on the competitive analysis and financial and risk analysis to determine project feasibility, and will continue to do so under the new proposal. Added language reserving the Administrator's right to waive the requirements on a case-by-case basis.
1738.35	Competitive analysis ...	The rules proposed in this section codify existing requirements published in Bulletin 1738–1. Applicants are aware of the requirements and currently comply with them.
1738.36	Business plan	The rules proposed in this section codify existing requirements published in Bulletin 1738–1. Applicants are aware of the requirements and currently comply with them.
1738.37	Financial information ..	The rules proposed in this section codify existing requirements published in Bulletin 1738–1. Applicants are aware of the requirements and currently comply with them. The proposed rule also allows cash-flow from operations to be used in determination of the cash requirement.
1738.38	System design	The rules proposed in this section codify existing requirements published in Bulletin 1738–1. Applicants are aware of the requirements and currently comply with them. New language reserving the Administrator's right to waive the requirements on a case-by-case basis.
1738.39	Submission of application.	New section that clarifies that applicants are encouraged to submit applications through the General Field Representative in their state for review prior to final submission. Applications will still be accepted at the National Office.
<i>Subpart F—Post Application Procedures:</i> 1738.50	Notification of completeness.	This new section codifies currently existing internal processes and is designed to help applicants understand the post-application process. We believe this demonstrates the Agency's commitment to a standardized and more transparent process.
1738.51	Determination of feasibility.	This new section codifies currently existing internal processes and is designed to help applicants understand the post-application process. We believe this demonstrates the Agency's commitment to a standardized and more transparent process.
1738.52	Notice to applicant of decision.	This new section codifies currently existing internal processes and is designed to help applicants understand the post-application process. We believe this demonstrates the Agency's commitment to a standardized and more transparent process.
<i>Subpart G—Miscellaneous Requirements and Information:</i> 1738.63	Annual audit and reporting requirements.	Codifies standard requirements currently existing in broadband loan closing documents. Added language to 1738.63(a) to allow the Administrator to waive the requirement that an audit be performed in the year in which the loan is approved if operations of the applicant have not yet started.
1738.65	Applicable laws	Codifies standard requirements existing in all broadband loan documents.

F. Proposed Rule Changes: The following proposals seek to implement changes to the Broadband Program's regulations regarding: (1) Funding in competitive markets and new eligibility requirements; (2) New equity and market survey requirements; and (3) New legal notice requirements to increase transparency. Through this Notice, the Agency seeks comments on all of these proposed changes from any and all interested parties.

(1) *Funding in competitive markets and new eligibility requirements:* The most intractable problem the Broadband Program has encountered is finding feasible loan applications which propose to serve only rural areas which do not have broadband service. The cost of building out a broadband system

coupled with low rural population density in unserved areas has consistently yielded loan proposals which cannot be supported by project revenues. Consequently, in the history of the program, the Agency has certified as complete only one application to serve a rural area completely without broadband service. Uniquely, that application was for an Indian reservation with a very different competitive environment.

In order for broadband loans to be feasible, it is necessary for applicants to serve low cost, more densely populated areas, as well as low density high cost areas. Although it is necessary to serve high density areas which are likely to have broadband service, the Agency proposes to place limitations on service

to such areas. The Agency proposes changes in eligibility that would prohibit funding within urban areas, regardless of population, and areas where a significant share of the market is already served by incumbent providers. To accomplish this, the Agency is adding or modifying three definitions, Existing Broadband Service Provider, Eligible Rural Community, and Urban Area, which will identify communities that will be ineligible for funding by establishing that sufficient service is already being provided.

(a) *Existing Broadband Service Provider.* The Agency initially proposes the definition of an existing broadband service provider to identify existing competition. As a basis, the Agency will use the current definition of

“broadband” established by the Federal Communications Commission (FCC) to determine Incumbent Service Providers that are providing broadband service to the households in the applicant’s proposed communities. To be recognized as an Existing Broadband Service Provider, the Incumbent Service Provider must provide evidence and certify to the Agency that 10 percent of the households passed by their facilities are purchasing their broadband service. Using this new definition, funding for any community where there are four or more Existing Broadband Service Providers will be prohibited.

In establishing the benchmark of “10 percent of households,” the Agency sought to establish a threshold penetration of the broadband market in any particular community in order to separate broadband service providers who are actively and successfully selling their services from those who are only marginally engaged with a community. The Agency believes that the threshold should differentiate providers who only market to a limited segment of the community (e.g. to businesses, densely populated areas, apartment buildings, etc.) so that a community is not treated as having service available from a provider who does not, in fact, serve all types of customers, throughout its service territory.

Nationwide, slightly more than 40 percent of households are subscribing to broadband service. This number was determined by using the FCC’s report entitled “High-Speed Services for Internet Access: Status as of June 30, 2006” and comparing the number of residential Advanced Services Lines (45.9 million) with the number of households in the country. The FCC report indicates that the two major technologies providing broadband service are cable modem (59.9%) and DSL (36.0%). In most rural communities, these two types of service are offered by two providers, the incumbent local cable company and the incumbent local exchange carrier (ILEC). For example, assuming that a particular community meets the national average penetration percentage of 40.9 percent and further assuming that there are only two providers supplying these services in the same proportions as the national data reflect, the percentage of households served by these two providers would be 24.5 percent and 14.7 percent for the cable company and the ILEC, respectively. This example reflects an idealized estimate. Nonetheless, looking to the idealized case for guidance indicates that setting a threshold at 20 percent of

the households in a market (roughly half of the average penetration) might well eliminate all but one provider in a market. Even a 15 percent threshold seems high, since nationwide, DSL does not yet reach that penetration. Therefore, we propose a threshold of 10 percent of the households in a market. A company offering broadband service will need to have a customer base of at least 10 percent of the households in a community in order to be considered an Existing Broadband Service Provider for the purposes of this proposed rule.

(b) *Urban Area*. In addition to identifying competition, the Agency proposes limiting eligibility of those communities that qualify under the regulations as rural in population, but are located within the boundaries of an Urban Area. The Agency believes that using the pre-established definition of Urban Area will clarify exactly which communities are eligible and reduce the number of “urban-like” communities that technically qualify in population size but are not representative of rural in most other characteristics.

(c) *Eligible Rural Community*. Tying together the preceding two concepts, then, the Agency proposes that an Eligible Rural Community mean a community which contains less than four Existing Broadband Service Providers and is not located in an Urban Area. This modification recognizes that, where there are four or more existing providers, the market is sufficiently served and does not warrant an additional market entrant subsidized through Federal funding.

In addition, the Agency continues to prioritize deployment of Broadband Service to households with no or limited broadband access while ensuring the financial feasibility of loans. To accomplish this, the Agency will require applications from new market entrants, start-ups or incumbent providers that are expanding their service area, to enter areas where 40 percent of households either have no or limited access to Broadband Service. This requirement addresses the need to reach unserved or underserved areas while also permitting service to more lucrative areas, which may be served by up to three Existing Service Providers, in order to attract feasible loan proposals which are supportable from project revenues. Permitting service in areas with up to three Existing Service Providers addresses the need for applicants to leverage revenues from lower-cost users (typically those in more densely populated areas within a city or town) in order to provide service to rural households in higher cost areas, while excluding areas with higher levels

of competition where loan feasibility is unlikely.

Lastly, the Agency’s proposed rule includes loans to incumbent providers to upgrade existing facilities without requiring service to additional customers as long as the upgrades enhance existing Broadband Service. For purposes of determining whether the proposed service area has “four or more” Existing Service Providers, thereby disqualifying the area from lending consideration, the applicant will not be considered as an Existing Broadband Service Provider. Therefore, a facility upgrade loan may be made to an applicant operating in an area which has three other Existing Broadband Service Providers.

The Agency believes that this approach will benefit rural residents by allowing incumbents to keep pace with the changing needs of their customers through continued advancement in technologies and services.

(2) *New equity and market survey requirements*: Two requirements of the Broadband Program have significantly precluded applicants from being eligible for a Broadband loan, the equity requirement and the market survey requirement. In response, the Agency is modifying both requirements so as to provide incentives for serving markets with limited or no broadband service and to reduce the costs to applicants under certain circumstances.

(a) *§ 1738.31 Equity requirement*: Under the current rules, to be eligible for a loan, applicants must have a 20 percent (of the requested loan amount) credit support contribution and in some instances, cash equal to the first full year’s operations. The concept of credit support was unique to the Agency and has been a source of confusion for many applicants. In an effort to better clarify its requirements, the Agency is proposing to replace the credit support methodology with a straight forward equity requirement, mirroring private industry.

With this proposed rule modification, the Agency is also addressing our applicants’ challenges in obtaining private investment capital to provide service in less lucrative, rural markets, particularly those with no broadband service or service from only one provider. A significant number of applicants, many of whom are start-ups, have noted that private financing for these areas is limited and difficult to obtain. Further, applicants assert that the current equity requirement proves too burdensome and serves as a barrier to entities seeking to serve these markets. The Agency’s records generally support this assertion. Of the 106

applications returned since the Program's inception, more than half were returned for lack of credit support. Therefore, the Agency is proposing to reduce its equity requirement from 20 percent to 10 percent of the requested loan amount for applicants proposing to serve an area wherein at least 40 percent of the households have no broadband access or service from only one provider. The Agency proposes that all other applicants be required to demonstrate a minimum equity position equal to 20 percent of the requested loan amount at the time the application is submitted.

(b) § 1738.33 *Market survey:*

Currently, the Agency uses market surveys, competitive assessments and financial analyses as tools to validate subscriber projections and determine loan feasibility. Applicants have asserted that completing a market survey can prove to be onerous, unnecessary, and cost prohibitive, especially for those seeking to serve areas where no service exists. Based on our experience with the program, the Agency finds that most market surveys submitted support a 15 percent penetration rate. As a result, the Agency relies more heavily on other means, such as the detailed competitive and financial analyses, to determine feasibility for areas where 15 percent or less penetration is projected. Therefore, in communities where an applicant is proposing to serve less than 15 percent of the market, the Agency is proposing to eliminate the requirement for a market survey, but continue to require submission of competitive and financial analyses.

(3) *New legal notice requirements to increase transparency:* The Agency is also proposing to modify the Legal Notice requirement of § 1738.32 to improve information to customers, existing service providers, and applicants. This requirement of the existing rule was designed to: (i) Identify areas with no existing Broadband Service for priority consideration, (ii) notify communities of the potential entrant of a new service provider, and (iii) provide incumbent service providers with an opportunity to describe their current service territory and service offerings, market share, etc. The concept of the legal notice is well intended and, the Agency believes, still necessary and useful to the Agency in making lending decisions. However, based on past experience, the current process needs to be modified. The Agency proposes further modifications to increase transparency, reach a broader range of interested parties, and provide more detailed information on

the extent of broadband deployment by incumbent providers. To address concerns with timely access to legal notices, the Agency is proposing to establish a clearly defined window for posting of the notices. Specifically, the legal notice will be published on the Agency's webpage after the application has been received in the Agency's national office and will remain on the webpage for a period of 30 working days. The notice must set forth the applicant's total proposed service area, including a service area map. An applicant will also need to indicate if it is proposing voice and video services, in addition to the present requirement of its intention to provide data services. This will increase the transparency of the new application to the incumbent provider, as well as alert customers to potential new service offerings.

In response to the Legal Notice, incumbent providers will have new responsibilities as well. The Legal Notice will now request any Incumbent Service Provider to submit to the Agency the following information (within 30 days of notice posting) on the number of customers: (i) Capable of receiving Broadband Service in the applicant's proposed service area; (ii) purchasing Broadband Service in the applicant's proposed service area (including the rates of data transmission being offered, and the cost of each level of Broadband Service); and (iii) receiving other services that will be offered in the applicant's proposed service area and the associated rates for these other services. An incumbent will also be requested to submit a map of its service territory.

It is important that the Agency receive this information, as it will be used by the Agency to determine if the incumbent will be classified as an Existing Broadband Service Provider, and ultimately whether an Eligible Rural Community is eligible for funding. If, however, an incumbent does not submit a response to the legal notice within the applicable time period, it will not be considered an Existing Broadband Service Provider for the purpose of determining applicant eligibility. Nonetheless, the incumbent will still be considered in the lending decision as a competitor. All proprietary and confidential information submitted by the incumbent will not be released under the Freedom of Information Act.

List of Subjects in 7 CFR Part 1738

Broadband, Loan programs-communications, Rural areas, Telephone, Telecommunications.

For reasons set out in the preamble, the Agency proposes to amend chapter

XVII of title 7 of the Code of Federal Regulations by revising part 1738 to read as follows:

PART 1738—RURAL BROADBAND ACCESS LOANS AND LOAN GUARANTEES

Subpart—General

Sec.

1738.1 General.

1738.2 Definitions.

1738.3—1738.9 [Reserved]

Subpart B—Types of Loans

1738.10 General.

1738.11 Broadband Loans and Loan Guarantees.

1738.12 Minimum and maximum loan amounts.

1738.13—1738.18 [Reserved]

Subpart C—Ineligible Areas, Eligible Entities and Eligible/Not Eligible Items

1738.19 Ineligible areas.

1738.20 Eligible entities.

1738.21 Service requirement for proposed projects.

1738.22 Items eligible to be financed.

1738.23 Items not eligible to be financed.

1738.24—1738.29 [Reserved]

Subpart D—Loan Application Requirements

1738.30 General.

1738.31 Equity requirement.

1738.32 Additional cash requirements.

1738.33 Legal notice.

1738.34 Market survey.

1738.35 Competitive analysis.

1738.36 Business plan.

1738.37 Financial information.

1738.38 System design.

1738.39 Submission of the application.

Subpart E—Terms for Loans and Loan Guarantees

1738.40 Direct 4 Percent and Cost of Money Loans.

1738.41 Loan security.

1738.42 Payments on loans.

1738.43 Loan guarantees.

1738.44—1738.49 [Reserved]

Subpart F—Post-Application Procedures

1738.50 Notification of completeness.

1738.51 Determination of feasibility.

1738.52 Notice to applicant on decision.

1738.53—1738.59 [Reserved]

Subpart G—Miscellaneous Requirements and Information

1738.60 Interim financing and construction.

1738.61 Priority for processing loan applications.

1738.62 Allocation of funds.

1738.63 Annual audit and reporting requirements.

1738.64 Applicable laws.

1738.65—1738.99 [Reserved]

1738.100 OMB control number.

Authority: Pub. L. 107–171, 7 U.S.C. 901 *et seq.*

Subpart A—General**§ 1738.1 General statement.**

(a) This part sets forth the general policies, types of loans and loan guarantees, and program requirements under the Rural Broadband Access Loan and Loan Guarantee Program to provide funds on a technology neutral basis for the costs of construction, improvement, and acquisition of facilities and equipment for broadband service in eligible rural communities.

(b) Additional information regarding the Rural Broadband Access Loan and Loan Guarantee Program can be found in Bulletin 1738-1, "Rural Broadband Access Loan and Loan Guarantee Application Guide" and Bulletin 1738-2, "Rural Broadband Access Loan and Loan Guarantee Advance and Construction Procedures Guide." These bulletins are located on the Agency's Web page: <http://www.usda.gov/rus/telecom/broadband.htm>. or you can contact Kenneth Kuchno, Director, Broadband Division at the following address for copies: Stop 1599, South Agriculture Building, Room 2868, Washington, DC 20250. (c) No fees or charges will be assessed for any loan made under this part.

§ 1738.2 Definitions.

(a) As used in this part:

Acquisition means the purchase of assets that will be used to provide Broadband Service, such as by acquiring facilities, equipment, operations, licenses, or majority stock interest of one or more organizations. Stock acquisitions must be arms-length transactions.

Administrator means the Administrator of the Rural Utilities Service (RUS), or his or her designee.

Advance of Funds means the transfer of loan funds from the Agency to the borrower.

Affiliate or Affiliated Company of any specified entity means any other entity directly or indirectly controlling of, controlled by, under direct or indirect common control with, or related to, such specified entity. For the purpose of this definition, "control" of any specified entity means the power to direct the management and policies of such specified entity, directly or indirectly, whether through the ownership of stock, by contract, or otherwise.

Agency shall mean the Rural Utilities Service, which administers the United States Department of Agriculture's (USDA) Rural Development Utilities Programs.

Applicant means an eligible entity requesting approval of a loan or loan guarantee under this part.

Arms-Length Transaction means a transaction between two related or affiliated parties that is conducted as if they were unrelated, so that there is no question of conflict of interest, or a transaction between two otherwise unrelated or unaffiliated parties.

Borrower means any organization that has an outstanding Broadband or Telecommunications loan made or guaranteed by the Agency.

Broadband Loan means any loan approved under Title VI of the Rural Electrification Act of 1936 (RE Act).

Broadband Service means any technology identified by the administrator as having the capacity to transmit data to enable a subscriber to the service to originate and receive high quality voice, data, graphics and video. To qualify as broadband service, the project must offer data transmission services and may provide voice, graphics, video and other services. The Agency will publish a notice in the **Federal Register** defining the minimum rate-of-data transmission criteria to qualify as broadband service during that fiscal year's funding period.

Census block means an area normally bounded by visible features, such as streets, streams, and railroads, and by nonvisible features, such as the boundary of an incorporated place, minor civil division, county, or other tabulation entity as described in the latest decennial census.

Census block group means a group of census blocks within a census tract whose numbers begin with the same digit; for example, BG 3 within a census tract includes all census blocks numbered from 3000 to 3999.

Composite economic life means the weighted (by dollar amount of each class of facility in the loan) average economic life of all classes of facilities in the loan.

Derivative means any right, interest, instrument or security issued or traded on the credit of the Guaranteed Loan or any Guaranteed Loan Portion, including but not limited to any participation share of, or undivided ownership or other equity interest in, the Guaranteed Loan or any Guaranteed Loan Portion; any note, bond or other debt instrument or obligation which is collateralized or otherwise secured by a pledge of, or security interest in, the Guaranteed Loan or any Guaranteed Loan Portion; or any such interest in such an interest or any such instrument secured by such an instrument.

Economic life means the estimated useful service life of an asset as determined by the Agency.

Eligible entity means a cooperative, nonprofit or for-profit corporation, limited dividend or mutual association, limited liability company, Indian tribe, tribal organization as defined in 25 U.S.C. 450b (b) and (c), state or local government, including any agency, subdivision, or instrumentality thereof (including consortia thereof). In addition, the entity must have sufficient authority to enter into a contract with the Agency and to carry out the purposes of the proposed loan. Individuals, partnerships of individuals, and entities that serve more than 2 percent of the telephone subscriber lines installed in the United States are not eligible entities.

Eligible Rural Community means any area, as confirmed by the latest decennial census of the Bureau of the Census, which is not located within:

- (1) The boundaries of an Urban Area;
- (2) An incorporated city or town with a population of more than 20,000; or
- (3) An area that has four or more Existing Broadband Service Providers (excluding the applicant).

Equity or Net Worth means Total Assets minus Total Liabilities. For example, the sum of the balances of the following accounts of the applicant: Capital Stock or Membership Units, Additional Paid-In-Capital, Treasury Stock, Other Capital, and Retained Earnings.

Existing Broadband Service Provider means an Incumbent Service Provider that is providing Broadband Service, and is able to provide evidence and certify to the Agency that 10 percent of the households passed by their facilities are purchasing their Broadband Service. Resellers of Broadband Service who utilize the physical facilities of other service providers to deliver their products to the subscriber will not be considered as an Existing Broadband Service Provider.

Feasibility study means the pro forma financial analysis prepared by the Agency, based on the financial projections supplied by the applicant and found acceptable by the Agency, to determine the financial feasibility of a loan.

Financial feasibility means the ability of an applicant to generate sufficient revenues to cover its expenses and service its debt and meet the minimum TIER requirement of 1.25 by the end of the Forecast Period.

Fiscal year means the fiscal year of the Federal Government (October 1 to September 30).

Forecast period means the time period used in the feasibility study to determine if an application is financially feasible. Financial feasibility of a loan application is usually based on 5-year projections.

Guaranteed-Amount Debt Derivative means any note, bond or other debt instrument or obligation which is collateralized or otherwise secured by a pledge of, or security interest in, the Guaranteed Loan Note or any Derivative, as the case may be, which has an exclusive or preferred claim to the Guaranteed Loan Amount or the respective Guaranteed Loan Portion Amount or the respective Guaranteed-Amount Equivalent, as the case may be.

Guaranteed-Amount Equity Derivative means any participation share of, or undivided ownership or other equity interest in, the Guaranteed Loan or any Derivative, as the case may be, which has an exclusive or preferred claim to the Guaranteed Loan Amount or the respective Guaranteed Loan Portion Amount or the respective Guaranteed-Amount Equivalent, as the case may be.

Guaranteed-Amount Equivalent means, with respect to any Derivative which is equal in principal amount to the Guaranteed Loan or any Guaranteed Loan Portion, that amount of payment on account of such Derivative which is equal to the Guaranteed Loan Amount or the respective Guaranteed Loan Portion Amount, as the case may be; or with respect to any Derivative which in the aggregate are equal in principal amount to the Guaranteed Loan or any Guaranteed Loan Portion, that amount of payment on account of such derivatives which is equal to the Guaranteed Loan Amount or the respective Guaranteed Loan Portion Amount, as the case may be.

Guaranteed Loan Amount means that amount of payment on account of the Guaranteed Loan which is guaranteed under the terms of the Guarantee.

Guaranteed Loan Note means, collectively, the note or notes executed and delivered by the Borrower to evidence the Guaranteed Loan.

Guaranteed Loan Portion means any portion of the Guaranteed Loan.

Guaranteed Loan Portion Amount means that amount of payment on account of any Guaranteed Loan Portion which is guaranteed under the terms of the Guarantee.

Guaranteed Loan Portion Note means any note executed and delivered by the Borrower to evidence a Guaranteed Loan Portion.

Incumbent service provider means an existing entity that is currently

providing data, voice, video and/or graphic services in the applicant's proposed service area.

Indefeasible Right to Use Agreement (IRU) means the effective long-term lease of a portion of the capacity of a cable, specified in terms of a certain number of channels of a given bandwidth.

Initial loan means the first loan made under the RE Act to a Borrower.

Interim construction means the construction, improvement, or acquisition of facilities and equipment proposed to be funded by loan funds, which occurs after the application is deemed complete by the Agency.

Interim financing means funding for the Interim construction.

Loan means any loan made or guaranteed under this part by the Agency, unless otherwise noted.

Loan contract means the loan agreement between the Agency and the borrower, including all amendments thereto.

Loan documents mean the loan contract, note, and security instrument between the borrower and the Agency and any associated documents pertaining to a loan once the loan is approved for financing.

Loan funds mean funds provided pursuant to a loan made or guaranteed under this part by the Agency.

Loan guarantee means a loan made by another lender and guaranteed by the Agency.

Loan guarantee documents mean the guarantee agreement, the loan contract between the guaranteed lender and the Borrower, the loan note guarantee, the Guaranteed Loan Note, and the Security Documents.

Pre-loan expenses means the expenses associated with the preparation of a loan application. These expenses include costs associated with the legal notice, market survey, competitive analysis, financial analysis, environmental report, engineering design, and required legal opinions. Pre-loan expenses must be fully supported and acceptable to the Agency if they are to be considered for funding.

RE Act means the Rural Electrification Act of 1936, as amended (7 U.S.C. 901 *et seq.*).

Release of funds means the availability of loan funds to be advanced for approved purposes.

RUS means the Rural Utilities Service, an agency of the United States Department of Agriculture, and successor to the Rural Electrification Administration.

Security Documents mean any mortgage, security agreement, and/or financing statement, or other documents

which grants to the Agency a security interest, including any amendments and supplements thereto.

Service area means the geographical area within which the applicant proposes to make Broadband Service available with a loan provided under this part.

Telecommunications means the transmission and reception of voice, data, sounds, signals, pictures, writings, or signs of all kinds, by wire, fiber, radio, light, or other visual or electromagnetic means.

Telecommunications loan means any telecommunication loan made under Title II, III, IV or VI of the RE Act.

TIER means Times Interest Earned Ratio. TIER is the ratio of an applicant's net income (after taxes) plus (adding back) interest expense, all divided by interest expense.

Total Assets means the sum of the balances of the following accounts of the applicant: Current Assets, Non Current-Assets, and Total Plant, minus the following accounts of the applicant: Accumulated Depreciation and Accumulated Amortization.

Unguaranteed-amount equivalent means all amounts of payment on account of any Derivative other than the respective Guaranteed-Amount Equivalent.

Unguaranteed loan amount means all amounts of payment on account of the Guaranteed Loan other than the Guaranteed Amount.

Unguaranteed loan portion amount means all amounts of payment on account of any Guaranteed Loan Portion other than the respective Guaranteed Loan Portion Amount.

Urban Area means, as defined by the Bureau of the Census, all territory, population, and housing units located within an urbanized area (UA) or an urban cluster (UC).

(b) Accounting terms not otherwise defined in this part shall have the definition ascribed to them under generally accepted accounting principles (GAAP).

§§ 1738.3–1738.9 [Reserved]

Subpart B—Types of Loans

§ 1738.10 General.

Financial assistance under the Rural Broadband Access Loan and Loan Guarantee Program shall be in the form of a Direct Cost-of-Money loan, a Direct 4 Percent Loan, and/or a Loan Guarantee to provide Broadband Service in Eligible Rural Communities.

§ 1738.11 Broadband Loans and Loan Guarantees.

Broadband Loans and Loan Guarantees shall consist of one or more of the following three types of financial assistance:

(a) *Direct Cost-of-Money*, which shall bear interest at a rate (the "Cost-of-Money Interest Rate") equal to the cost of borrowing to the Department of Treasury for obligations of comparable maturity. The Cost-of-Money Interest Rate will be supplied by the Agency each time funds are actually advanced to the Borrower.

(b) *Direct 4 Percent*, which shall bear an interest rate of 4 percent on any advance to the Borrower.

(1) To be eligible for a direct loan bearing an interest rate of 4 percent, the applicant must propose serving an Eligible Rural Community that:

(i) Has a population of less than 5,000 inhabitants; and

(ii) Is not currently capable of receiving Broadband Service or can receive Broadband Service from only one Existing Broadband Service Provider.

(iii) Is located in a county with per capita personal income that is less than or equal to that percent of the national per capita personal income which the Agency will publish in the **Federal Register** at the beginning of each fiscal year. County per capita income is published by the Bureau of Economic Analysis, U.S. Department of Commerce, at <http://www.bea.doc.gov/nea/regional/reis/>. The Agency will use the most recent statistics published on October 1 of the fiscal year in which the application is deemed complete by the Agency.

(2) When an approved application exceeds the maximum amount of 4 percent financing that may be available to the Borrower, a direct loan made at 4 percent may be made simultaneously with a Cost-of-Money Interest Rate loan.

(3) A 4 percent loan may be made simultaneously with a Cost-of-Money Interest Rate loan or a private loan guarantee.

(c) *Loan Guarantee*, which shall bear interest at a rate, set by the guaranteed lender that must be consistent with the then applicable market rate for loans of comparable amounts and maturities.

§ 1738.12 Minimum and maximum loan amounts.

Applications for loans or loan guarantees of less than \$100,000 will not be considered. The maximum of any single type of loan or loan combination will be published in the **Federal Register** at the beginning of each fiscal year.

§§ 1738.13–1738.18 [Reserved]**Subpart C—Ineligible Areas, Eligible Entities and Eligible/Ineligible Items****§ 1738.19 Ineligible areas.**

The Agency will not approve the use of a broadband loan:

(a) To more than one applicant to provide Broadband Service within the same Eligible Rural Community; or

(b) To an applicant proposing to provide Broadband Service in an Eligible Rural Community where an existing Borrower is already providing Broadband Service.

§ 1738.20 Eligible entities.

Only Eligible Entities which propose providing Broadband Services in Eligible Rural Communities shall be eligible for a Broadband Loan.

§ 1738.21 Service requirements for proposed projects.

(a) A project in an area not currently served by the applicant must:

(1) Be in an Eligible Rural Community.

(2) Contain at least 40 percent of households with no access to Broadband Service or access to only one Existing Broadband Service Provider. (For example, if a start-up company or new entrant submits a loan application to provide Broadband Service to 1000 households, 400 (1000 × 40%) of the households must have no broadband access or have access to only one Existing Broadband Service Provider. Likewise, if an Incumbent Service Provider submits a loan application to provide Broadband Service to 2000 households in its existing service territory and 1000 households outside of its existing territory, 400 (1000 × 40%) of the households outside its existing service territory must have no broadband access or have access to only one Existing Broadband Service Provider.)

(b) Applications submitted by Incumbent Service Providers solely for the purpose of upgrading existing facilities in Eligible Rural Communities must enhance existing service by providing or improving Broadband Service and other services related thereto.

(c) Areas that are being acquired from an Incumbent Service Provider will be considered existing service areas of the applicant.

§ 1738.22 Items eligible to be financed.

The proceeds of any loan made under this part may be used:

(a) To fund the construction, improvement, and acquisition of all facilities, wherever located, required to

provide Broadband Service to Eligible Rural Communities, including facilities required for providing other services over the same facilities that Broadband Services are being provided. Start-up and overhead costs that can be capitalized and included as part of the cost of facilities required to provide Broadband Service are eligible for financing.

(b) To fund Pre-Loan Expenses not to exceed 5 percent of the requested total Broadband Loan amount, excluding any amounts requested to refinance outstanding telecommunication loans.

(c) To finance facilities to provide Broadband Service leased under the terms of a capital lease as defined in generally accepted accounting principles. Loan funds will be limited to the cost of the capital lease for the first 5 years of the loan amortization period.

(d)(1) To finance an Acquisition, provided that:

(i) The Acquisition is necessary for furnishing or improving rural Broadband Service;

(ii) The acquired Service Area, if any, is in an Eligible Rural Community; and

(iii) Funds provided for the Acquisition do not exceed 50 percent of the approved loan amount.

(2) For the purposes of the Acquisition, the applicant will be considered the Incumbent Service Provider with regard to the acquired Service Area, if any.

(e) To refinance an outstanding obligation of an applicant on another Telecommunications Loan made under the RE Act if the use of the proceeds realized will further the construction, improvement, or acquisition of facilities for the provision of Broadband Service in Eligible Rural Communities, provided that:

(1) Funds used for refinancing may not constitute more than 40 percent of the loan;

(2) The amortization period for the funds associated with the refinancing of outstanding obligations cannot exceed the remaining amortization period of the notes being refinanced. If multiple notes are being refinanced, an average remaining amortization period will be calculated based on the weighted dollar average of the notes being refinanced; and

(3) The Applicant must be current with payments on the notes to be refinanced.

§ 1738.23 Items not eligible to be financed.

The proceeds of any loan made under this part cannot be used:

(a) To fund the costs associated with facilities covered by an Indefeasible Right of Use Agreement (IRU);

(b) To acquire less than the majority interest of the stock of a company offering, or capable of offering Broadband Services, unless otherwise approved by the Agency;

(c) To acquire the stock of an affiliate;

(d) To purchase or acquire any facilities or equipment of an affiliate of the applicant. However, the Agency may consider, on a case by case basis, such funding if the Applicant can demonstrate that the purchase or acquisition will be an arms-length transaction, and that the cost is the most economically available for the facilities or equipment in question;

(e) To finance Customer Premise Equipment (CPE) not owned by the Applicant during its economic life and any associated inside wiring, unless:

(1) Additional collateral, acceptable to the Agency, at least equal to the purchase price of the CPE is pledged, which collateral has not been purchased with loan funds, or

(2) A revolving fund for the initial purchase of CPE to be sold is established, and as CPE is sold to the customer, at least the Borrower's cost of such equipment is deposited back from the proceeds of the sale into the revolving fund to purchase additional CPE units. For additional information on this option, refer to Bulletin 1738-1.

(f) To purchase or lease vehicles not used primarily in construction of the Broadband Service project to be financed; or

(g) To finance systems or facilities that have not been designed and constructed in accordance with the loan contract, which incorporates Bulletin 1738-2.

§§ 1738.24–1738.29 [Reserved]

Subpart D—Loan Application Requirements

§ 1738.30 General.

A loan application will be considered complete upon the submission of acceptable information regarding:

- (a) The equity requirement;
- (b) The legal notice;
- (c) The market survey;
- (d) The competitive analysis;
- (e) The business plan;
- (f) The financial information; and
- (g) The system design.

§ 1738.31 Equity requirement.

(a) To be eligible for a loan, an applicant must have a minimum equity position in the operation proposed to be funded. For start-up companies, new entrants into an area and Incumbent Service Providers that are proposing to extend their service territory, the applicant must demonstrate a minimum

equity position equal to 10 percent of the requested loan amount at the time the application is submitted. For all other applications, the applicant must demonstrate a minimum equity position equal to 20 percent of the requested loan amount at the time the application is submitted. If the applicant does not have the required equity in the operation to be funded at the time the application is submitted, the shortfall for this requirement can be satisfied as follows:

(1) With an investor's proposal to cover the shortfall of the equity requirement by infusing additional capital into the operation. The additional capital must be deposited into the applicant's operating accounts prior to loan closing. If this option is elected, evidence must be included in the application that clearly identifies the investor's commitment to the project along with its bank or financial statements that demonstrates its ability to satisfy this requirement. This evidence must be acceptable to the Agency before the application will be considered complete and ready for further processing. If an investor's proposal to satisfy this requirement is not included in the loan application, the application will be returned. The Agency reserves the right to reject investments that are on a preferred basis for any reason.

(2) With an unconditional, irrevocable letter of credit (LOC) satisfactory to the Agency. If an LOC will be used to satisfy the equity requirement, the LOC must be secured and serviced by an entity other than the applicant applying for the loan and must remain in effect until the applicant's financial position has reached a Net Worth equal to 20 percent of Total Assets after 80 percent of loan funds have been expended. The Agency must be an unconditional payee under the LOC and the LOC must be in place prior to loan closing.

(b) For State and local governments, the equity requirement can be satisfied with general obligation bonds. If the equity requirement is satisfied with general obligation bonds, the Broadband Loan or loan guarantee cannot be subordinate to the bonds.

(c) Revenue bonds supported by the operations being funded cannot be used to satisfy the equity requirement.

(d) Based on the results of the Agency's financial analysis of the application, additional equity requirements may be included as covenants to a loan offer.

(e) The Administrator reserves the right to modify or waive the requirements of this section as long as those modifications do not result in a

projected negative cash position in any quarter throughout the forecast period and the modifications are required to provide Broadband Service in areas that are not capable of receiving Broadband Service or can receive Broadband Service from only one Existing Broadband Service Provider.

§ 1738.32 Additional cash requirements.

(a) Once the Agency has completed its review of the loan application, the applicant will be notified if additional cash requirements are needed to support the feasibility of the loan. Additional cash infusions will be necessary when the Agency's financial analysis indicates that cash from operations and previous cash infusions cannot sustain a positive cash position throughout the forecast period.

(1) The amount of the additional cash infusions required must bring the cash balance at the end of each year of the Forecast Period to zero.

(2) For purposes of satisfying the additional cash requirement for a start-up operation or an operation that has not demonstrated positive cash flow for the two previous years prior to the date the application was submitted, only 50 percent of projected revenues for each year of the forecast period will be used in the feasibility study to determine if an operation can sustain a positive cash position.

(3) The applicant will be required to infuse additional cash into the operation to cover projected deficits for the first two years of operations at loan closing and to enter into legal arrangements with the Agency committing to additional cash infusions to ensure that the operation will sustain a positive cash position on a quarterly basis throughout the forecast period.

(4) If debt is incurred to satisfy the additional cash requirement, this debt must take a subordinate lien position to the Agency debt. The Agency will provide the applicant with options for satisfying any additional requirements.

(5) Once the applicant has agreed to a method for satisfying the additional cash requirements, this method will be incorporated into the loan documents.

(6) If a loan is offered to the applicant, the applicant will have 120 days from the date of the loan contract to have the additional cash infusions deposited into the company applying for the loan and enter into any other legal arrangements to cover proposed deficits. If these requirements are not completed within this timeframe, the loan offer will be terminated, absent a written request from the applicant, and consent thereto from the Agency.

(b) If additional requirements and covenants are required to obtain loan approval, they will be detailed in the loan documents.

§ 1738.33 Legal notice.

(a) All applicants, as part of submitting a completed application, must prepare a legal notice to be published on the Agency Web page stating the applicant's intent to offer Broadband Service in a particular community. In addition, if the applicant is proposing other (*i.e.* video, voice, etc.) services, these services must also be identified in the legal notice. The legal notice will be published on the Agency's Web page after the application has been received in the Agency's national office and will remain on the Web page for a period of 30 work days. The notice must set forth the applicant's total proposed service area, including a service area map, and request any Incumbent Service Provider to submit to the Agency, within this 30 day period, the following information:

(1) The number of residential and business customers capable of receiving Broadband Service in the applicant's proposed service area;

(2) The number of residential and business customers purchasing Broadband Service in the applicant's proposed service area, the rates of data transmission being offered, and the cost of each level of Broadband Service;

(3) The number of residential and business customers receiving other services that will be offered in the applicant's proposed service area and the associated rates for these other services;

(4) A map of its service territory.

(b) The information that is submitted by the Incumbent Service Provider will be used by the Agency to determine if the Incumbent Service Provider will be classified as an Existing Broadband Service Provider. If an Incumbent Service Provider does not submit a response to the legal notice, it will not be considered an Existing Broadband Service Provider. However, all Incumbent Service Providers will be considered in the Agency lending decision.

(c) All proprietary and confidential information submitted by the incumbent in response to the legal notice will not be released under the Freedom of Information Act.

§ 1738.34 Market survey.

(a) Except as provided in paragraph (b) of this section, the applicant must complete a market survey for each area where Broadband Service is proposed to be provided and include it as part of the

application. The survey must not only include questions about the deployment of Broadband Services but must also address all other services that are being proposed. The survey must be conducted on each Eligible Rural Community where service is proposed. Additional information on the requirements of the market survey can be found in Bulletin 1738-1.

(b) For any service that the applicant is projecting less than a 15 percent penetration of households passed in the total proposed service territory, by the end of the Forecast Period, a market survey does not need to be completed. The proposed rates for these services must be affordable as determined by the Agency. If the rates are not affordable, the Agency will require that a market survey be completed.

(c) Generally, for a market survey to be acceptable to the Agency, it must have been completed within six months from the date the application was submitted to the Agency for processing. The Agency reserves the right to reject any market survey so long as it can demonstrate that the market survey does not support the financial projections or the business plan or that the demographics of the proposed service territory have significantly changed since the survey was completed.

(d) With respect to loans for areas that do not have the capability of receiving Broadband Service or can receive Broadband Service from only one Existing Broadband Service Provider, the Administrator reserves the right to waive or modify the requirements of this section on a case by case basis.

§ 1738.35 Competitive analysis.

The applicant must identify all competitors, including resellers, in their proposed service territory irregardless of the competitor's market share and prepare a competitive analysis, for all types of services proposed and include it as part of the application. This analysis must include each competitor's proposed rate packages for all services offered and to the extent possible, the level of service being provided and the area that is being covered. Although a market survey is not required for areas where an applicant is projecting less than 15 percent penetration of the households passed for a specific service, a competitive analysis is required for all proposed service territories.

§ 1738.36 Business plan.

A business plan must be included as part of the application and must address, at a minimum, the following items:

(a) The proposed use of loan funds and if any non-loan funds will be required to complete the proposed project;

(b) A detailed description of working capital requirements and the source of these funds;

(c) A description of how the equity requirements will be satisfied;

(d) A description of the services that will be offered, the rates for the proposed services and the marketing plan to sell these services;

(e) A description of any current operations including services being provided, areas being served, rate structure and penetration rates;

(f) A description of any licenses and regulatory approvals that are required for the proposed operation including the status of obtaining these items;

(g) A detailed description of the qualifications of the proposed management team for the operation including a resume of each team member detailing prior positions held for the previous 10 years from the date the application is submitted;

(h) A description of the staffing requirements to operate the proposed system; and

(i) A description of the workforce that is required to construct the system. This description must agree with the build-out schedule included in § 1738.37.

§ 1738.37 Financial information.

The financial information that must be included in the application to support the business plan is as follows:

(a) Copies of audited financial statements (balance sheet, income statement, cash flow statement) for the three years preceding the date of the application for an existing company. If audited statements are not available, unaudited statements and tax returns for the three previous years must be submitted;

(b) Copies of audited financial statements for the parent operation for the year preceding the year the application was submitted if the applicant for the Broadband Loan is a subsidiary operation. If audited statements are not available, unaudited statements and tax returns for the previous year must be submitted;

(c) Copies of audited financial statements for any affiliated operation that is providing services to the applicant for the year preceding the year the application was submitted. If audited statements are not available, unaudited statements and tax returns for the previous year must be submitted;

(d) Customer projections for the forecast period that substantiate the projected revenues for each service that

is to be provided. The projections must at a minimum be on an annual basis and must be provided for each Eligible Rural Community that will be receiving service. These projections must be clearly supported by the information contained in the market survey;

(e) Financial projections in the form of balance sheets, income statements and cash flow statements for the 5-year forecast period. These projections must be supported by detailed narrative assumptions that fully explain the methodology used to develop the projections. The financial projections submitted by the applicant and the feasibility study prepared by the Agency must demonstrate that the proposed operation will be able to meet a minimum TIER requirement equal to 1.25 by the end of the forecast period. (A projected TIER of 1.25 does not guarantee that a loan will be approved.) Based on the findings of the feasibility study, the Agency will establish a TIER maintenance requirement in the loan documents that will remain in effect throughout the amortization period; and

(f) A list of all outstanding obligations of the applicant. Copies of existing notes and loan and security agreements must be included in the application.

§ 1738.38 System design.

(a) The system design must fully support the delivery of Broadband Service and any other services being provided, must demonstrate that the project will be completed within 3 years from the date of the loan contract, and must include the following items:

(1) A detailed description of the proposed technology that will be used to provide the services. This description must include sufficient information for the Agency to make the determination that all households in the proposed service territory will have the capability of receiving Broadband Services. For further clarification, reference Bulletin 1738-2;

(2) Existing and proposed network diagrams that clearly demonstrate the traffic flows through the network from the interconnection points with the backbone providers to the end users;

(3) Estimated project costs detailing all facilities that are required to complete the project. These estimated costs must be broken down to indicate costs associated with each community to be served; and

(4) A construction build-out schedule of the proposed facilities by community on a quarterly basis. The build-out schedule must:

(i) Include a description of the work force that will be required to complete the proposed construction;

(ii) Include a timeline demonstrating project completion within 3 years from the date of the Loan Contract;

(iii) Include detailed information showing that all households that are proposed to be passed with facilities funded by the Agency must have the capability of receiving Broadband Service with the completion of construction of the system. For additional information on how to satisfy this requirement, please refer to Bulletin 1738-1.

(iv) Include detailed information showing that construction of the proposed facilities will start within 6 months from the date the Administrator signs the Loan Documents.

(5) A depreciation schedule for the proposed facilities;

(6) Information required by 7 CFR part 1794, an environmental report prepared in accordance therewith;

(7) Any other system requirements which shall be published annually in the **Federal Register**, which the Administrator shall determine to be necessary in addressing the rapidly changing technological needs of the Broadband Program.

(b) With respect to loans for areas that are not capable of receiving Broadband Service or can receive Broadband Service from only one Existing Broadband Service Provider, the Administrator reserves the right to waive or modify the requirements of this section on a case by case basis.

§ 1738.39 Submission of the application.

Loan applications can be submitted directly to the Agency's National Office or can be submitted to the Agency's general field representative (GFR) that is assigned to the area where the applicant's headquarters are located. Although the applications can be submitted directly to the National Office, it is recommended that the applicant identify and contact the appropriate GFR as early as possible when preparing a loan application. The GFR will assist the applicant with the preparation of the application and explain the regulations and requirements that govern the Broadband Program. The applicant should contact the National Office in Washington to identify the GFR that is assigned to the area where their headquarters are located or refer to the list of GFR's assigned to different parts of the country on the Agency webpage. Please refer to the following Web address to identify the GFR assigned to your proposed service territory: <http://www.usda.gov/rus/telecom/staff/gfr-state-list.htm>. All applications must contain two hard

copies and an electronic copy of the entire application.

Subpart E—Terms for Loans and Loan Guarantees

§ 1738.40 Direct 4 Percent and Cost of Money Loans.

(a) Terms and conditions of loans are set forth in a mortgage, note, and loan contract. Provisions of the mortgage and loan contract are implemented by provisions in the Agency bulletins and regulations. Samples of the mortgage, note, and loan contract can be found on the Agency Web page: <http://www.usda.gov/rus/telecom/broadband.htm>.

(b) The Agency reserves the right to establish terms and conditions, including security requirements, on a case-by-case basis.

§ 1738.41 Loan security.

(a) The Agency makes loans only if, in the judgment of the Administrator, the security is reasonably adequate and the loan will be repaid within the time agreed.

(b) The Agency generally requires that an applicant provide it with an exclusive first lien, in form and substance satisfactory to the Agency, on all of the applicant's property and such additional security as the Agency may require. The Agency will share its first lien position with another lender provided the Broadband Loan is adequately secured and the security arrangements are acceptable to the Agency. The Agency will consider entering into joint security arrangements with other lenders on a *pari passu*, prorated basis.

(c) All collateral that is securing the loan must be free from liens or security interests other than those permitted by the Agency or the Security Documents. The applicant must own collateral that will be purchased with loan funds unless otherwise designated by the Agency.

(d) In the case of loans that include the financing of broadband facilities that do not constitute self-contained operating systems or units, the applicant shall, in addition to the mortgage and/or security lien on all of the applicant's facilities financed by the Agency, furnish adequate assurance, in the form of contractual or other arrangements, satisfactory to the Agency, that continuous and efficient broadband service will be rendered.

(e) Additional financial, investment, operational, reporting, and managerial controls will appear in the loan documents required by the Agency.

§ 1738.42 Payments on loans.

Broadband loans must be repaid with interest within a period that, rounded to the nearest whole year, equals the expected composite economic life of the facilities to be financed, as calculated by the Agency. The expected composite economic life shall be based upon the depreciation rates for the facilities financed by the loan.

(a) The depreciation rates used shall be the rates currently in place, as long as the Agency finds them to be reasonable for the telecommunications industry.

(b) Applicants may request a repayment period that is shorter than the expected composite economic life of the facilities financed. A shorter period may be approved as long as the Administrator determines that the loan remains feasible.

(c) Interest is payable on funds advanced each month as it accrues beginning with the first billing after the advance, as defined in the note. Principal payments on each note are scheduled to begin one year after the date of the first advance. After this deferral period, interest and principal payments on all funds advanced during this one-year period shall be made in equal monthly installments. Principal payments on funds advanced one year or more after the date of the first advance will begin with the first billing after the advance. The interest and principal payments on each of these advances shall be made in equal monthly installments. On a case by case basis for areas that are not capable of receiving Broadband Service or can receive Broadband Service from only one Existing Service Provider, the Administrator reserves the right to modify the terms and conditions for the interest and principal payments.

§ 1738.43 Loan guarantees.

(a) *Eligible guaranteed lenders.* To be eligible for a Loan Guarantee, guaranteed lenders must be legally organized lending institutions, such as commercial banks, trust companies, mortgage banking firms, insurance companies, and any other institutional investor authorized by law to loan money, which must be subject to credit examination and supervision by a Federal or state agency, unless the Agency determines that alternative examination and supervisory mechanisms are adequate.

(b) *Requirements for the Loan Guarantee.* At the time of application, Applicants must provide, in form and substance acceptable to the Agency:

(1) Evidence of the guaranteed lender's eligibility under paragraph (a) of this section;

(2) Evidence that the guaranteed lender is capable of adequately servicing the guaranteed loan;

(3) Evidence that the guaranteed lender is in good standing with its licensing authority and meets the loan making, loan servicing, and other requirements of the jurisdiction in which the lender makes loans;

(4) Evidence satisfactory to the Agency of its qualification under this part, along with the name of the authority that supervises it;

(5) A commitment letter from the guaranteed lender that will be providing the funding, and the terms of such funding, all of which may be conditioned on final approval of the Broadband Loan by the Agency; and

(6) A description of any and all charges and fees for the loan provided they are not greater than those normally charged other applicants for the same type of loan in the ordinary course of business. Notwithstanding, such charges and fees shall not be included within the loan guarantee.

(c) *Terms for Guarantee.* Loan Guarantees will only be given on the conditions that:

(1) The Loan Guarantee is no more than 80 percent of the principal amount, which shall exclude any and all charges and fees;

(2) The guarantee is limited to the loan repayment obligation of the Borrower and does not extend to guaranteeing that the guaranteed lender will remit to a holder, loan payments made by the Borrower;

(3) The interest rate must be fixed and must be the same or lesser for the Guaranteed Loan Amount or the respective Guaranteed Loan Portion Amount or the respective Guaranteed-Amount Equivalent, as the case may be, and Unguaranteed Loan Amount or the respective Unguaranteed-Amount Equivalent, as the case may be;

(4) The entire loan will be secured by the same security with equal lien priority for the Guaranteed Loan Amount or the respective Guaranteed Loan Portion Amount or the respective Guaranteed-Amount Equivalent, as the case may be, and Unguaranteed Loan Amount or the respective Unguaranteed-Amount Equivalent, as the case may be;

(5) The Unguaranteed Loan Amount or the respective Unguaranteed Loan Portion Amount or the respective Unguaranteed-Amount Equivalent, as

the case may be, will neither be paid first nor given any preference or priority over the Guaranteed Loan Amount or the respective Guaranteed Loan Portion Amount or the respective Guaranteed-Amount Equivalent, as the case may be;

(6) Any assignment by the guaranteed lender requires the prior written approval from the Agency, which assignment shall entitle the holder to all of the guaranteed lender's rights, but which shall ultimately maintain the guaranteed lender responsible for servicing the entire loan;

(7) The Borrower, its principal officers, members of the borrower's board of directors and members of the immediate families of said officials shall not be a holder of the guaranteed lender's loan;

(8) The Agency will not guarantee any loan under this subpart that provides for a balloon payment of principal or interest at the final maturity date of the loan; or the payment of interest on interest;

(9) All loan guarantee documents between the Agency and the guaranteed lender are prepared by the Agency; and

(10) The guaranteed loan agreement between the borrower and the lender shall be subject to RUS approval.

(d) *Obligations of Guaranteed lender.* Once a loan guarantee has been approved, the Guaranteed lender will be responsible for:

(1) Fully servicing the loan;

(2) Determining that all prerequisites to each advance of loan funds by the lender under the terms of the contract of guarantee, all financing documents, and all related security documents have been fulfilled;

(3) Obtaining approval from the Agency to advance funds prior to each advance;

(4) Billing and collecting loan payments from the Borrower;

(5) Notifying the Administrator promptly of any default in the payment of principal and interest on the loan and submit a report, as soon thereafter as possible, setting forth its views as to the reasons for the default, how long it expects the borrower will be in default, and what corrective actions the borrower states it is taking to achieve a current debt service position; and

(6) Notifying the Administrator of any known violations or defaults by the borrower under the lending agreement, contract of guarantee, or related security instruments, or conditions of which the lender is aware which might lead to nonpayment, violation, or other default.

(e) *Certain Agency Rights and Remedies.* The Guarantee must provide that:

(1) Upon notice to the lender, RUS may assume loan servicing responsibilities for the loan or the Guaranteed Loan Amount or the respective Guaranteed Loan Portion Amount or the respective Guaranteed-Amount Equivalent, as the case may be, or require the lender to assign such responsibilities to a different entity, if the lender fails to perform its loan servicing responsibilities under the loan guarantee agreement, or if the lender becomes insolvent, makes an admission in writing of its inability to pay its debts generally as they become due, or becomes the subject of proceedings commenced under the Bankruptcy Reform Act of 1978 (11 U.S.C. 101 *et seq.*) or any similar applicable Federal or state law, or is no longer in good standing with its licensing authority, or ceases to meet the eligibility requirements of this section. Such negligent servicing is defined as the failure to perform those services which a reasonable prudent lender would perform in servicing its own portfolio of loans that are not guaranteed, and includes not only a failure to act but also not acting in a timely manner.

(2) The Guarantee shall cease to be effective with respect to any Guaranteed Loan Amount or any Guaranteed Loan Portion Amount or any Guaranteed-Amount Equivalent to the extent that:

(i) The Guaranteed Loan Amount or the respective Guaranteed Loan Portion Amount or the respective Guaranteed-Amount Equivalent, as the case may be, is separated at any time from the Unguaranteed Loan Amount or the respective Unguaranteed Loan Portion Amount or the respective Unguaranteed-Amount Equivalent, as the case may be, in any way, directly or through the issuance of any Guaranteed-Amount Equity Derivative or any Guaranteed-Amount Debt Derivative; or

(ii) Any holder of the Guaranteed Loan Note or any Guaranteed Loan Portion Note or any Derivative, as the case may be, having a claim to payments on the Guaranteed Loan receives more than its pro-rata percentage of any payment due to such holder from payments made under the Guarantee at any time during the term of the Guaranteed Loan.

(f) The Agency shall provide additional loan guarantee policies, consistent with OMB Circular A-129, in order to achieve its mission of promoting broadband in rural areas, which shall be published annually in the **Federal Register**.

(g) Loan guarantees made under this part are supported by the full faith and credit of the United States and incontestable except for fraud or

misrepresentation of which the holder had actual knowledge at the time it became a holder.

§§ 1738.44–1738.49 [Reserved]

Subpart F—Post-Application Procedures

§ 1738.50 Notification of completeness.

The Agency will conduct an initial review of the application after it is received in the National Office to determine if the application is complete and ready for further analysis.

(a) If the application is determined to be complete, the applicant will be notified by the Agency and further analysis of the application will continue.

(b) If the application is determined to be incomplete, the applicant will receive a detailed list of items requiring further explanation that will have to be fully addressed by the applicant and submitted to the Agency within a specified timeframe. If the applicant fails to submit the additional information in the specified timeframe, the application will be deemed ineligible for funding and returned to the applicant.

(c) If the application is determined to be ineligible for funding, the application will be returned and the applicant will receive a detailed list explaining the reasons the application was not accepted.

§ 1738.51 Determination of feasibility.

(a) Loans will only be made under this part if the applicant's financial operations, taking into account the impact of the facilities financed with the proceeds of the loan and the associated debt, are financially feasible, as determined by the Agency.

(b) If the application is determined to meet all statutory and regulatory requirements and the feasibility study demonstrates that the TIER requirement can be satisfied, the application will be submitted to the Agency's credit committees for consideration. Submission of the application to the Agency's credit committees does not guarantee that a loan will be approved.

§ 1738.52 Notice to applicant on decision.

Once the Agency's credit committees have considered the application, the applicant will be notified of the Agency's decision concerning their request for financial assistance.

§§ 1738.53–1738.59 [Reserved]

Subpart G—Miscellaneous Requirements and Information

§ 1738.60 Interim financing and construction.

(a) Upon notification by the Agency that an applicant has submitted all the required documentation and the application is considered complete for the Agency to conduct its analysis, the applicant, at its own risk, may enter into an interim financing agreement with a lender other than the Agency or use its own internally generated funds to start construction that is included in the loan application. The Agency's determination that an application is considered complete for analysis is not a commitment that a loan will be approved.

(b) To qualify for funding, interim construction must comply with the same requirements that apply to construction included in an approved broadband loan. For information on requirements, see 7 CFR part 1788, 7 CFR part 1794, Bulletin 1738-2, Bulletin 20-15, and Bulletin 320-15.

§ 1738.61 Priority for processing loan applications.

(a) In making or guaranteeing loans, priority shall be given to applications in the following order:

(1) Applications for service areas that include only households that have no broadband access or receive Broadband Service from only one Existing Broadband Service Provider.

(2) Applications for service areas that include only areas where at least 40 percent of households have no access to Broadband service or access to only one Existing Broadband Service provider;

(3) All other applications

(b) Once an application has been prioritized according to the criteria listed in paragraphs (a) (1) through (3) of this section, they will be processed on a first-in, first-out basis within each priority category.

(c) As applications are processed, using the first-in, first-out process, RUS may expedite for consideration for funding applications proposing to provide service where none is available.

§ 1738.62 Allocation of funds.

For funds made available for each fiscal year, national and State reserves shall be established in accordance with Title VI of the RE ACT.

§ 1738.63 Annual audit and reporting requirements.

(a) If a loan offer is accepted, the applicant will be required to submit an annual CPA audit. The first audit is

required for the calendar year in which the loan is approved. The Administrator can waive the requirement that an audit be performed in the year in which the loan is approved if operations of the applicant have not yet started.

(b) If a loan offer is accepted, the applicant will be required to submit quarterly financial and progress reports utilizing the Agency's electronic reporting system.

§ 1738.64 Applicable laws.

(a) Applicants are required to comply with certain regulations on nondiscrimination and equal employment opportunity. See RUS Bulletin 1790-1, "Nondiscrimination Among Beneficiaries of RUS Programs" and RUS Bulletin 20-15:320-15, "Equal Employment Opportunity in Construction Financed with RUS Loans"; 7 CFR parts 15 and 15b and 45 CFR part 90.

(b) Applicants are required to comply with all Federal, state and local laws, rules, regulations, ordinances, codes and orders.

§§ 1738.65-1738.99 [Reserved]

§ 1738.100 OMB control number.

The information collection requirements in this part are approved by the Office of Management Budget (OMB) and assigned OMB control number 0572-0130.

Dated: May 4, 2007.

James M. Andrew,

Administrator, Rural Utilities Service.

[FR Doc. E7-9021 Filed 5-10-07; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA-R04-OAR-2006-0362-200702; FRL-8312-6]

Approval and Promulgation of Implementation Plans and Designations of Areas for Air Quality Planning Purposes; Kentucky: Redesignation of the Boyd County, Kentucky Portion of the Huntington-Ashland 8-Hour Ozone Nonattainment Area to Attainment for Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: On September 29, 2006, the Commonwealth of Kentucky (Kentucky), through the Kentucky Division for Air Quality (KDAQ), submitted a request to redesignate the

Kentucky portion of the bi-state Huntington-Ashland 8-hour ozone nonattainment area to attainment for the 8-hour National Ambient Air Quality Standard (NAAQS); and to approve a State Implementation Plan (SIP) revision containing a maintenance plan for the Kentucky portion of the bi-state Huntington-Ashland area. The bi-state Huntington-Ashland 8-hour ozone nonattainment area is comprised of one county in Kentucky (Boyd County) and two counties in West Virginia (Cabell and Wayne counties). In this action, EPA is proposing to approve Kentucky's 8-hour ozone redesignation request for Boyd County, which is the Kentucky portion of the bi-state Huntington-Ashland 8-hour ozone nonattainment area. Additionally, EPA is proposing to approve the 8-hour ozone maintenance plan for Boyd County, Kentucky, including the state motor vehicle emission budgets (MVEBs) for nitrogen oxides (NO_x) and volatile organic compounds (VOCs). This proposed approval of Kentucky's redesignation request is based on EPA's determination that Kentucky has demonstrated that Boyd County, Kentucky has met the criteria for redesignation to attainment specified in the Clean Air Act (CAA), including the determination that the entire (both the Kentucky and West Virginia portions) Huntington-Ashland 8-hour ozone nonattainment area has attained the 8-hour ozone standard. On May 17, 2006, the State of West Virginia submitted a redesignation request and maintenance plan for the West Virginia portion (Cabell and Wayne counties) of this 8-hour ozone area. EPA has taken action on West Virginia's redesignation request and maintenance plan through a separate action. The final rulemaking approving the West Virginia submittal was published in the **Federal Register** on September 15, 2006. In this action, EPA is also providing the status of its transportation conformity adequacy determination for the new MVEBs for 2018 that are contained in the 8-hour ozone maintenance plan for Boyd County, Kentucky. MVEBs for Cabell and Wayne counties in West Virginia are included in the West Virginia submittal.

DATES: Comments must be received on or before June 11, 2007.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R04-OAR-2006-0362, by one of the following methods:

(a) *www.regulations.gov*: Follow the on-line instructions for submitting comments.

(b) *E-mail: LeSane.Heidi@epa.gov.*

(c) *Fax: 404-562-9019.*

(d) *Mail:* EPA-R04-OAR-2006-0362 Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960.

(e) *Hand Delivery or Courier:* Heidi LeSane, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

Instructions: Direct your comments to Docket ID No. EPA-R04-OAR-2006-0362. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through *www.regulations.gov* or e-mail, information that you consider to be CBI or otherwise protected. The *www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other