

interconnection requirements.<sup>200</sup> In opposition, some commenters request that the requirements be applied to every applicant, regardless of the nature of the entity.<sup>201</sup>

Commenters express concern that NTIA's requirements would not mirror the rules that are ultimately adopted in the Federal Communications Commission's (FCC) ongoing rulemaking proceeding regarding a Free and Open Internet.<sup>202</sup> These commenters argue that if the requirements applicable to BTOP applicants are inconsistent with those faced by other service providers, then these additional nondiscrimination obligations will prove burdensome or duplicative for broadband service providers receiving grant funds.<sup>203</sup> Commenters suggest that NTIA declare a sunset date for these requirements either when the FCC finalizes its network neutrality rules or at another reasonably foreseeable date.<sup>204</sup> Commenters also recommend that NTIA declare that compliance with the FCC rules would be sufficient to meet the requirements of BTOP.<sup>205</sup>

A few commenters oppose the First NOFA's nondiscrimination and interconnection requirements altogether.<sup>206</sup> These commenters argue that the scope of these requirements chilled participation in the Program during the initial round of funding<sup>207</sup> and that the requirements conflicted with a private company's ability to manage its own network.<sup>208</sup> Commenters also argue that the current approach to the requirements would pose an oversight problem for NTIA and RUS and recommend that compliance be left up to the grant recipients.<sup>209</sup>

A few commenters also recommend that NTIA clarify its interconnection requirements in order to minimize cost and controversy.<sup>210</sup> These commenters are especially concerned that the interconnection and nondiscrimination rules during the initial round of funding were unclear as applied to contractors or subcontractors.<sup>211</sup>

NTIA agrees with commenters that support maintaining the consistency of the interconnection and nondiscrimination

<sup>200</sup> See, e.g., Merit Networks at 9 (suggesting a balancing test when applying the nondiscrimination and interconnection requirements).

<sup>201</sup> See, e.g., Org. for the Promotion & Advancement of Small Telecomms. Companies at 7–8; Indep. Tel. and Telecomms. Alliance at 10.

<sup>202</sup> See, e.g., ADTRAN at 4–5; Telecomms. Indus. Ass'n at 18; Indep. Tel. and Telecomms. Alliance at 10; Open Range Commc'ns at 10–11; U.S. Telecom at 32.

<sup>203</sup> See, e.g., ADTRAN at 2; Telecomms. Indus. Ass'n at 18; U.S. Telecom at 31–33.

<sup>204</sup> See, e.g., Indep. Tel. and Telecomms. Alliance at 10; Open Range Commc'ns at 10–11; ADTRAN at 4–5.

<sup>205</sup> See, e.g., ADTRAN at 4–5.

<sup>206</sup> See, e.g., AT&T at 17–18; State of S.D. at 1; AzulStar at 4.

<sup>207</sup> See, e.g., AT&T at 17–18.

<sup>208</sup> See, e.g., State of S.D. at 1; AzulStar at 4.

<sup>209</sup> See, e.g., AT&T at 18.

<sup>210</sup> See, e.g., Stratum Broadband at 24; Alaska Commc'ns Sys. at 7–8; AT&T at 18–19; U.S. Telecom at 33–34; CONXX at 16.

<sup>211</sup> *Id.*

requirements across the two rounds of funding. Leaving the requirements unchanged from the initial round of funding will help to facilitate the administration of the grants awarded during the first and second rounds and avoid imposing differing nondiscrimination and interconnection standards on recipients. Accordingly, NTIA has decided against making any significant revisions to this section. Any changes made to this section from the First NOFA are intended only to clarify and not change the applicants' obligations.

#### Sale of Project Assets

Section IX.C.2 of the NOFA generally prohibits the sale or lease of award-funded broadband facilities, unless the sale or lease meets certain conditions. Specifically, the agencies may approve a sale or lease if it is for adequate consideration, the purchaser agrees to fulfill the terms and conditions relating to the project, and either the applicant includes the proposed sale or lease in its application as part of its original request for grant funds or the agencies waive this provision for any sale or lease occurring after the tenth year from the date the grant, loan, or loan/grant award is issued.<sup>212</sup> Some stakeholders have suggested that this “ten-year holding rule” is overly restrictive and is a barrier to participation in BIP and BTOP.<sup>213</sup> The agencies invited public comment on whether and how this section should be revised to adopt a more flexible approach toward awardee mergers, consistent with USDA and DOC regulations, while still ensuring that awardees are not receiving excessive profit from the sale of award-funded assets.<sup>214</sup>

The clear majority of forty-seven parties who filed comments on the NOFA's conditions on the post-award sale or lease of project assets support a relaxation of these conditions.<sup>215</sup> Only a few commenters support retention of the rules.<sup>216</sup> Most commenters agree that the prohibitions on the sale or lease of project facilities are unreasonably broad because they fail to provide flexibility for the government to consent to a reasonable lease or sale during the first ten years. One commenter voices a concern shared by many that the conditions restricting post-award sales or leases may inhibit obtaining funding for the project, explaining that “the 10-year prohibition on the sale of the funded assets also seems to cause a ‘chilling effect’ in terms of capital raising by applicants and may have caused many potential broadband providers to avoid BIP/BTOP entirely.”<sup>217</sup>

Commenters supporting greater flexibility regarding the sale of assets recommend the

<sup>212</sup> See 74 FR at 58944.

<sup>213</sup> See, e.g., KeyOn Commc'ns at 3; Commc'ns Finance Ass'n at 1.

<sup>214</sup> See 74 FR at 58944.

<sup>215</sup> See, e.g., Cricket Commc'ns at 12; Stratum Broadband at 12; Flow Mobile at 15.

<sup>216</sup> Eng'g Ass'n, Inc. at 4; E. Shore of Va. Broadband Auth. at 5; Canby Telecom at 1; Mid-Rivers Commc'ns at 10.

<sup>217</sup> See, e.g., KeyOn Commc'ns at 3; E. Shore of Va. Broadband Auth. at 5; Native Broadband Satellite at 8; Alaska Commc'ns Sys. at 8; Cricket Commc'ns at 12; Cal. Broadband Coop. at 5.

following revisions: The second NOFA should allow the government to approve the sale or lease of project assets on a case-by-case basis;<sup>218</sup> the agencies should remove the 10-year limit and focus on unjust enrichment;<sup>219</sup> clarify that the project assets mean only those assets which are purchased directly from grant funds awarded and not \* \* \* equipment or services purchased \* \* \* with “matching funds;”<sup>220</sup> relax rules so that the agencies may approve sales, “as long as the successor agrees to the obligations of the program;”<sup>221</sup> allow for accelerated depreciation of assets;<sup>222</sup> restrictions should not apply to IRUs or leases to research and education networks;<sup>223</sup> and modify the policy to accommodate the sale or lease to accommodate the normal five-year replacement cycle of broadband equipment.<sup>224</sup>

NTIA agrees with the majority of commenters proposing to relax restrictions on the post-award sale or lease of project assets and revises this section accordingly. As a result, awardees may petition for a waiver authorizing the sale or lease of assets at any time during the life of the award-funded facilities and shall include supporting documentation and justification regarding why the petition should be granted.

Dated: January 15, 2010.

**Lawrence E. Strickling,**

*Assistant Secretary for Communications and Information.*

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**BILLING CODE 3510–60–P**

## DEPARTMENT OF AGRICULTURE

### Rural Utilities Service

**RIN 0572–ZA01**

### Broadband Initiatives Program

**AGENCY:** Rural Utilities Service, Department of Agriculture.

**ACTION:** Notice of Funds Availability (NOFA) and solicitation of applications.

**SUMMARY:** The Rural Utilities Service (RUS) announces its general policy and application procedures for the second round of funding under the broadband initiatives (the Second Round NOFA) established pursuant to the American Recovery and Reinvestment Act of 2009 (Recovery Act) for the Broadband Initiatives Program (BIP) which provides loans, grants, and loan/grant combinations to facilitate broadband deployment in rural areas. In facilitating the expansion of broadband

<sup>218</sup> See, e.g., Rural Broadband Now at 9.

<sup>219</sup> See, e.g., U.S. Telecom at 37–38.

<sup>220</sup> See, e.g., Dixie Tech. Funding Agency at 15.

<sup>221</sup> See, e.g., Monte R Lee & Co. at 8.

<sup>222</sup> See, e.g., Senior Broadband/Internet Adoption Collaborative at 10.

<sup>223</sup> See, e.g., Internet2 at 26–27.

<sup>224</sup> See, e.g., TransWorld Network at 5.

communications services and infrastructure, BIP will advance the objectives of the Recovery Act by spurring job creation and the economy and by building technological infrastructure that will fuel long-term economic growth and opportunity.

**DATES:** Applications will be accepted for Last Mile and Middle Mile projects from February 16, 2010 at 8 a.m. Eastern Time (ET) until March 15, 2010 at 5 p.m. ET. The application window for Satellite, Technical Assistance, and Rural Library Broadband Projects will be announced in a separate request for proposal in the **Federal Register**.

**Application Submission:** The application packages for electronic submissions will be available at <http://www.broadbandusa.gov>.

**Electronic submissions:** Electronic submissions of applications will allow for the expeditious review of an Applicant's proposal, consistent with the goals of the Recovery Act. As a result, all Applicants for Last Mile, Middle Mile, and Satellite projects must file their application electronically. Electronic applications for Last Mile and Middle Mile projects must be submitted by 5 p.m. ET on March 15, 2010. The government electronic application system will provide a date and time stamped confirmation number that will serve as proof of submission. Only applications for Technical Assistance and Rural Library Broadband grants will be submitted in paper form. Paper applications for Technical Assistance and Rural Library Broadband grants will be available at <http://www.broadbandusa.gov> once the request for proposals has been published. Applicants filing paper copies should submit one original and one copy of the application for efficient processing.

**Proof of Mailing.** Paper applications for Technical Assistance and Rural Library Broadband grants must include proof of mailing consisting of one of the following: (i) A legibly dated U.S. Postal Service postmark. Please note that the U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, Applicants should check with their local post office; (ii) a legible mail receipt with the date of mailing stamped by the U.S. Postal Service; or (iii) a dated shipping label, invoice, or receipt from a commercial carrier. Neither of the following will be accepted as proof of mailing: a private metered postmark; nor a mail receipt that is not dated by the U.S. Postal Service.

**Mailing Address.** Completed applications must be mailed, shipped,

or sent overnight express to: Broadband Initiatives Program, Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Stop 1599, Room 2868, Washington, DC 20250.

*Or hand-delivered to:* Broadband Initiatives Program Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Room 2868 Washington, DC 20250.

**Contact Information:** For general inquiries, contact David J. Villano, Assistant Administrator Telecommunications Program, Rural Utilities Service, U.S. Department of Agriculture (USDA), e-mail: [BroadbandUSA@usda.gov](mailto:BroadbandUSA@usda.gov), telephone:(877) 508-8364. For inquiries regarding BIP compliance requirements, including applicable Federal rules and regulations protecting against fraud, waste and abuse, contact [bipcompliance@wdc.usda.gov](mailto:bipcompliance@wdc.usda.gov). You may obtain additional information regarding applications for BIP via the Internet at <http://www.broadbandusa.gov>.

**Authority:** This notice is issued pursuant to the American Recovery and Reinvestment Act of 2009, Public Law 111-5, 123 Stat. 115 (2009) and the Rural Electrification Act of 1936, 7 U.S.C. 901 *et seq.*

#### SUPPLEMENTARY INFORMATION:

**Catalog of Federal Domestic Assistance (CFDA) Number:** Broadband Initiatives Program (BIP)—10.787.

#### Additional Items in Supplementary Information

**I. Overview:** Describes the purposes of the Recovery Act and the changes in BIP from the First Round NOFA.

**II. Definitions:** Sets forth the key statutory terms and other terms.

**III. Funding Opportunity Description:** Describes funding categories, requirements, and the amount of funds available for each category.

**IV. Eligibility Information:** Establishes eligibility criteria, eligibility factors, eligible and ineligible costs, and other eligibility requirements.

**V. Application and Submission Information:** Provides information regarding how to apply, application materials, and the application process.

**VI. Application Evaluation Criteria:** Establishes the evaluation criteria for application review.

**VII. Waiver for Grants Capped at (75%) of Award for Last Mile and Middle Mile Projects:** Establishes waiver procedures for larger grant component.

**VIII. Award Administration Information:** Provides award notice information, administrative and national policy requirements, terms and conditions, and other reporting requirements for award recipients.

**IX. Other Information:** Sets forth guidance on funding, compliance with various laws,

confidentiality, discretionary awards, and authorized signatures.

## I. Overview

### A. Background

On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009 (Recovery Act) into law.<sup>1</sup> The essential goal of the Recovery Act is to provide a "direct fiscal boost to help lift our Nation from the greatest economic crisis in our lifetimes and lay the foundation for future growth."<sup>2</sup> Accordingly, the Recovery Act identifies five overall purposes: (1) To preserve and create jobs and promote economic recovery; (2) to assist those most impacted by the recession; (3) to provide investments needed to increase economic efficiency by spurring technological advances in science and health; (4) to invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits; and (5) to stabilize state and local government budgets.<sup>3</sup> The Recovery Act further instructs the President and the heads of Federal departments and agencies to manage and expend Recovery Act funds to achieve these five purposes, "commencing expenditures and activities as quickly as possible consistent with prudent management."<sup>4</sup>

Consistent with the purposes described above, the Recovery Act provided RUS with \$2.5 billion to expand access to broadband services in rural America. The Recovery Act expanded RUS' existing authority to make loans and provided new authority to make grants for the purpose of facilitating broadband deployment in rural communities. The Recovery Act specifically made Federal assistance available for grants and loans to enhance service in areas which are at least 75 percent rural and "without sufficient access to high speed broadband service to facilitate rural economic development."

On July 9, 2009, RUS and the National Telecommunication Information Administration (NTIA) issued a joint Notice of Funds Availability at 74 FR 33104 governing the first round of Recovery Act broadband funding under BIP and NTIA's Broadband Technology Opportunity Program (BTOP). Under this first round Notice (the First Round

<sup>1</sup> American Recovery and Reinvestment Act of 2009, Public Law 111-5, 123 Stat. 115 (2009).

<sup>2</sup> President Obama, Statement on Signing the American Recovery and Reinvestment Act of 2009 (Feb. 17, 2009).

<sup>3</sup> Recovery Act sec. 3(a), 123 Stat. at 115-16.

<sup>4</sup> See *id.* § 3(b), 123 Stat. at 116.

NOFA), RUS made approximately \$2,400,000,000 in funding available for BIP. Approximately 2,200 applications seeking \$28 billion in Federal financial assistance were submitted in response to the First Round NOFA.

The First Round NOFA opened BIP to a wider range of Applicants and projects than the RUS' traditional programs. This enabled RUS to get a better understanding of the type of applications available to meet the need for broadband services in rural areas. With that experience, RUS, working in conjunction with NTIA's BTOP, is focusing the second round funding on rural economic development in addition to continuing the effort of the First Round NOFA to reach unserved and underserved areas. RUS has qualified for funding any rural area that does not have broadband service at the rate of 5 Megabits/second (Mbps) (upstream and downstream combined) in at least 50 percent of its area. RUS has determined that rural areas without service at 5 Mbps (upstream and downstream combined) lack high speed broadband service sufficient to facilitate rural economic development as required by the Recovery Act.

In this Second Round NOFA, RUS and NTIA have determined that the best use of limited funding is to have RUS and NTIA focus on funding different aspects of broadband infrastructure. RUS will concentrate on funding Last Mile projects. With decades of experience of financing telecommunications infrastructure in rural America, RUS is uniquely equipped to focus on Last Mile rural projects. However, it is still important for RUS to continue funding certain Middle Mile projects to ensure all proposed rural economic development strategies incorporating broadband technology are given full consideration by an Agency whose mission is rural development. As a result, RUS will still consider funding Middle Mile projects, but strongly encourages such projects only be undertaken by current RUS loan or grant recipients, given the complexity of such projects, the amount of time to close these deals with respect to RUS' statutory lien on project assets and any other debt or equity holders, and the limited timeframe available before Recovery Act funds expire. Additionally, NTIA has proposed in its second NOFA a Comprehensive Communities Infrastructure initiative that will fund Middle Mile infrastructure projects that include connections to community anchor institutions. As a result, RUS highly recommends that all other Middle Mile applicants consider applying to BTOP.

Based on these considerations and in consideration of the multitude of comments filed in response to the Request for Information released on November 10, 2009, at 74 FR 58940, RUS has determined to make the following changes:

#### *B. Application Changes From the First Round NOFA*

##### 1. Funding Categories

###### a. Retained and Eliminated Categories

In the First Round NOFA, RUS made funds available for three types of projects: Last Mile, Middle Mile and Last Mile Remote. This NOFA has retained funding for Last Mile projects and Middle Mile Projects, and eliminated the funding category for Last Mile Remote projects.

###### b. New Categories

It is essential to make every effort in this NOFA to reach unserved premises. A separate Satellite Project category has been established to reach premises left unserved by other technologies.

Lastly, two funding purposes, Rural Library Broadband and Technical Assistance, have been added to allow Awardees the opportunity to adjust projects to include service to rural libraries and participation with rural economic development strategies.

##### 2. Modification of Eligible Service Areas

In this Second Round of funding RUS has focused its efforts on rural economic development in addition to continuing to reach unserved rural areas. RUS has qualified for funding any rural area in which at least 50 percent of the premises in the area do not have access to broadband service at the rate of 5 Mbps (upstream and downstream combined). RUS has determined that these areas lack high speed broadband service sufficient to facilitate rural economic development as required by the Recovery Act. Service offerings must still be within proposed funded service areas which are at least 75 percent rural as required by the Recovery Act.

##### 3. Change in Loan/Grant Award Allocation

The First Round NOFA provided that all successful applications would receive an award comprised of 50 percent loan and 50 percent grant (50/50 loan/grant combination), except for rural remote projects which could receive up to 100 percent grant funding. Rural remote areas were defined as those unserved 100 percent rural areas which were located 50 miles or more from non-rural areas. This Second Round NOFA, however, combines rural

remote and rural non-remote funding and therefore has a standard award of 75/25 grant/loan combination. It is important to note that applicants requesting a larger loan component will be awarded more points in the scoring system and may have a greater likelihood of being funded. Applicants may request more than a 75 percent grant component by submitting a waiver request to the Administrator, which demonstrates their need for additional grant funding in accordance with the requirements of this Second Round NOFA. The waiver request will be addressed at the time any award is offered. The Administrator has the authority to award grants up to 100 percent.

##### 4. No Joint RUS/NTIA Application

Because the Recovery Act prohibits a project from receiving funding from NTIA in areas where RUS has funded a project, the first NOFA required Applicants to submit infrastructure applications consisting of proposed funded service areas which were at least 75 percent rural to RUS to be considered under BIP, with the option of additional consideration under BTOP. The first NOFA provided that NTIA would not fund such an application unless RUS had declined to fund it. In response to comments from stakeholders during the initial round of funding, the agencies' Request For Information invited public comment on whether the agencies should continue to require that these kinds of rural infrastructure applications be submitted to RUS first or whether the agencies should permit Applicants to file rural applications directly to NTIA without also having to submit them to RUS.<sup>5</sup>

The majority of commenters agree that rural Applicants should be permitted to apply directly to NTIA for BTOP grants without being required to first apply to RUS for BIP loans or grants.<sup>6</sup> The most widely cited rationale was the burden imposed on Applicants to provide the additional financial analysis required by the RUS loan application for rural projects that do not qualify as remote and unserved or are not viable with only 50 percent grant funding.<sup>7</sup> Commenters also cite the inefficiency of requiring RUS to review proposals that are not viable for BIP.<sup>8</sup>

A majority of commenters favor the continued use of a common BIP-BTOP

<sup>5</sup> See 74 FR at 58941.

<sup>6</sup> See, e.g., Massachusetts Executive Office of Housing and Economic Development at 3-4; American Library Association at 7.

<sup>7</sup> See, e.g., TCA at 1-2 (Nov. 30, 2009).

<sup>8</sup> See, e.g., XO Communications at 2 (Nov. 30, 2009); TCA at 1-2.

application to avoid the duplicative effort of completing multiple applications.<sup>9</sup> A few of these commenters favor maintaining the initial round of funding's BIP-first rule requiring concurrent joint applications and reserving to RUS the first option to fund eligible proposals.<sup>10</sup> The chief benefit adduced in support of this position is RUS' expertise in evaluating rural applications so as to avoid redundant awards to "active" RUS borrowers.<sup>11</sup> Commenters further recommend that the agencies implement a "check box" by which an Applicant may request immediate consideration by NTIA because its rural project requires more than a 50 percent grant to be viable or seeks to address one of NTIA's broadband objectives.<sup>12</sup> They also recommend allowing Applicants to produce only one financial analysis to demonstrate an ability to support either a 50 percent contribution (as required for BIP) or a 20 percent contribution (as required for BTOP) to a project.<sup>13</sup>

RUS and NTIA agree with the majority of commenters who argue that the "BIP-first" requirement of the initial funding round added an additional unnecessary burden for many Applicants. In this funding round, RUS and NTIA conclude that Applicants that are eligible for both BIP and BTOP funding may elect to apply directly to either NTIA for BTOP grants or RUS for BIP loans or loan/grants. However, both agencies strongly recommend that current RUS loan or grant recipients apply to BIP. Applicants may not apply to both agencies for the same grant project or for a substantially similar project.

RUS believes that the elimination of joint applications will significantly streamline RUS' internal review of applications. Moreover, the joint application process was burdensome on the Applicants. Eliminating this option is critical to ensuring that RUS is able to carry out its review in a timely manner, and that applications will be funded before the statutory deadline of September 30, 2010.

<sup>9</sup> See, e.g., Texas Statewide Telephone Cooperative at 5 (Nov. 25, 2009).

<sup>10</sup> See, e.g., Vantage Point Solutions at 5-7; Rural Community Assistance Partnership at 2 (Nov. 19, 2009); RVW Inc. at 2; Mid-Rivers Communications at 6-7 (Dec. 1, 2009); South Dakota Telecommunications Association at 5, 11 (Nov. 30, 2009).

<sup>11</sup> See, e.g., Mid-Rivers Communications at 6.

<sup>12</sup> See, e.g., National Rural Telecommunications Cooperative and DigitalBridge Communications Corp. at 6-7 (Nov. 30, 2009).

<sup>13</sup> See, e.g., John Staurulakis, Inc. at 18; TCA at 1-2.

#### 5. Elimination of Two-Step Application Process

The first round NOFA provided for a two-step application process. Under this process, the bulk of the materials required from the Applicant were sought with the application. Once this material was evaluated, RUS made an initial determination as to whether the application would likely be funded. If so, the application was moved into a second review process in which additional information was requested from the Applicant. The Applicant was given an additional 30 days to provide it.

Although commenters generally had few problems with the two-step review process, several commenters argued persuasively that doing away with the two-step review process in favor of a simplified one-step process would streamline the application process.

After an evaluation of the first round applications and consideration of the comments received, RUS determined that a one-step application process will best streamline BIP. Removal of the second step simplifies the application process, and adds valuable time to both the application window and the Agency review process. This clearly promotes the submission of more solid applications.

#### 6. Cost Effectiveness/Reasonableness

To effectively leverage Recovery Act broadband funds for last mile projects, RUS will limit Federal assistance to no more than \$10,000 per premises passed, unless a waiver is requested from the Administrator. The Administrator will consider such requests based on whether the application provides assistance to a significant number of critical community facilities, supports a recognized rural regional development plan, supports public safety projects, enhances broadband service to rural libraries, supports persistent poverty counties or substantially unserved areas, including Indian country. If the waiver request is denied, any award may be made contingent on improving cost effectiveness, or the application may be placed in the second review process and the Applicant will have an opportunity to revise its proposal.

#### 7. Elimination of Census Block Reporting

The First Round NOFA required that Applicants report their proposed funded service territories on a census block basis. It was thought that this level of granularity was necessary to evaluate applications; however, reporting at the census block level imposed a significant burden on Applicants.

A majority of the commenters advocate abandoning Census blocks in favor of other means of specifying proposed funded service areas.<sup>14</sup> Commenting municipalities and cities unanimously express their dissatisfaction with the use of Census block data, citing it as a cumbersome method of reporting proposed funded service area designations.<sup>15</sup> Multiple commenters offer zip codes, city boundaries, or even latitude and longitude coordinates as less burdensome alternatives for Applicants.<sup>16</sup> Several commenters propose using Census tract data as a less burdensome alternative to census block data, in part because broadband service providers are already required to report their subscriber and demographic information according to census tracts in order to file FCC Form 477.<sup>17</sup>

For the Second Round NOFA, RUS has eliminated census block reporting. This requirement created unnecessary problems in the application process. Moreover, the present state of the mapping tool already identifies the affected census blocks as the Applicant draws its service territory. The elimination of this burden will allow Applicants to focus more time on the technical issues and feasibility of their application.

#### 8. Elimination of Paper Applications for Last Mile and Middle Mile Projects

The First Round NOFA required that most applications for BIP be filed electronically. However, it provided an exception for certain Applicants to file their applications on paper.<sup>18</sup> For the Second Round NOFA, RUS has eliminated paper applications for Last Mile and Middle Mile projects. RUS did not receive many paper applications in round one. Nevertheless, since paper applications have to be manually input into the electronic application system, their processing considerably slowed

<sup>14</sup> See, e.g., NCTH-Cleartalk at 1 (Nov. 21, 2009); Commonwealth of Pennsylvania at 4; Satellite Industry Association at 4 (Nov. 30, 2009); New America Foundation at 21 (Nov. 30, 2009).

<sup>15</sup> See, e.g., Montgomery Co. at 2 (Nov. 30, 2009); Oakland Co. at 1 (Nov. 30, 2009); City of New York at 2; City of San Francisco at 3 (Nov. 30, 2009).

<sup>16</sup> See, e.g., Open Range Communications at 4 (Nov. 30, 2009); Center of Social Inclusion at 2; Harris Corp at iii (Nov. 30, 2009).

<sup>17</sup> See, e.g., John Staurulakis, Inc. at 14 (Nov. 30, 2009); Rural Broadband Corp. at 7.

<sup>18</sup> Applicants requesting less than \$1 million in assistance (in the form of grants, loans, or a combination of grants and loans) were allowed to file their applications in a paper format for the first round NOFA, if filing electronically would impose a hardship on the Applicants. Applicants whose authorized representatives were individuals with disabilities were also allowed to file their applications in a paper format irrespective of the funding size of their request.

RUS' application review process and diverted limited resources. Since Last Mile, Middle Mile, and Satellite projects are anticipated to be the most lengthy and complex applications, as well as constituting the largest pool of applications, RUS now requires that they be submitted in electronic form. A major justification identified in the First Round NOFA for allowing the submission of paper applications concerned the need to provide an alternative means of submitting applications by individuals with disabilities. RUS has determined that the electronic application intake system that will be used during the second round of funding complies with the requirements of the Rehabilitation Act.

## 9. Reconsideration of Applications

### a. Second Review

If RUS expects to have excess funding capacity in the Second Round NOFA, the RUS Administrator may permit Applicants to adjust applications for reconsideration that would otherwise not be funded. RUS will reconsider only such applications which can be updated, reviewed and awarded funds before the expiration of Recovery Act funding, contain specific and limited adjustments, and promote significant economic rural development, as determined by the Administrator. Those applications that are considered for Second Review will not be permitted to redo the application, but only provide the supplemental information the Agency has requested. This will require a very stringent timeline for the Applicant and RUS. Any application that is processed under this procedure will be funded only after all properly submitted applications have been funded and will be subject to all applicable requirements under this NOFA.

### b. Transferability

Under this NOFA, RUS will accept applications from NTIA that it determines it will not fund, but that may be consistent with RUS' BIP requirements and priorities. RUS will handle such applications, if timely received from NTIA, under its Second Review process outlined in this NOFA.

## 10. Administrator's Discretion

RUS has determined that in the Second Round NOFA, the Administrator will have the opportunity to exercise discretion in the application evaluation process in several ways to ensure the best mix of approved applications consistent with the purposes of BIP. One of the ways to exercise such discretion is for the

Administrator to have the ability to separately award priority points and larger grant components to applications that provide significant assistance to critical community facilities (including libraries), promote rural economic development, support persistent poverty counties, serve chronically underserved areas, demonstrate cost effectiveness, offer low-cost service options, and/or provide for geographic diversity.

## II. Definitions

The terms and conditions provided in this NOFA are applicable to and for purposes of this NOFA only. Unless otherwise provided in the award documents, all financial terms not defined herein shall have the meaning as defined by Generally Accepted Accounting Principles.

*Administrator* means the RUS Administrator, or the Administrator's designee.

*Applicant* means an entity requesting an award under this NOFA, and where applicable, the First Round NOFA.

*Award documents* mean, as applicable, the grant documents, loan documents, or loan/grant combination documents.

*Award* means a grant, loan, or loan/grant combination made under this NOFA.

*Awardee* means a grantee, borrower, or borrower/grantee under this NOFA.

*BIP* means the Broadband Initiatives Program, administered by the RUS, under the Recovery Act.

*Broadband* means providing two-way data transmission with advertised speeds of at least 768 kilobits per second (kbps) downstream and at least 200 kbps upstream to end users, or providing sufficient capacity in a middle mile project to support the provision of broadband service to end users.

*Build-out* means the construction or improvement of facilities and equipment as specified in an Applicant's application.

*CALEA* means the Communications Assistance for Law Enforcement Act, 47 U.S.C. 1001 *et seq.*

*Composite economic life* means the weighted (by dollar amount of each class of facility) average economic life of all classes of facilities financed under this NOFA.

*Critical community facilities* means public facilities that provide community services essential for supporting the safety, health, and well-being of residents, including, but not limited to, emergency response and other public safety activities, hospitals and clinics, libraries and schools.

*Current ratio* means the current assets divided by the current liabilities.

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

*Forecast period* means the time period used by RUS to determine if an application is financially feasible. Financial feasibility of an application is based on five-year projections.

*GAAP* means generally accepted accounting principles.

*Grant agreement* means the agreement between RUS and the Awardee for grants awarded under this NOFA, including any amendments thereto, available for review at <http://www.broadbandusa.gov>.

*Grant documents* mean the grant agreement and security documents between the RUS and the Awardee and any associated documents pertaining to the grant.

*Grant funds* mean Federal funds provided pursuant to a grant made under this NOFA.

*High Speed Access* means high speed broadband service to facilitate rural economic development, or service at the rate of at least 5 Mbps (upstream and downstream combined).

*Interconnection Point* means the termination point of a Middle Mile project.

*Last Mile project* means any terrestrial infrastructure project the predominant purpose of which is to provide broadband service to end users or end-user devices (including households, businesses, public safety entities, and critical community facilities).

*Loan* means any loan made under this NOFA.

*Loan contract* means the loan agreement between RUS and the Awardee, including all amendments thereto, available for review at <http://www.broadbandusa.gov>.

*Loan documents* mean the loan contract, note(s), and security documents between the Awardee and RUS and any associated documents pertaining to the loan.

*Loan/grant* means any loan/grant combination made under this NOFA.

*Loan/grant contract* means the loan/grant contract between RUS and the Awardee, including all amendments thereto available at <http://www.broadbandusa.gov>.

*Loan/grant documents* mean the loan/grant contract, note(s), and security documents between the Awardee and RUS and any associated documents pertaining to the loan/grant.

*Middle Mile project* means any broadband infrastructure project the predominant purpose of which is to provide interoffice transport, backhaul,

internet connectivity, or special access (including point-to-point projects), which furthers rural economic development, submitted in an application or co-application.

*Pre-application expense* means any reasonable expense incurred after the release of this NOFA to prepare an application or to respond to RUS inquiries about the application, including engineering costs and accountant/consultant fees.

*Proposed funded service area* means, for Last Mile projects, the contiguous area (either in all or part of an existing service area or a new service area) where the Applicant is requesting funds to provide broadband service pursuant to this NOFA. An Applicant may propose to serve more than one proposed funded service area. For Middle Mile projects, the proposed funded service area shall be the locations of the proposed interconnection points.

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

*Recovery Act* means the American Recovery and Reinvestment Act of 2009, Public Law 111-5, 123 Stat. 115 (2009).

*Rural area* means any area, as confirmed by the latest decennial census of the Bureau of the Census, which is not located within: (1) a city, town, or incorporated area that has a population of greater than 20,000 inhabitants; or (2) an urbanized area contiguous and adjacent to a city or town that has a population of greater than 50,000 inhabitants. For purposes of the definition of rural area, an urbanized area means a densely populated territory as defined in the latest decennial census of the Bureau of the Census.

*Rural Library* means a library in a rural area.

*RUS Accounting Requirements* shall mean compliance with U.S. GAAP, acceptable to RUS, as well as compliance with the requirements of the applicable regulations: 7 CFR 3015, 3016, or 3019 (for BIP Awardees in these CFRs the term grant recipient shall also mean loan recipient and loan/grant recipient) or the system of accounting prescribed by RUS Bulletin 1770B-1.

*Satellite Project* means any project to provide satellite broadband service to unserved rural premises (including households, businesses, public safety entities, and critical community facilities), either by funding customer-premises equipment, terrestrial equipment, and/or discounted broadband service for at least one year.

*Security document* means any mortgage, deed of trust, security

agreement, financing statement, or other document that RUS determines is necessary to perfect its interest in the security for a loan, grant, or loan/grant.

*Service area* means the area, including the proposed funded service area, where the Applicant offers or intends to offer any service.

*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 (existing and any new interest expense including the interest expense associated with the proposed loan).

*Unserved area* means a service area with no access to facilities-based, terrestrial broadband service, either fixed or mobile, at the minimum broadband transmission speed (set forth in the definition of broadband in this section). A premises has access to broadband service if it can readily subscribe to that service upon request.

### III. Funding Opportunity Description

#### A. Funding Categories

##### 1. Last Mile Projects

Applications for Last Mile projects must predominantly provide broadband service directly to the premises or to end users. Only those applications whose proposed funded service area contains 75 percent or more rural areas, within which not more than 50 percent of the premises in the rural areas have High Speed Access will be considered for funding. The standard award is a grant/loan combination of 75 percent grant and 25 percent loan. Applicants may request a waiver for more than 75 percent grant in accordance with Section VII of this NOFA, or may request a greater percentage of loan.

##### 2. Middle Mile Projects

RUS strongly encourages applications for Middle Mile projects from current RUS loan and grant recipients. Such projects are complex and more difficult to close, especially given the limited timeframe available before Recovery Act funds expire.

Applicants must propose that at least 75 percent of the interconnection points be in rural areas with no more than 50 percent of the premises having High Speed Access. The communities in which the interconnection points terminate shall be used to determine the percentage of High Speed Access. For those interconnection points which do not terminate in any recognizable community, the nearest Census Designated Place shall be used. Middle Mile projects must provide interoffice transport, backhaul, internet

connectivity, or special access (including point-to-point projects). The standard award is a grant/loan combination of 75 percent grant and 25 percent loan. Applicants may request a waiver for more than 75 percent grant in accordance with Section VII of this NOFA, or may request a greater percentage of loan.

##### 3. Satellite Projects

Given the importance of efforts to reach unserved premises, a separate Satellite Project category has been established to reach premises left unserved by other technologies. Subsequent to the opening of the window for Last Mile and Middle Mile projects, the Agency will publish a Request for Proposals for Satellite Projects, including the announcement of the funding allocation.

Applicants must propose to serve only unserved rural premises in any of the regions listed in Section IX.T of this NOFA. Applicants may propose to serve more than one region; however, Applicants must submit applications which are broken out for each region. Only one Applicant will be selected to serve a region.

At a minimum, an application must commit to providing broadband service, to providing customer-premises equipment (CPE) to subscribers at no cost (including no costs for installation, activation, or other hidden fees) and to providing to such subscribers at least a 25 percent reduction in the Applicant's service rates as of December 1, 2009, for a term of at least one year.

Subsequent to the opening of the window for Last Mile and Middle Mile projects, the Agency will publish a Request for Proposals for Satellite grants, including the announcement of the funding allocation and the requirements of the application. The funding award for Satellite Projects is grant funding.

##### 4. Technical Assistance Grants

Awardees under the First Round NOFA or Applicants under this NOFA may submit a request for an additional grant for funding for the purpose of developing regional broadband development strategies in rural areas. Technical Assistance grants may be used for the development of a USDA-recognized regional strategy. Under this program, Technical Assistance Awardees will work in public/private partnerships to develop a USDA-approved regional plan to provide broadband service in rural areas that remain critically unserved. In addition, in order to foster cross collaboration with other related Federal programs,

Technical Assistance plans may be used by Applicants for submission to other Federal agencies, including programs of the Department of Transportation, Homeland Security, the Federal Communications Commission (FCC), and Telemedicine Program of the Indian Health Service. By fostering the development of rigorous regional broadband strategies, RUS anticipates that Technical Assistance Awardees will also be able to submit more focused applications in the future to RUS Infrastructure Telecommunications, RUS' Rural Broadband Access, Community-Oriented Connectivity Broadband, and Distance Learning and Telemedicine grant and loan programs.

Grants for Technical Assistance will be made in an amount up to \$200,000. RUS, in its discretion, may decrease the requested award amount based on its evaluation of an application and based on the level of funding available for this program.

Subsequent to the opening of the window for Last Mile and Middle Mile projects, the Agency will publish a Request for Proposals for Technical Assistance grants, including the announcement of the funding allocation and the requirements of the application. Applications for Technical Assistance grants will be accepted in paper-form only (the Easy Grants System will not be used to accept Technical Assistance grant applications), as set forth in the Request for Proposals.

#### 5. Rural Library Broadband Grants

Awardees from the First Round NOFA or Applicants under this NOFA may submit a request for a grant to reimburse the associated costs for connecting any rural library in their proposed funded service area, being constructed, or to be constructed, with funding from an award from USDA's Community Facilities program of the Rural Housing Service. Such costs need not have been addressed in the original application submitted under the First Round NOFA or Second Round NOFA.

Subsequent to the opening of the window for Last Mile and Middle Mile projects, the Agency will publish a Request for Proposals for Rural Library Broadband grants, including the announcement of the funding allocation and the requirements of the application. Applications for Rural Library Broadband grants will be accepted in paper-form only, as set forth in the Request for Proposals.

#### B. Available Funds

##### 1. General

Approximately \$2,200,000,000 in funding has been set aside for funding opportunities under this NOFA.<sup>19</sup>

##### 2. Funding Limits

Award amounts under this NOFA will be limited as follows:

##### a. Last Mile Projects

Up to \$1,700,000,000 is available for loans or loan/grant combinations for Last Mile projects.

##### b. Middle Mile Projects

Up to \$300,000,000 is available for loans or loan/grant combinations for Middle Mile projects.

##### c. Satellite Project, Rural Library Broadband, and Technical Assistance Projects

Up to \$100,000,000 is available for grants for Satellite projects, as well as any and all funds not obligated for Last Mile and Middle Mile projects; and up to \$5,000,000 is available for grants for Rural Library Broadband and Technical Assistance projects.

##### d. Reserve

Up to \$95,000,000 is available for a reserve.

##### 3. Repooling

RUS retains the discretion to divert funds from one category of projects to another.

##### 4. Award Period

All awards must be made and funding obligated by September 30, 2010. While the completion time will vary depending on the complexity of the project, award recipients must substantially complete projects supported by this program within two years, and projects must be fully completed within three years of the date of issuance of the award.

##### 5. Type of Funding Instrument

The funding instruments will be grants, loans, and loan/grant combinations.

#### IV. Eligibility Information

##### A. General

Applicants must satisfy the following eligibility requirements to qualify for funding.

<sup>19</sup> This amount may be increased to include unobligated funds from the First Round NOFA.

#### B. Eligible Entities

##### 1. Last Mile and Middle Mile Projects

The following entities are eligible to apply for assistance:

- a. States, local governments, or any agency, subdivision, instrumentality, or political subdivision thereof;
- b. A territory or possession of the United States;
- c. An Indian tribe (as defined in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b));
- d. A native Hawaiian organization;
- e. A non-profit foundation, a non-profit corporation, a non-profit institution, or a non-profit association;
- f. Other non-profit entities;
- g. For-profit corporations;
- h. Limited liability companies; and
- i. Cooperative or mutual organizations.

##### 2. Satellite Projects

- a. A satellite Internet Service Provider (ISP);
- b. A reseller of satellite ISP service;
- c. A distributor or dealer of satellite ISP service; and
- d. A consortium of a, b, or c above.

#### C. Application Eligibility Factors for Last Mile and Middle Mile Projects

The following eligibility factors establish basic requirements that all Applicants must comply with in order to be eligible for an award. Applicants failing to comply with these requirements will not have their applications considered.

##### 1. Fully Completed Application

Applicants must submit a complete application and provide all supporting documentation required for the application.

##### 2. Timely Completion

A project is eligible only if the application demonstrates that the project can be "substantially completed" within two years of the date of issuance of the award and fully complete within three years of the date of the award. A project is considered "substantially complete" when an Awardee has received 67 percent of its award funds.

##### 3. Technical Feasibility

Only projects that RUS determines to be technically feasible will be eligible for an award under this NOFA. Applicants will be required to submit a system design, network diagram and project timeline, certified by a professional engineer, for any application requesting funds over \$1 million.

#### 4. Nondiscrimination and Interconnection<sup>20</sup>

All Applicants must commit to the following Nondiscrimination and Interconnection Obligations: (a) Adhere to the principles contained in the FCC's Internet Policy Statement (FCC 05-151, adopted August 5, 2005) or any subsequent ruling or statement; (b) not favor any lawful Internet applications and content over others; (c) display any network management policies in a prominent location on the service provider's Web page and provide notice to customers of changes to these policies (Awardees must describe any business practices or technical mechanisms they employ, other than standard best efforts Internet delivery, to allocate capacity; differentiate among applications, providers, or sources; limit usage; and manage illegal or harmful content); (d) connect to the public Internet directly or indirectly, such that the project is not an entirely private closed network; and (e) offer interconnection, where technically feasible without exceeding current or reasonably anticipated capacity limitations, on reasonable rates and terms to be negotiated with requesting parties. This includes both the ability to connect to the public Internet and physical interconnection for the exchange of traffic. Applicants must disclose their proposed interconnection, nondiscrimination and network management practices with the application.

All these requirements shall be subject to the needs of law enforcement and reasonable network management. Thus, Awardees may employ generally accepted technical measures to provide acceptable service levels to all customers, such as caching (including content delivery networks) and application-neutral bandwidth allocation, as well as measures to address spam, denial of service attacks, illegal content, and other harmful activities.

In addition to providing the required connection to the Internet, Awardees may offer managed services, such as telemedicine, public safety communications, distance learning, and virtual private networks that use private network connections for enhanced quality of service, rather than traversing the public Internet. In evaluating the reasonableness of network management techniques, RUS will be guided by any applicable rules or findings established by the FCC, whether by rulemaking or adjudication.

An Awardee may satisfy the requirement for interconnection by negotiating in good faith with all parties making bona fide requests. The Awardee and requesting party may negotiate terms such as business arrangements, capacity limits, financial terms, and technical conditions for interconnection. If the Awardee and requesting party cannot reach agreement, they may voluntarily seek an interpretation by the FCC of any FCC rules implicated in the dispute. If an agreement cannot be reached within 90 days, the party requesting interconnection may notify RUS in writing of the failure to reach satisfactory terms with the Awardee. The 90-day limit is to encourage the parties to resolve differences through negotiation.

With respect to non-discrimination, those who believe an Awardee has failed to meet the non-discrimination obligations should first seek action at the FCC of any FCC rules implicated in the dispute. If the FCC chooses to take no action, those seeking recourse may notify RUS in writing about the alleged failure to adhere to commitments of the award.

Entities that successfully reach an agreement to interconnect with a system funded under BIP may not use that interconnection agreement to provide services that duplicate services provided by projects funded by outstanding telecommunications loans made under the RE Act. Further, interconnection may not result in a BIP-funded facility being used for ineligible purposes under the Recovery Act.

These conditions apply to the Awardee and will remain in effect for the life of the Awardee's federally funded facilities and equipment used in the project. These conditions will not apply to any existing network arrangements or to non-Awardees using the network. Note, however, that the Awardee may negotiate contractual covenants with other broadband service providers engaged to deploy or operate the network facilities and pass these conditions through to such providers. Awardees that fail to accept or comply with the terms listed above may be considered in default of their loan or grant agreements. RUS may exercise all available remedies to cure the default.

#### 5. Service Areas

##### a. Eligible Service Areas for Last Mile and Middle Mile Projects

Applications for Last Mile projects must predominantly provide broadband service directly to the premises or to end users in a proposed funded service

area(s) that is/are 75 percent or more rural, within which not more than 50 percent of the premises in the rural areas have High Speed Access.

Applications for Middle Mile projects must provide interoffice transport, backhaul, internet connectivity or special access to interconnection points. At least 75 percent of the interconnection points must be in rural areas with no more than 50 percent of the premises having High Speed Access. The communities in which the interconnection points terminate shall be used to determine the percentage of High Speed Access. For those interconnection points which do not terminate in any recognizable community, the nearest Census Designated Place shall be used.

##### b. Ineligible Service Areas for Last Mile and Middle Mile Projects

###### i. Overlapping Service Areas

RUS will not fund more than one project to serve any given geographic area. If more than one application would serve any overlapping geographic area, the application with the highest score will be funded; other applications for the same area will be rejected in their entirety unless RUS, in its discretion, determines that the extent of the overlap is *de minimis*, or less than 25 percent of each application's entire proposed funded service area. Notwithstanding, RUS, in its discretion, may readjust the proposed funded service area in any offer of funding to eliminate overlapping areas between one or more applications in order to promote rural economic development. The Agency's proposal for service area readjustment may include a requirement that the Applicant will not compete in the excluded service area.

For the purposes of the Agency's determination of overlap, funding categories will not be subject to overlap analysis. For example, Last Mile projects shall not be considered to overlap with Middle Mile projects.

###### ii. Incumbent Service Areas

For all applications, the existing service area of RUS borrowers in which they provide broadband service shall not be eligible. These areas can be found at <http://www.broadbandUSA.gov>. In addition, the service areas of Awardees under the first round BIP/BTOP NOFA shall also be ineligible for funding.

#### 6. Fully Funded

A project is eligible only if, after approval of the award, all project costs can be fully funded. To demonstrate this, Applicants must include with the application evidence of all funding,

<sup>20</sup> Nothing herein shall be construed to affect the jurisdiction of the Federal Communications Commission with respect to such matters.

other than the RUS award, necessary to support the project, such as bank account statements or firm letters of commitment from equity participants or other lenders documenting the timely availability of funds. Equity partners that are not specifically identified by name will not be considered in the financial analysis of the application.

#### 7. Financial Feasibility and Sustainability

Only projects that RUS determines to be financially feasible, and/or sustainable will be eligible for an award under this NOFA. A project is financially feasible when the Applicant is able to generate sufficient revenues to cover its expenses, has sufficient cash flow to service its debts and obligations as they come due, and meet the minimum TIER requirement of one and generate a minimum current ratio of one by the end of the forecast period, as determined by RUS. In addition, the project must also demonstrate a positive cash balance for each year of the forecast period.

#### 8. Leveraging of Recovery Act Funds

In order to leverage funds to provide Federal assistance cost-effectively to the maximum number of eligible projects so as to ensure that as many households as possible that do not have sufficient access to high speed broadband will receive service, RUS has determined to limit Federal assistance under this NOFA for Last Mile projects to \$10,000 per premises passed in the proposed funded service area, unless a waiver is requested from the Administrator. The Administrator may waive this funding limitation if he determines that the application provides assistance to a significant number of critical community facilities, supports a recognized rural regional development plan, supports public safety projects, enhances broadband service to rural libraries, or supports persistent poverty counties or chronically unserved areas such as Indian country. If the waiver request is denied, any award may be made contingent on improving cost effectiveness, or the application may be placed in the second review process and the Applicant will have an opportunity to revise its proposal. To calculate the cost per premises passed, the Applicant shall divide the total award requested in the application by the total number of premises passed with facilities funded by an award.

#### 9. Service Requirements

Projects must provide broadband service proposed in the application for the composite economic life of the

facilities, as approved by RUS, or as provided in the Award Documents for 100 percent grants, starting from the date of project completion.

#### D. Eligible Cost Purposes

##### 1. General

Award funds must be used only to pay for eligible costs. Eligible costs must be consistent with the cost principles identified in the applicable OMB circulars.<sup>21</sup> In addition, costs must be reasonable, allocable, necessary to the project, and comply with the Recovery Act requirements. Any application that proposes to use any portion of the award funds for any ineligible cost will be rejected.

##### 2. Eligible and Ineligible Costs

###### a. Last Mile and Middle Mile Projects

###### i. Eligible Infrastructure Award Expenses

Award funds may be used to pay for the following expenses:

AA. To fund the construction or improvement of all facilities required to provide broadband service, including facilities required for providing other services over the same facilities, and including equipment required to comply with CALEA;

BB. To fund the cost of leasing facilities required to provide broadband service if such lease qualifies as a capital lease under GAAP. Award funds may be used to fund the cost of a capital lease for no longer than the first three years after the date of the Award Documents; and

CC. To fund reasonable pre-application expenses in an amount not

<sup>21</sup> For example, there is a set of Federal principles for determining eligible or allowable costs. Allowability of costs will be determined in accordance with the cost principles applicable to the entity incurring the costs. Thus, allowability of costs incurred by state, local or federally-recognized Indian tribal governments is determined in accordance with the provisions of OMB Circular A-87, "Cost Principles for State, Local and Indian Tribal Governments." The allowability of costs incurred by non-profit organizations is determined in accordance with the provisions of OMB Circular A-122, "Cost Principles for Non-Profit Organizations." The allowability of costs incurred by institutions of higher education is determined in accordance with the provisions of OMB Circular A-21, "Cost Principles for Educational Institutions." The allowability of costs incurred by hospitals is determined in accordance with the provisions of Appendix E of 45 CFR part 74, "Principles for Determining Costs Applicable to Research and Development under Grants and Contracts with Hospitals." The allowability of costs incurred by commercial organizations and those non-profit organizations listed in Attachment C to Circular A-122 is determined in accordance with the provisions of the Federal Acquisition Regulation (FAR) at 48 CFR part 31. See 7 CFR 3015, 3016, or 3019 (governing the Department of Agriculture's implementation of OMB requirements).

to exceed five percent of the award. Pre-application expenses may be reimbursed if they are incurred after the publication date of this NOFA.

###### ii. Ineligible Infrastructure Award Expenses

Award funds may not be used for any of the following purposes:

AA. To fund operating expenses of the Applicant;

BB. To fund costs incurred prior to the date on which the application is submitted, with the exception of eligible pre-application expenses;

CC. To fund an acquisition, including the acquisition of the stock of an affiliate, or the purchase or acquisition of any facilities or equipment of an affiliate. Due to the competitive nature of the application process, if affiliated transactions are contemplated in the application, approval of the application does not constitute approval to enter into affiliated transactions;

DD. To fund the purchase or lease of any vehicle other than those used primarily in construction or system improvements;

EE. To fund broadband facilities leased under the terms of an operating lease;

FF. To fund merger or consolidation of entities;

GG. To fund costs incurred in acquiring spectrum as part of an FCC auction or in a secondary market acquisition; and

HH. To fund the costs of a satellite launch, construction, purchase, or leasing of transponder space.

###### b. Eligible Satellite Award Expenses

An eligible Satellite project award may be used by the Applicant:

i. To fund customer-premises equipment up to \$750 per subscriber (inclusive of the CPE, installation, and activation fees);

ii. To reduce the monthly service cost; and/or

iii. To fund the construction of terrestrial ground facilities, including equipment required to comply with CALEA.

###### c. Eligible Rural Library Broadband Grants Expenses

Award funds may be used by the Applicant to pay for the costs of the last mile connection to the rural library.

###### d. Eligible Technical Assistance Grants Expenses

Award funds may be used by the Applicant to fund the provision of technical assistance for the development of a regional broadband plan. Such technical assistance must include both planning and economic expertise.

## V. Application and Submission Information

### A. Request for Application Package

Complete application packages, including required Federal forms and instructions, will be available at <http://www.broadbandusa.gov>. Additional information can be found in the *Application Guidelines* at <http://www.broadbandusa.gov>. This Web site will be updated regularly.

Applicants that are eligible for both BIP and BTOP have the option to apply to either agency for funding for the same project. However, applicants should apply to only one agency for a given project. RUS strongly recommends that applications for Middle Mile projects that are current RUS loan or grant recipients and applications with Last Mile projects that propose funding service areas that are 75 percent or more rural should apply to BIP for funding. RUS strongly recommends that applicants with Middle Mile projects that are not current RUS loan or grant recipients or applicants with Last Mile projects that propose service areas that are less than 75 percent rural should apply to BTOP for funding. This recommendation is necessary to improve the efficiency of both BIP and BTOP and to leverage the core expertise of the agencies. The RUS and NTIA will coordinate to identify potential service area overlaps, and will resolve such conflicts in the manner that best satisfies the statutory objectives of both programs.

### B. Registration

#### 1. DUNS Number

All Applicants must supply a Dun and Bradstreet Data Universal Numbering System (DUNS) number. Applicants can receive a DUNS number at no cost by calling the dedicated toll-free DUNS number request line at 1-866-705-5711 or via the Internet at <http://www.dunandbradstreet.com>.

#### 2. Central Contractor Registration (CCR)

All Applicants must provide a CCR (CAGE) number evidencing current registration in the CCR database. If the Applicant does not have a current CCR (CAGE) number, the Applicant must register in the CCR system available at <http://www.ccr.gov/StartRegistration.aspx>. Applicants are encouraged to register early due to potential delays in registration.

### C. Contents of the Application

#### 1. Requirements for Single Applications from Same Entity for Last Mile and Middle Mile Projects

A complete application will include the following:

- a. The identity of the Applicant and general Applicant and project information including:
  - i. A description of the project that will be made public consistent with the requirements of the Recovery Act; and
  - ii. The estimated dollar amount of the funding request;
- b. An executive summary of the project as detailed in the application;
- c. A description of the proposed funded service area including the number of premises passed including the number of critical community facilities, and public safety entities to be passed and/or involved in the project;
- d. Subscriber projections including the number of subscribers for broadband, video and voice services and any other service that may be offered;
- e. The number of jobs the project is expected to create or save;
- f. A map, as furnished on <http://www.broadbandUSA.gov> of the proposed funded service areas indentifying the unserved areas and the areas without High Speed Access;
- g. The names of the communities, census designated places or other areas, including tribal lands, within the proposed funded service area; information as to whether the communities and areas identified above are rural or non-rural; the methodology for making the above classifications; and for Middle Mile projects, identification of the locations of the interconnection points.
- h. A description of the proposed service offerings, and the associated pricing plan, that the applicant proposes to offer, as well as the advertised prices of service offerings by competitors in the same area and; an explanation of why the proposed service offerings are affordable;
- i. A description of the applicant's nondiscrimination, interconnection, and network management plans;
- j. A system design which includes a description of the proposed technology used to deliver the broadband service demonstrating that all premises in the proposed funded service area will be offered broadband service, a network diagram, a timeline including key milestones for implementation of the project, and a construction schedule all of which must be certified by a professional engineer who is certified in at least one of the states where there is project construction, if the funding

request exceeds \$1,000,000, unless the Administrator determines that such certification is not possible; an estimate of the cost of the project per household; a depreciation schedule for the facilities proposed for funding, a description of the necessary work force needed to build and operate the system, whether the applicant is seeking a waiver of the Buy American provision; and whether the project allows more than one provider to serve end users; a list of all required licenses and regulatory approvals needed for the proposed project; and how much the applicant will rely on contractors or vendors to deploy the network facilities;

k. Resumes of key management personnel, a description of the organization's readiness to manage a broadband services network, and an organizational chart showing any parent organizations and/or subsidiaries and affiliates;

l. A legal opinion (as set forth in the application) that: (1) Addresses the applicant's ability to enter into the award documents; (2) describes all pending litigation matters; and (3) addresses the applicant's ability to pledge security as required by the award documents;

m. Evidence of other Recovery Act awards, or collaboration with other Recovery Act awardees;

n. Summary and itemized budgets of the infrastructure costs of the proposed project, including if applicable, the ratio of loans to grants, and any other source of outside funding, especially any other Recovery Act funds under other Federal programs, and an explanation of the cost per premises passed;

o. A detailed description of working capital requirements and the source of these funds;

p. Historical financial statements, Certified Public Accountant (CPA) audits if applicable, for the previous two calendar years;

q. Pro Forma financial analysis, prepared in conformity with U.S. GAAP and the Agency's guidance on grants accounting, found at <http://www.usda.gov/RUS/pasd/auditreg.htm>, related to the sustainability of the project, including subscriber estimates and other proposed service offerings in addition to broadband Internet access; annual financial projections including balance sheets, income statements, and cash flow statements and supporting assumptions for a five-year forecast period as applicable; and a list of committed sources of capital funding;

r. Attachments required in the application;

s. A self-scoring sheet, analyzing the objective scoring criteria set forth in this NOFA;

t. The pricing package being offered to critical community facilities, or socially and economically disadvantaged small business concern (SDB) as defined under section 8(a) of the Small Business Administration, if any;

u. A list of all the Applicant's outstanding and contingent obligations, including copies of existing notes, loan and security agreements, and guarantees;

v. If an SDB, evidence that the applicant is an SDB;

w. A completed Environmental Questionnaire, other documentation requests, and required environmental authorizations and permits, including those required by the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*) (NEPA), the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470 *et seq.*) (NHPA), and the Endangered Species Act of 1973, as amended (16 U.S.C. 1534 *et seq.*) (ESA) as applicable;

x. A description of measurable service metrics and target service level objectives (SLOs) (*e.g.*, the speed with which new service will be established, service availability, and response time for reports of system failure at a residence) that will be provided to the customer, and a description of the approach and methodology for monitoring ongoing service delivery and service quality for the services being employed;

y. Any waiver requests for projects proposing more than the \$10,000 per premises funding limitation, or for applications requesting more than 75% grant; and

z. Certification from the applicant that agreements with or obligations to investors do not breach the obligations to the government under the draft Award Documents.

## 2. Requirements for Multiple Applications From Same Entity for Last Mile and Middle Mile Projects

a. All of the requirements specified in paragraph (1) of this section, unless specifically provided for in paragraph (b).

b. For existing companies, consolidated pro forma financial statements that include a baseline financial statement for existing operations, which start with the prior two years of the company's financial position, for a five year projected period, with an additional set of financial statements that layer each of the operations for the addition

applications into the baseline statements. In addition, a reconciliation schedule supporting the consolidation of the individual pro forma financial statements for revenue, capital spending, operating expenses, BIP funding and external funding for the company. For Start-up operations, consolidated pro forma financial statements that include the financial statements of the operation included in the application as the baseline financial statements, with an additional set of financial statements that layer each of the operations for the additional applications into the baseline statements. In addition, a reconciliation schedule supporting the consolidation of the individual pro forma financial statements for revenue, capital spending, operating expenses, BIP funding and external funding for the company.

c. A commitment from all investors indicating their willingness to commit funds even if all applications are not funded.

## 3. Requirements for Applications for Satellite Projects

A complete application will include the following:

a. The identity of the Applicant and general Applicant and project information including:

i. A description of the project that will be made public consistent with the requirements of the Recovery Act;

ii. The Congressional Districts affected by the project;

b. An executive summary of the project;

c. A description of the Applicant's ability to cover an entire region;

d. A description of the proposed service offerings and associated pricing plans, which must include a reduction of at least 25 percent of the Applicant's service rates in effect as of December 1, 2009 for at least one year, the provision of no cost CPEs (including no installation, activation, or other hidden fees), and how its rates will be affordable to low-income households. A copy of the service rate plans in effect on December 1, 2009, must also be included;

e. Resumes of key management personnel, a description of the organization's readiness to manage a broadband services network, and an organizational chart showing any parent organizations and/or subsidiaries and affiliates;

f. A legal opinion (as set forth in the application) that: (1) Addresses the Applicant's ability to enter into the award documents; (2) describes all pending litigation matters; and (3)

addresses the Applicant's ability to pledge security as required by the award documents;

g. An itemized budget of the costs of the proposed project;

h. Pro Forma financial analysis related to the sustainability of the project, including subscriber estimates and proposed service offerings in addition to broadband Internet access; annual financial projections including balance sheets, income statements, and cash flow statements and supporting assumptions for a five-year forecast period as applicable; and a list of committed sources of capital funding;

i. Historical financial statements, Certified Public Accountant (CPA) audits if applicable, for the previous two calendar years;

j. Certifications required in the application;

k. The pricing package being offered to critical community facilities, if any;

l. A list of all its outstanding and contingent obligations, including copies of existing notes, loan and security agreements, and guarantees;

m. A detailed description of working capital requirements and the source of these funds;

n. A completed Environmental Questionnaire, other documentation requests, and required environmental authorizations and permits, including those required by the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*) (NEPA), the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470 *et seq.*) (NHPA), and the Endangered Species Act of 1973, as amended (16 U.S.C. 1534 *et seq.*) (ESA) as applicable; and

o. A description of measurable service metrics and target service level objectives (SLOs) (*e.g.*, the speed with which new service will be established, service availability, and response time for reports of system failure at a residence) that will be provided to the customer, and a description of the approach and methodology for monitoring ongoing service delivery and service quality for the services being employed.

## D. Material Representations

The application, including certifications, and all forms submitted as part of the application will be treated as a material representation of fact upon which RUS will rely in awarding grants.

## VI. Application Evaluation Criteria

### A. Evaluation Criteria for Last Mile and Middle Mile Projects

Each application will be scored against the following objective criteria, and not against other applications.

#### 1. Proportion of Rural Residents Served in Unserved Areas (10 Points)

Points will be awarded for serving rural residents located in unserved areas. For every 10 percent of unserved households compared to the total households to be served that will receive broadband service, 1 point will be awarded up to a maximum of 10 points. For Middle Mile projects, this will be based on the location of the interconnection points.

#### 2. Rural Area Targeting (10 Points)

Points will be awarded for exceeding the 75 percent rural area service requirement. For every 5 percent increase in the total proposed funded service area that is above 75 percent rural, 2 points will be awarded up to a maximum of 10 points. For Middle Mile projects, this will be based on the location of the interconnection points.

#### 3. Distance From Non-Rural Areas (5 Points)

Up to 5 points will be awarded for proposed funded service areas that are at least 10 miles from the closest non-rural area. For each additional 10 miles that at least one proposed funded service area is located away from the closest non-rural area, 1 additional point will be awarded up to a total of 5 points. For Applicants with multiple service areas, this calculation will be based on the service area closest to the non-rural area. For Middle Mile projects, this will be based on the location of the interconnection points.

#### 4. Title II Borrowers (8 Points)

Eight points will be awarded to applications which are submitted by entities which have borrowed under Title II of the RE Act.

#### 5. Other Recovery Act Awards (5 Points)

Points will be awarded for cooperation with other Recovery Act programs, where collaboration would lead to greater project efficiencies. In each case, the Applicant must convincingly demonstrate that these leveraging efforts are substantive and meaningful. Five points will be awarded for any cooperation with a Recovery Act award.

#### 6. Performance of the Offered Service (10 Points)

##### a. Last Mile Projects

For wireline projects that are constructed to deliver a minimum of 5 Mbps service to the premises (upstream and downstream combined), 5 points will be awarded. For fixed wireline projects that are constructed to deliver a minimum of 20 Mbps service to the premises (upstream and downstream combined), 10 points will be awarded. For wireless projects that are constructed to deliver a minimum of 3 Mbps service to the end user (upstream and downstream combined), 8 points will be awarded. For mobile wireless projects that are constructed to deliver a minimum of 3 Mbps service to the end user (upstream and downstream combined), 10 points will be awarded. For combination systems, scoring will be based on the predominant technology used.

##### b. Middle Mile Projects

For Middle Mile projects that are constructed to deliver 100 Mbps service to all interconnection points in their network, 10 points will be awarded.

#### 7. Service to Critical Community Facilities and SDBs (6 Points)

For applications that are proposing to offer discounted rate packages to all critical community facilities in the proposed funded service area(s) that are at least 25 percent lower than the proposed base rate packages for at least 3 years, 4 points will be awarded. For applications that are proposing to offer discounted rate packages at least 25 percent lower than the proposed base rate packages to SDBs in the proposed funded service area for at least three years, 2 points will be awarded.

#### 8. Applicant's Organizational Capability (10 Points)

Up to 10 points will be awarded based on the strength of the project's management team. RUS will evaluate past performance and accomplishments and award points accordingly. Details of these requirements will be in the Application Guide.

#### 9. Socially and Economically Disadvantaged Small Business Concern (3 Points)

Three points will be awarded to Applicant SDBs.

#### 10. Leverage of Outside Resources (10 Points)

Up to 10 points will be awarded based on the amount of outside resources contributed to the total financing provided under BIP:

a. 10 points if this ratio is 100 percent.<sup>22</sup>

b. 7 points if this ratio is between 75 percent and 99 percent.

c. 5 points if this ratio is between 50 percent and 74 percent.

d. 3 points if this ratio is between 25 percent and 49 percent.

e. 0 points if the ratio is less than 25 percent.

Outside resources are limited to new investments that are proposed to support the project and do not include any existing assets that the Applicant already owns or has rights to or any revenues generating from the operations.

#### 11. Extent of Grant Funding (15 Points)

Up to 15 points will be awarded based on the amount of grants funds requested in relation to the total amount of the award requested:

a. 0 points if requesting a grant greater than 70 percent.

b. 5 point if requesting a grant between 51 and 70 percent.

c. 10 points if requesting a grant between 16 and 50 percent.

d. 15 points if requesting a grant between 0 and 15 percent.

#### 12. Cost Effectiveness (8 Points)

For Last Mile projects, up to 8 points will be awarded for projects that promote cost effectiveness of Federal assistance, based on cost per premises passed. To calculate the cost per premises passed, the Applicant shall divide the total award requested in the application by the total number of premises passed.

a. 2 points if cost per premises passed is less than \$8,000.

b. 4 points if cost per premises passed is less than \$7,000.

c. 6 points if cost per premises passed is less than \$6,000.

d. 8 points if cost per premises passed is less than \$5,000.

### B. Administrator's Bonus Points (10 points)

The Administrator, at his discretion, can award up to a maximum of 10 bonus points to applications that provide significant assistance to critical community facilities (including libraries), promote rural economic

<sup>22</sup> This ratio is calculated by the amount of new equity that the applicant proposes to support the project compared to the requested amount of the award. For example, if the applicant proposes \$1 million in outside equity and requests \$1 million in assistance, the ratio is \$1 million/\$1 million, or 100 percent. If the applicant proposes \$500,000 in outside equity and requests \$1 million in assistance, the ratio is \$500,000/\$1 million, or 50 percent. This scoring criterion is intended to encourage a public/private partnership.

development, support persistent poverty counties, serve chronically underserved areas, demonstrate cost effectiveness, offer low-cost service options, and/or provide for geographic diversity. However, the Administrator's points may not raise an Applicant's score to more than 100 points.

## VII. Waiver for Grants Capped at 75% of Award for Last Mile and Middle Mile Projects

### A. Waiver Request

All Applicants may request a grant that does not exceed 75 percent of eligible projects. An Applicant may apply for a loan for any eligible project costs not covered by a grant under this NOFA. Applicants requesting more than a 75 percent grant component must request a waiver from the Administrator, demonstrating their need for additional grant funding, as well as the factors set forth in paragraph B of this section. If the waiver request is denied, the application may be adjusted by the Agency if an award is offered or may be placed in the second review process and the Applicant will have an opportunity to revise its funding request. The Administrator may award grants up to 100 percent.

### B. Administrator's Waiver for Grants above 75% Waiver Considerations

The Administrator may grant a request for waiver for a larger grant component based on the following factors:

#### 1. Distance From Non-Rural Areas

The Administrator will consider the distance from the focus of the proposed funded service areas from the closest non-rural area.

#### 2. Rural Area Targeting

The Administrator will consider the percentage of the proposed funded service area that is above the 75 percent requirement.

#### 3. Density

The Administrator will consider the density of the proposed funded service area, calculated from the population and area totals of all proposed funded service areas taken from the mapping tool.

#### 4. Median Household Income

The Administrator will consider the median household income of the proposed funded service area, comparing the county median household income to that of the State median income level. For applications serving multiple counties, the

Administrator will weigh the percentages of all counties.

### 5. Unemployment

The Administrator will consider the state unemployment level compared to the National Unemployment Level in the state of the proposed funded service area. For applications serving multiple states, the Administrator will weigh the percentages in each State.

### C. Notice of Proposed Funded Service Areas for Last Mile and Middle Mile Projects

RUS will post a Public Notice of the proposed funded service areas of each Last Mile application, and the communities in which the interconnection points terminate for Middle Mile applications, as outlined in Section IV.C.5.a(i), at <http://www.broadbandusa.gov> for a 30 day period. The Public Notice will provide existing service providers an opportunity to submit to the agencies information regarding their service offerings. The information submitted by an existing service provider will be treated as proprietary and confidential to the extent permitted under applicable law.

### D. Evaluation and Processing Procedures

#### 1. Last Mile and Middle Mile Projects—First Review

Applications for Last Mile and Middle Mile projects will be evaluated using the criteria stated in Section VII.A of this NOFA. Public comments received with respect to an application's proposed funded service area will be reviewed and evaluated. Eligibility of proposed funded service areas may be verified by Agency field staff. RUS reserves the right to ask Applicants for clarifying information and additional verification of assertions in the application. For those applications that RUS has determined eligible for funding, RUS will send award documents. Applications meeting the guidelines set forth in paragraph D.2 below may be requested to provide additional information to the Agency for a second review.

#### 2. Last Mile and Middle Mile Projects—Second Review

Subject to available funding, Applicants with applications that have not been approved under the first review, may be requested to provide additional information if the application: (a) Can be revised, reviewed, and awarded funds before the expiration of Recovery Act funding, (b) contains specific and limited

adjustments; and (c) promotes significant economic rural development, as determined by the Administrator.

Such Applicants will have no more than 15 days within which to provide the additional information. Applicants will not be permitted to redo the application, but only provide the supplemental information the Agency has requested. The application with the additional information will be reviewed under the same standard as the first review. Any application that is processed under this procedure will be funded only after all properly submitted applications have been funded and will be subject to all applicable requirements under this NOFA. For those applications which the Agency has decided to fund, award documents will be sent.

### 3. Transfer of Applications

For applications that NTIA determines it will not fund, but that may be consistent with RUS' BIP requirements and priorities, NTIA will transfer to BIP for consideration of funding. Notwithstanding, NTIA makes no representation that the application is eligible under the requirements of BIP. Any decision on the funding of such transfers shall ultimately be in the sole discretion of RUS. RUS will handle such applications, if timely received from NTIA, under its Second Review process outlined above.

### 4. Satellite Projects

The United States will be divided into eight service area regions eligible for Satellite applications. Applicants must propose serving only unserved rural premises in any of the eight regions listed in Section IX.T in this NOFA; provided, however, unserved rural premises in proposed funded service areas of Awardees under the First Round NOFA and this NOFA shall not be eligible for services from satellite projects. Applicants may submit an application for more than one region; however, each region in the application must be broken out, so that the Agency can analyze the proposal for each region individually. Applicants are encouraged to serve all unserved rural premises throughout the region on a first-come, first-served basis until the award funds are expended.

Applications will be evaluated using the criteria set forth herein and in the Request for Proposals. Procedures for selection of Awardees to provide satellite service will be set forth in the Request for Proposals to be published at a later date. The deadline for satellite application submissions will be provided in that Request.

## 5. Technical Assistance Grants

Applications for Technical Assistance grants will be evaluated on the extent to which the Awardee of the First Round NOFA or Applicants under this NOFA has considered developing a USDA-approved regional planning organization(s), the strength and scope of the regional broadband development strategy, and the proposed broadband service to be brought to rural areas that remain critically unserved. The proposal should provide various strategies and the anticipated costs of each. Applicants may request up to \$200,000. RUS, in its discretion, may decrease the requested award amount based on its evaluation of the application and the level of funding available for this program.

## 6. Regional Library Broadband Grants

Applications for Regional Library Broadband grants will be accepted from Awardees of the First Round NOFA or Applicants under this NOFA to cover the costs associated with connecting any rural library in their proposed funded service area, that is either being constructed, or to be constructed, with funding from USDA's Community Facilities Program of the Rural Housing Service. Such costs need not have been addressed in the original application submitted under the First Round NOFA or Second Round NOFA. Applications need only address the rural libraries involved, the cost of providing a broadband connection and the date by which such service will be provided. RUS, in its discretion, may increase or decrease the requested award amount based on its evaluation of the reasonableness of the costs and the level of funding available for this program.

## VIII. Award Administration Information

### A. Award Notices

Successful Applicants will receive award documents from RUS following award notification. Applicants may view sample award documents at <http://www.broadbandusa.gov>.

### B. Administrative Requirements

#### 1. Pre-award conditions

No funds will be disbursed under this program until all other sources of funding have been obtained and any other pre-award conditions have been met. Failure to obtain one or more sources of funding committed to in the Application or to fulfill any other pre-award condition within 30 days of award announcement will result in withdrawal of the award.

## 2. Failure To Comply With Award Requirements

If an Awardee fails to comply with the terms of the award as specified in the award documents, RUS may exercise rights and remedies.

## 3. Advance Procedures

RUS loan and grant advances are made at the request of the Awardee according to the procedures stipulated in the award documents. Loan/grant combination funds are advanced in proportion to the amount of the award made in the form of loans and grants.

## 4. Contracting

Contracting is to be done at the Awardee's discretion, using private contracts or RUS' form contracts. However, equal employment opportunity, civil rights, and the requirements of this NOFA must still be met.

## 5. Accounting, Monitoring, and Reporting Requirements

Awardees must follow RUS' accounting, monitoring, and reporting requirements. These requirements, which are specified in the award documents, include, but are not limited to, the following:

a. Awardees must adopt a GAAP system of accounts acceptable to RUS, and which complies with RUS Accounting Requirements, as defined herein;

b. Awardees must submit annual audited financial statements along with a report on compliance and on internal control over financial reporting, and a management letter in accordance with the requirements of 7 CFR part 1773. The CPA conducting the annual audit is selected by the Awardee and must be approved by RUS as set forth in 7 CFR 1773.4;

c. Awardees must submit to RUS the information as specified in Section VIII.D.2 of this NOFA;

d. Awardees must comply with all reasonable RUS requests to support ongoing monitoring efforts. The Awardee shall afford RUS, through its representatives and representatives of the USDA Office of Inspector General reasonable opportunity, at all times during business hours and upon prior notice, to have access to and the right to inspect the broadband system, and any other property encumbered by the mortgage or security agreement, and any or all books, records, accounts, invoices, contracts, leases, payrolls, timesheets, cancelled checks, statements, and other documents, electronic or paper of every kind belonging to or in the possession of the Awardee or in any way pertaining

to its property or business, including its subsidiaries, if any, and to make copies or extracts therefrom.

## 6. Assistance Instruments

a. Terms and conditions of grants or loan/grant combinations are set forth in the non-negotiable standard grant or loan/grant contract, note, and/or mortgage found at <http://www.broadbandusa.gov>.

b. Terms and conditions of loans are set forth in the non-negotiable standard loan contract, note, and/or mortgage found at <http://www.broadbandusa.gov>.

c. Loan and grant documents appropriate to the project must be executed prior to any advance of funds.

d. Sample loan documents and grant agreements can be found at <http://www.broadbandusa.gov>.

## 7. Loan and Loan/Grant Terms and Conditions

The following terms shall apply to the loans, as well as other terms that are specified in the loan documents:

### a. Interest Rate

Loans shall bear interest at a rate equal to the cost of borrowing to the Department of Treasury for obligations of comparable maturity. The applicable interest rate will be set at the time of each advance.

### b. Repayment Period

Unless the Applicant requests a shorter repayment period, broadband loans must be repaid with interest within a period that, rounded to the nearest whole year, is equal to the expected Composite Economic Life of the assets to be financed, as determined by RUS based upon acceptable depreciation rates.

### c. Amortization Period

Interest begins accruing on the date of each loan advance and interest payments are due monthly. After one year from the first advance, monthly principal payments will be established in an amount that amortizes the outstanding balance over the remaining term of the loan.

### d. Fidelity Bonding

Applicants must agree to obtain a fidelity bond for 15 percent of the award amount. The fidelity bond must be obtained as a condition of award closing. RUS may reduce the percentage required if it determines that 15 percent is not commensurate with the risk involved.

#### e. Security

The portion of the award must be adequately secured, as determined by RUS.

i. The loan and loan/grant combination must be secured by the assets purchased with the loan or loan/grant funds, as well as all other assets of the Applicant and any other co-signer of the loan documents that are available to be pledged to RUS.

ii. RUS must be given an exclusive first lien, in form and substance satisfactory to RUS, on all of the assets purchased with the loan or loan/grant funds. RUS may share its first lien position with one or more lenders on a *pari passu* basis if security arrangements are acceptable to RUS.

iii. Unless otherwise approved by RUS, all property purchased with award funds must be owned by the Awardee.

iv. In the case of awards that include financing of facilities that do not constitute self-contained operating systems, the Applicant shall furnish assurances, satisfactory to RUS, that continuous and efficient service at the broadband funding speed will be rendered.

#### C. Award Terms and Conditions

##### 1. Scope

Awardees, including all contractors and subcontractors, are required to comply with the obligations set forth in the Recovery Act and the requirements established herein. Any obligation that applies to the Awardee shall extend for the life of the awarded-funded facilities.

##### 2. Sale or Lease of Project Assets

The sale or lease of any portion of the award-funded broadband facilities shall be governed by the applicable Award Document and the Department's grant regulations at 7 CFR 3015, 3016, and 3019. Unless otherwise permitted in the Award Document, project assets cannot be sold while the loan is outstanding. Terms under which grant assets can be sold are outlined in the Department's grant regulations cited above.

##### 3. Certifications

a. The Applicant must certify that he or she is authorized to submit the application on behalf of the eligible entity(ies) listed on the application; that the Applicant has examined the application, that all of the information in the application, including certifications and forms submitted, all of which are part of the application, are material representations of fact and true and correct to the best of his or her knowledge; that the entity(ies) that is requesting funding pursuant to the

application and any subawardees will comply with the terms, conditions, purposes, and Federal requirements of the program; that no kickbacks were paid to anyone; and that a false, fictitious, or fraudulent statement or claim on this application is grounds for denial or termination of an award, and/or possible punishment by a fine or imprisonment as provided in 18 U.S.C. 1001 and civil violations of the False Claims Act (31 U.S.C. 3729 *et seq.*);

b. The Applicant certifies that the entity(ies) he or she represents have and will comply with all applicable Federal, state, and local laws, rules, regulations, ordinances, codes, orders, and programmatic rules and requirements relating to the project.<sup>23</sup> The Applicant acknowledges that failure to do so may result in rejection or deobligation of the award. The Applicant acknowledges that failure to comply with all Federal and program rules could result in civil or criminal prosecution by the appropriate law enforcement authorities;

#### D. Reporting Requirements

##### 1. General Recovery Act Requirements

###### a. OMB Reporting Requirements Implementing the Recovery Act

Any grant, loan, or loan/grant combination awarded under this NOFA shall be subject to the applicable statutes and regulations regarding reporting on Recovery Act funds.<sup>24</sup> If Recovery Act funds are combined with other funds to fund or complete projects and activities, Recovery Act funds must be accounted for separately from other funds and reported to RUS or any Federal web site established for Recovery Act reporting purposes. Moreover, recipients of funds under this NOFA must also comply with the accounting requirements as established or referred to in this NOFA.

###### b. Required Data Elements

The Awardee and each contractor engaged by the Awardee must submit the following information to the relevant Agency:

- i. The total amount of Recovery Act funds received;
- ii. The amount of Recovery Act funds received that were expended or obligated to projects or activities;

<sup>23</sup> See Recovery Act sec. 6001(e)(4), 123 Stat. at 514.

<sup>24</sup> See, e.g., 2 CFR part 176; OMB, Interim Final Guidance for Federal Financial Assistance, 74 FR 18449 (Apr. 23, 2009); Implementing Guidance for Reports on Use of Funds Pursuant to the American Recovery and Reinvestment Act of 2009 (OMB M-09-21 June 22, 2009); and Updated Guidance on the American Recovery and Reinvestment Act of 2009 (OMB M-10-08 Dec. 18, 2009).

iii. A detailed list of all projects or activities for which Recovery Act funds were expended or obligated, including (1) the name of the project or activity; (2) a description of the project or activity; (3) an evaluation of the completion status of the project or activity; (4) an estimate of the number of jobs created and the number of jobs retained by the project or activity; and (5) for infrastructure investments made by state and local governments, the purpose, total cost, and rationale of the Agency for funding the infrastructure investment with Recovery Act funds, and name of the person to contact at the Agency if there are concerns with the infrastructure investment; and

iv. Detailed information on any subcontracts or subgrants awarded by the Awardee to include the data elements required to comply with the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109-282, 120 Stat. 1186 (to be codified at 31 U.S.C. 6101 note)), allowing aggregate reporting on awards below \$25,000 or to individuals.<sup>25</sup>

Awardees that must report information according to paragraph b(iv) of this section (re: subcontracts or subgrants) must register with the CCR database (<http://www.ccr.gov/>) or complete other registration requirements as determined by the Director of OMB.

##### c. Reporting Deadlines

Recovery Act reports are due to the agencies 10 days after the quarter in which the award was issued ends and, unless otherwise noted, each quarter thereafter in which the Awardee receives financial assistance. The final report should summarize the Awardee's quarterly filings and state whether the project's goals have been satisfied. Pursuant to OMB Guidelines, reports should be submitted electronically to <http://www.federalreporting.gov>. If the Awardee fails to submit an acceptable quarterly report or audited financial statement within the timeframe designated in the grant or loan award, the agencies may suspend further payments until the Awardee complies with the reporting requirements. Additional information regarding reporting requirements will be specified at the time the award is issued.

##### 2. BIP-Specific Reporting Requirements

In addition to the general Recovery Act reporting requirements, BIP Awardees shall also report on the information requested below:

<sup>25</sup> Recovery Act sec. 1512(c), 123 Stat. at 287.

a. Awardees must submit to RUS 30 calendar days after the end of each calendar year quarter, balance sheets, income statements, statements of cash flow, rate package summaries, and the number of customers taking broadband service on a per community basis utilizing RUS' Broadband Collection and Analysis System (BCAS). BCAS is an electronic reporting system that is accessed through the Internet.

b. Annually on January 31, starting the first January 31 after completion of the project, Awardees must submit to RUS, using the electronic reporting system provided by RUS:

- i. Number of households and businesses subscribing to broadband service;
- ii. Number of households and businesses subscribing to broadband service that receive improved access; and
- iii. Number of educational, library, healthcare, and public safety providers receiving either new or improved access to broadband service.

c. Awardees shall specifically state in the applicable quarter when they have received 67 percent of the award funds. Reaching this threshold will indicate that the Awardee has substantially completed its project.

d. The obligation to report under this section shall exist while the Awardee has an outstanding loan/grant combination, or for a grant only, for five years from the date of the completion of the project.

## IX. Other Information

### A. Funding Rounds

This is the final funding round for BIP.

### B. Discretionary Awards

The government is not obligated to make any award as a result of this announcement, and will fund only projects that are deemed likely to achieve the program's goals and for which funds are available.

### C. Limitation on Expenditures

The Recovery Act imposes an additional limitation on the use of funds expended or obligated from appropriations made pursuant to its provisions. Specifically, for purposes of this NOFA, none of the funds appropriated or otherwise made available under the Recovery Act may be used by any State or local government, or any private entity, for any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool.<sup>26</sup>

<sup>26</sup> *Id.* Sec. 1604, 123 Stat. at 303.

### D. Recovery Act Logo

All projects that are funded by the Recovery Act shall display signage that features the Primary Emblem throughout the construction phase. The signage should be displayed in a prominent location on site. Some exclusions may apply. The Primary Emblem should not be displayed at a size less than six inches in diameter.

### E. Environmental and National Historic Preservation Requirements

Awarding agencies are required to analyze the potential environmental impacts, as required by the NEPA and the NHPA for Applicant projects or proposals seeking Recovery Act funding. All Applicants are required to complete the Environmental Questionnaire under the description of program activities and to submit all other required environmental documentation with the application.

It is the Applicant's responsibility to obtain all necessary Federal, State, and local governmental permits and approvals necessary for the proposed work to be conducted. Applicants are expected to design their projects so that they minimize the potential for adverse impacts to the environment. Applicants also will be required to cooperate with the granting agencies in identifying feasible measures to reduce or avoid any identified adverse environmental impacts of their proposed projects. The failure to do so may be grounds for not making an award.

Applications will be reviewed to ensure that they contain sufficient information to allow Agency staff to conduct a NEPA analysis so that appropriate NEPA documentation can be submitted to the agencies, along with the recommendation for funding of the selected applications. Applicants proposing activities that cannot be covered by existing environmental compliance procedures will be informed after the technical review stage whether NEPA compliance and other environmental requirements can otherwise be expeditiously met so that a project can proceed within the timeframes anticipated under the Recovery Act.

If additional information is required after an application is accepted for funding, funds can be withheld by the agencies under a special award condition requiring the Awardee to submit additional environmental compliance information sufficient for the Agency to make an assessment of any impacts that a project may have on the environment.

### F. Davis-Bacon Wage Requirements

Pursuant to section 1606 of the Recovery Act, any project using Recovery Act funds requires the payment of not less than the prevailing wages for "all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government."<sup>27</sup>

### G. Financial and Audit Requirements

To maximize the transparency and accountability of funds authorized under the Recovery Act, all Applicants are required to comply with the applicable regulations set forth in OMB's Interim Final Guidance for Federal Financial Assistance.<sup>28</sup>

Recipients that expend \$500,000 or more of Federal funds during their fiscal year are required to submit an organization-wide financial and compliance audit report. The audit must be performed in accordance with the U.S. General Accountability Office, Government Auditing Standards, located at <http://www.gao.gov/govaud/ybk01.htm>, and OMB Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations, located at <http://www.whitehouse.gov/omb/circulars/a133/a133.html>. Awardees are responsible for ensuring that sub-recipient audit reports are received and for resolving any audit findings.

### H. Deobligation

The RUS reserves the right to deobligate awards to recipients under this NOFA that demonstrate an insufficient level of performance, or wasteful or fraudulent spending, and award these funds competitively to new or existing Applicants prior to September 30, 2010.

### I. Confidentiality of Applicant Information

Applicants are encouraged to identify and label any confidential and proprietary information contained in their applications. The Agency will protect confidential and proprietary information from public disclosure to the fullest extent authorized by applicable law, including the Freedom of Information Act, as amended (5 U.S.C. 552), the Trade Secrets Act, as amended (18 U.S.C. 1905), the Economic Espionage Act of 1996 (18 U.S.C. 1831 *et seq.*), and CALEA (47 U.S.C. 1001 *et seq.*). Applicants should be aware, however, that the Recovery

<sup>27</sup> *Id.* Sec. 1606, 123 Stat. at 303.

<sup>28</sup> See OMB, Interim Final Guidance for Federal Financial Assistance, 74 FR 18449 (Apr. 23, 2009).

Act requires substantial transparency. For example, RUS is required to make publicly available on the Internet a list of each entity that has applied for a grant, a description of each application, the status of each application, the name of each entity receiving funds, the purpose for which the entity is receiving the funds, each quarterly report, and other information.<sup>29</sup>

#### J. Disposition of Unsuccessful Applications

Applications accepted for review for Fiscal Year 2010 BIP will be retained for two years, after which they will be destroyed.

#### K. State Certifications

With respect to funds made available under Recovery Act to state or local governments for infrastructure investments, the governor, mayor, or other chief executive, as appropriate, must certify that the infrastructure investment has received the full review and vetting required by law and that the chief executive accepts responsibility that the infrastructure investment is an appropriate use of taxpayer dollars. This certification must include a description of the investment, the estimated total cost, and the amount of funds to be used, and must be posted on the recipient's Web site and linked to <http://www.recovery.gov>. A state or local Agency may not receive infrastructure investment funding from funds made available under the Recovery Act unless this certification is made and posted.<sup>30</sup>

#### L. Compliance With Applicable Laws

Any recipient of funds under this NOFA shall be required to comply with all applicable Federal and state laws, including but not limited to: i. The nondiscrimination and equal employment opportunity requirements of Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e *et seq.*; 7 CFR part 15); ii. section 504 of the Rehabilitation Act (29 U.S.C. 794 *et seq.*; 7 CFR part 15b); iii. The Age Discrimination Act of 1975, as amended (42 U.S.C. 6101 *et seq.*; 45 CFR part 90); iv. Executive Order 11375, amending Executive Order 11246, Relating to Equal Employment Opportunity (3 CFR part 102). See 7 CFR parts 15 and 15b and 45 CFR part 90, 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"). The RUS Bulletins are available at <http://www.broadbandusa.gov>; v. The Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151 *et seq.*); vi. The Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 CFR subpart 101-19.6); and vii. The Council on Environmental Quality Regulations for Implementing the Procedural Provisions of NEPA and certain related Federal environmental laws, statutes, regulations, and Executive Orders found in 7 CFR part 1794. A more complete list of such requirements can be found in the applicable grant agreement or loan contract.

#### M. Communications Laws

Awardees, and in particular, Broadband Infrastructure Awardees, will be required to comply with all applicable Federal and State communications laws and regulation as applicable, including, for example, the Communications Act of 1934, as amended, (47 U.S.C. 151 *et seq.*) the Telecommunications Act of 1996, as amended (Pub. L. 104-104, 110 Stat. 56 (1996), and CALEA. For further information, see <http://www.fcc.gov>.

#### N. Buy American Notice

##### 1. General Prohibition and Waiver

None of the funds appropriated or otherwise made available by the Recovery Act may be used for the construction, alteration, maintenance, or repair of a public building or public work (as such terms are defined in 2 CFR 176.140) unless all of the iron, steel, and manufacturing goods used in the project are produced in the United States.<sup>31</sup> On July 1, 2009, the Department of Agriculture published a notice in the **Federal Register** at 74 FR 31402 stating that the Secretary of Agriculture has determined that applying the Buy American provision for the use of certain broadband equipment in public BIP projects would be inconsistent with the public interest.

As explained below, to the extent that an Applicant wishes to use broadband equipment or goods that are not covered by the Secretary's waiver, it may seek an additional waiver on a case-by-case basis as part of its application for Recovery Act funds.

##### 2. OMB Buy American Notice Requirement

Pursuant to OMB guidance on the Recovery Act,<sup>32</sup> RUS is required to

provide notice as prescribed at 2 CFR 176.170.

Section 176.170: Notice of Required Use of American Iron, Steel, and Manufactured Goods (covered under International Agreements)—Section 1605 of the American Recovery and Reinvestment Act of 2009.

When requesting applications or proposals for Recovery Act programs or activities that may involve construction, alteration, maintenance, or repair of a public building or public work, and involve iron, steel, and/or manufactured goods covered under international agreements, the agency shall use the notice described in the following paragraphs in the solicitation:

(a) *Definitions. Designated country iron, steel, and/or manufactured goods, foreign iron, steel, and/or manufactured good, manufactured good, public building and public work, and steel, as used in this provision, are defined in 2 CFR 176.160(a).*

(b) *Requests for determinations of inapplicability.* A prospective applicant requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) should submit the request to the award official in time to allow a determination before submission of applications or proposals. The prospective Applicant shall include the information and applicable supporting data required by 2 CFR 176.160 (c) and (d) in the request. If an Applicant has not requested a determination regarding the inapplicability of section 1605 of the Recovery Act before submitting its application or proposal, or has not received a response to a previous request, the Applicant shall include the information and supporting data in the application or proposal.

(c) *Evaluation of project proposals.* If the Federal Government determines that an exception based on unreasonable cost of domestic iron, steel, and/or manufactured goods applies, the Federal Government will evaluate a project requesting exception to the requirements of section 1605 of the Recovery Act by adding to the estimated total cost of the project 25 percent of the project cost if foreign iron, steel, or manufactured goods are used based on unreasonable cost of comparable domestic iron, steel, or manufactured goods.

(d) *Alternate project proposals.*

(1) When a project proposal includes foreign iron, steel, and/or manufactured goods, other than designated country iron, steel, and/or manufactured goods, that are not listed by the Federal Government in this Buy American

<sup>29</sup> See Recovery Act sec. 6001(j)(5), 123 Stat. at 515.

<sup>30</sup> See *id.* §§ 1511, 1526, 123 Stat. at 287, 293.

<sup>31</sup> *Id.* Sec 1605, 123 Stat. at 303.

<sup>32</sup> See 2 CFR part 176.

notice in the request for applications or proposals, the Applicant may submit an alternate proposal based on use of equivalent domestic or designated country iron, steel, and/or manufactured goods.

(2) If an alternate proposal is submitted, the Applicant shall submit a separate cost comparison table prepared in accordance with paragraphs 2 CFR 176.160(c) and (d) for the proposal that is based on the use of any foreign iron, steel, and/or manufactured goods for which the Federal Government has not yet determined an exception applies.

(3) If the Federal Government determines that a particular exception requested in accordance with 2 CFR 176.160(b) does not apply, the Federal Government will evaluate only those proposals based on use of the equivalent domestic or designated country iron, steel, and/or manufactured goods, and the Applicant shall be required to furnish such domestic or designated country items.

*O. Executive Order 12866*

This notice has been determined to be “economically significant” under Executive Order 12866. The Recovery Act also appropriates \$2.5 billion to RUS for broadband grants and loans. Awards must be made no later than September 30, 2010. In accordance with Executive Order 12866, an economic analysis was completed outlining the costs and benefits of implementing each of these programs. The complete analysis is available from RUS upon request.

*P. Executive Order 13132*

It has been determined that this notice does not contain policies with federalism implications as that term is defined in Executive Order 13132.

*Q. Administrative Procedure Act Statement*

This NOFA is being issued without advance rulemaking or public comment. The Administrative Procedure Act of 1946, as amended (5 U.S.C. 553) (APA), has several exemptions to rulemaking requirements. Among them is an exemption for “good cause” found at 5 U.S.C. 553(b)(B), which allows effective government action without rulemaking procedures where withholding the action would be “impracticable, unnecessary, or contrary to the public interest.”

USDA has determined, consistent with the APA that making these funds available under this NOFA for broadband development, as mandated by the Recovery Act, is in the public interest. Given the emergency nature of the Recovery Act and the extremely short time period within which all funds must be obligated, withholding this NOFA to provide for public notice and comment would unduly delay the provision of benefits associated with these broadband initiatives and be contrary to the public interest.

For the same reasons, the Agency finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effectiveness for this action. Because notice and opportunity for comment are not required pursuant to 5 U.S.C.

553(d)(3) or any other law, the analytical requirements of the Regulatory Flexibility Act of 1980, as amended (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

*R. Paperwork Reduction Act*

Copies of all forms, regulations, and instructions referenced in this NOFA may be obtained from RUS by e-mailing [BroadbandUSA@usda.gov](mailto:BroadbandUSA@usda.gov). Data furnished by the Applicants will be used to determine eligibility for program benefits. Furnishing the data is voluntary; however, the failure to provide data could result in program benefits being withheld or denied.

The collection of information is vital to RUS to ensure compliance with the provisions of this Notice and to fulfill the requirements of the Recovery Act. The information collection requirements contained in the NOFA have been approved by the Office of Management and Budget (OMB) under OMB Control Number 0572–0142.

The agency expects to request emergency clearance from OMB and to publish a notice seeking public comment on the information collection requirements of the Satellite, Technical Assistance, and Libraries programs at a later date.

*S. Recovery Act*

Additional information about the Recovery Act is available at <http://www.Recovery.gov>.

*T. Satellite Regions*

Region 1	Region 2	Region 3	Region 4	Region 5	Region 6
State	State	State	State	State	State
Washington Oregon California Nevada Idaho Utah Arizona	Montana Wyoming North Dakota South Dakota Nebraska Minnesota Iowa Wisconsin Illinois	Colorado New Mexico Kansas Oklahoma Texas Missouri Arkansas Louisiana	Michigan Indiana Ohio Kentucky West Virginia Pennsylvania Virginia	Tennessee Mississippi Alabama Georgia Florida South Carolina North Carolina	Maryland Delaware New Jersey New York Connecticut Rhode Island Massachusetts New Hampshire Vermont Maine

Region Seven—Alaska

Region Eight—Hawaii

*U. Authorized Signatories*

Only authorized grant and loan officers can bind the Government to the expenditure of funds.

Dated: January 15, 2010.

**Jonathan Adelstein,**

*Administrator, Rural Utilities Service.*

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