

**A SUMMARY OF THE BIP/BTOP  
NOTICE OF FUNDS AVAILABILITY**

July 2, 2009

Yesterday, the National Telecommunications and Information Administration (NTIA) and the Rural Utilities Service (RUS) jointly released a Notice of Funds Availability (NoFA) announcing the process by which applicants can secure funding for broadband projects under the American Recovery and Reinvestment Act of 2009 (ARRA). A copy of the NoFA is available at [http://broadbandusa.sc.egov.usda.gov/files/BB%20NoFA%20FINAL%20with%20disclaimer\\_1.pdf](http://broadbandusa.sc.egov.usda.gov/files/BB%20NoFA%20FINAL%20with%20disclaimer_1.pdf).

The key dates for potential applicants for this first tranche of funding:

July 7, 2009	Application form becomes available.
July 7-24, 2009	Various NTIA/RUS workshops for potential applicants
July 14, 2009	Window opens for filing of applications
August 14, 2009	Deadline for submission of applications
November 7, 2009	Approximate date for commencement of awards

The purpose of this memorandum is to provide a quick turn-around, high-level summary of the more significant decisions made by NTIA and RUS as to how the ARRA will be implemented. The NoFA is dense with detail in its 120+ pages, and of necessity many of those details are not addressed here. In addition, with respect to the NTIA Broadband Technology Opportunities Program (BTOP), our focus is primarily on the provisions relating to the funding of broadband infrastructure, not community computer centers or demand-side programs. Finally, the application form itself will not be available until July 7<sup>th</sup>, and it would not be surprising if that document imposes requirements in addition to those spelled out in the NoFA.

The NoFA includes some surprises. Far more than a third of the ARRA broadband funds are allocated to the first tranche. The RUS grant-to-loan ratio is tilted far more heavily towards grants than most expected. There is far less time to prepare applications for the first tranche than had been anticipated. And, although there is just one NoFA and there will be just one application form, BTOP and the Broadband Initiatives Program (BIP) – the new name for the RUS ARRA program – are very different programs that will be administered in very different ways. In addition, the non-discrimination and interconnection obligations and definitions of “unserved” and “underserved” are significant. Forget what you thought you knew – the NoFA, along with the documents referenced in it and the materials being posted by NTIA and RUS at <http://www.broadbandusa.gov> are must reading for anyone contemplating submission of an application.

## A Summary Of The BIP/BTOP Notice Of Funds Availability

July 2, 2009

Page 2

### **What funding is available under this NoFA?**

The ARRA provides RUS and NTIA with a total of approximately \$7.2 billion dollars for funding of broadband or broadband-related projects. Note that for purposes of the NoFA, all applicants for broadband infrastructure funding, whether from BTOP or BIP, must propose to offer last mile service providing two-way data transmission with advertised speeds of at least 768 kbps downstream and at least 200 kbps upstream to end users or, for middle mile projects, providing sufficient capacity to support the provision of broadband service to end users (p. 18).<sup>1</sup> Approximately \$4 billion (*i.e.*, more than 50% of the total allocated for BTOP and BIP under the ARRA) will be available for funding of projects applied for during the first application window (p. 8). The award of the remaining funds will be addressed in future NoFAs, which may differ significantly from this initial one (p. 87).

The approximately \$4 billion available during the first window will be allocated as follows:

***BIP Funding:*** The ARRA appropriates a total of \$2.5 billion for RUS to distribute to BIP applicants for broadband infrastructure projects, through grants, loans and/or loan guarantees, for broadband infrastructure projects. RUS has announced that it intends to use approximately \$2 billion of this funding to provide grants, with the remaining funds used, in conjunction with leverage, to provide up to \$7 billion in loans, although it has reserved the right to alter the grant-to-loan ratio.

To be eligible for BIP funding, an application must demonstrate that at least 75 percent of the proposed funded service area qualifies as a “rural area without sufficient access to broadband service to facilitate rural economic development.” RUS has determined that to satisfy this benchmark, projects must serve at least 75 percent “unserved” or “underserved” “rural areas”, as each of these terms is defined the NoFA.<sup>2</sup> All applications to fund broadband infrastructure in

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<sup>1</sup> Of course, while this constitutes the minimum requirement, as discussed in the attachment to this summary, both agencies’ scoring criteria provides advantages to those proposing higher-bandwidth services.

<sup>2</sup> An unserved area is defined as one composed of one or more contiguous census blocks, where at least 90 percent of households lack access to facilities-based, terrestrial broadband service, either fixed or mobile, at the minimum broadband transmission speed. A household has access to broadband service “if the household can readily subscribe to that service upon request” (p. 23). Satellite service is excluded from this definition to avoid a finding that no area in the U.S. is unserved (p. 106).

A proposed funded service area may qualify as underserved for Last Mile projects if: 1) no more than 50 percent of the households in the proposed funded service area have access to facilities-based, terrestrial broadband service at greater than minimum broadband transmission speed; 2) no fixed or mobile broadband service provider advertises broadband transmission speeds of at least three megabits per second downstream in the proposed funded service area; or 3) the rate of broadband subscribership for the proposed funded service area is 40 percent of households or less. A proposed funded service area may qualify as underserved for Middle Mile projects if one interconnection

A Summary Of The BIP/BTOP Notice Of Funds Availability

July 2, 2009

Page 3

proposed service areas which are at least 75 percent rural are required to be submitted to RUS for consideration under BIP, but can also be submitted to NTIA for consideration under BTOP. NTIA will review these applications using the BTOP evaluation criteria, but will only grant applications if RUS has determined not to fund the project (p.40).

Nearly all of the \$2.5 billion, *i.e.* approximately \$2.4 billion, has been set aside for funding during the first window (p. 23). Of that amount, up to \$1.2 billion is available for Last Mile projects,<sup>3</sup> with up to \$400 million for grants covering Remote Area projects,<sup>4</sup> and up to \$800 million for loans or loan/grant combinations for Non-Remote projects (pp. 23-24). Last Mile Remote Area projects must predominantly provide broadband directly to the premise or to end users within completely remote areas, while Last Mile Non-Remote Area projects must predominantly provide broadband directly to the premise or to end users that are not exclusively within remote areas. Last Mile Non-Remote Area projects may encompass both remote and non-remote areas, and will be awarded scoring points based upon the remote areas to be served. Projects which include Non-Remote and Remote areas will be funded by loans or loan/grant combinations (p. 9). Up to another \$800 million will be available for loans or loan/grant combinations for Middle Mile projects (p. 24).<sup>5</sup>

RUS retains the discretion to reallocate the funds from one category to another, and to award less than the full amount of the funding available under this NoFA (p. 24). Also, up to \$325,000,000 is available as a “national reserve” that may be used to increase the funding available for specific categories or set aside for future NoFAs (p. 24).

In the case of BIP loans, the interest rate will be set at the time of each advance at the cost of borrowing to the Department of Treasury for obligations of comparable maturity (p. 76). Unless the applicant requests a shorter repayment period, BIP loans must be repaid with interest

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point terminates in a proposed funded service area that qualifies as unserved or underserved for Last Mile projects (p. 22).

A rural area is defined as “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 U.S. Census Bureau” (p. 21-22).

<sup>3</sup> A Last Mile project is “any infrastructure project the predominant purpose of which is to provide broadband service to end users or end-user devices (including households, businesses, community anchor institutions, public safety entities, and critical community facilities)” (p. 20).

<sup>4</sup> A Remote Area is “an unserved, rural area 50 miles from the limits of a non-rural area” (p. 21).

<sup>5</sup> A Middle Mile project is “a broadband infrastructure project that does not predominantly provide broadband service to end users or to end-user devices, and may include interoffice transport, backhaul, Internet connectivity, or special access” (p. 21). It “must connect at least two points without predominantly providing broadband service to the premise or end users, and must be capable of bringing broadband service to eligible service areas” (p. 41).

A Summary Of The BIP/BTOP Notice Of Funds Availability

July 2, 2009

Page 4

within the expected Composite Economic Life of the assets to be financed, as determined by RUS based upon acceptable depreciation rates. Interest begins accruing on the date of each loan advance and interest payments are due monthly. Upon completion of the build-out, or a date certain that is determined at closing, whichever occurs first, monthly principal payments will be established in an amount that amortizes the outstanding balance over the remaining term of the loan. BIP loan awardees must obtain a fidelity bond for 15 percent of the loan amount, unless RUS determines that 15 percent is not commensurate with the risk involved. In addition, the loan portion of the award must be adequately secured, as determined by RUS (p. 76-77).

For BIP loan/grant combinations, the grant component sought may not exceed the loan component (p. 76). RUS will favor applications that propose a higher percentage of loan funds (pp. 9, 76).

BIP will not fund more than one project to serve any given geographic area, and there is uncertainty as to whether it will fund new projects in areas for which RUS funding has already been made available. If more than one application would serve any overlapping geographic area, the application with the highest score will be funded and 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* (p. 32).

***BTOP Funding:*** Up to \$1.6 billion has been set aside for funding of BTOP projects in the first window (p. 25). Of that amount, up to \$1.4 billion has been allocated among three categories: Broadband Infrastructure projects (up to \$1.2 billion); Public Computer Center projects (up to \$50 million); and Sustainable Broadband Adoption projects (up to \$150 million). NTIA retains the discretion to move these funds from one category to another. Funds not distributed in the first window may be used to fund subsequent NoFAs. The “national reserve” for BTOP is set at no more than \$200 million (p. 25).

Absent a waiver, awardees under BTOP will be required to provide matching funds of at least 20 percent toward the total eligible project cost. Generally, federal funds may not be used as matching funds except as provided by federal statute. In-kind contributions, including third party in-kind contributions, may count toward satisfying the non-federal matching requirement if they are allowable project expenses. However, applications that propose to provide matching funds of greater than 20 percent, that provide for all cash matches or that receive matching funds from acceptable federal sources will be given additional favorable consideration in the BTOP application review process (p. 72).

The Broadband Infrastructure category will fund projects that deliver broadband service through two components -- Last Mile and Middle Mile facilities -- to unserved and underserved areas (p. 12).

## A Summary Of The BIP/BTOP Notice Of Funds Availability

July 2, 2009

Page 5

The Public Computer Center category will fund projects that expand public access to broadband service and enhance broadband capacity at entities, such as community colleges and public libraries, that permit the public to use these computing centers (p. 12). Applicants must have a project that provides broadband access to the general public or a specific vulnerable population, such as low-income, unemployed, aged, children, minorities and people with disabilities (p. 42). Further, eligible projects “must create or expand a public computer center meeting a specific public need for broadband service, including but not limited to education, employment, economic development, and enhanced service for health-care delivery, children, and vulnerable populations” (p. 42).

Lastly, the Sustainable Broadband Adoption category will fund “innovative projects that promote broadband demand, including projects focused on providing broadband education, awareness, training, access, equipment or support, particularly among vulnerable population groups where broadband technology has traditionally been underutilized” (p. 12). Applications for such projects should demonstrate a “sustainable increase in demand for and subscribership to broadband services” and “meet a specific public need for broadband service, including, but not limited to, education, employment, economic development, and enhanced service for health-care delivery, children, and vulnerable populations” (p. 43).

### **Who is eligible to participate?**

Pursuant to Section 6001(e)(1)(C) of the ARRA, the NTIA Administrator has found that it is in the public interest to open BTOP funding opportunities to commercial entities. Thus, eligibility for both BTOP and BIA is open to state and local governmental entities, the District of Columbia, territories and possessions of the US, Indian tribes, native Hawaiian organizations, non-profit organizations, for-profit corporations, limited liability companies and cooperative or mutual organizations (pp. 26-27).

### **How can the funding be used?**

In addition to the requirements and restrictions set forth above, the NoFA establishes a variety of additional limits on what projects will be funded by BTOP and BIP and how awards can be used. Eligible costs must be “reasonable, allocable, necessary to the project, and comply with the funding statute requirements.” (p. 35). “Any application that proposes to use any portion of the award funds for any ineligible cost will be rejected” (p. 35).

For all broadband infrastructure projects,<sup>6</sup> funds may be used to fund the construction or improvement of all facilities required to provide broadband service. For BIP only, permissible

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<sup>6</sup> Detailed specifications regarding eligible and ineligible costs for Public Computer Centers and Sustainable Broadband Adoption is set forth at pages 37-39 of the NoFA.

## A Summary Of The BIP/BTOP Notice Of Funds Availability

July 2, 2009

Page 6

expenses can include expenses for facilities required to provide other services over the same facilities as are used for broadband. Permissible expenses can include the cost for five years of leasing facilities required to provide broadband service if such lease qualifies as a capital lease under GAAP. In addition, awards can be used to cover reasonable pre-application expenses in an amount not to exceed five percent of the award so long as they are incurred after the publication of the NoFA. For BTOP, awards can be used to fund such other projects and activities as the NTIA Administrator finds to be consistent with BTOP (p. 36).

The NoFA identifies a variety of prohibitions on how award funds may be used, barring: (i) funding operating expenses; (ii) funding costs incurred prior to the date on which the application is submitted, except for the permissible pre-application expenses noted above; (iii) funding broadband facilities leased under the terms of an operating lease; (iv) funding a merger or consolidation of entities; or (v) funding costs incurred in acquiring spectrum as part of an FCC auction or in a secondary market acquisition (p. 36).

### **What is the application process?**

As noted above, the application to be submitted will not be available until July 7<sup>th</sup>. It will be available at [http://broadbandusa.sc.egov.usda.gov/download\\_app.htm](http://broadbandusa.sc.egov.usda.gov/download_app.htm). Completed applications for funds under this NoFA can be filed from July 14<sup>th</sup> until August 14<sup>th</sup>. All applications must be filed electronically, save for those submitted by persons with disabilities or those requesting less than \$1 million (p. 55), which can be filed on paper. At a minimum, applications will be required to contain the information set forth in Section VI.D of the NoFA for so-called “step one” filings, discussed below, as well as any other information required by the NoFA, the application form, or the ARRA. The applications will be evaluated under the process described in the following section of this summary.

Although we will not know precisely what is required of an applicant until the application form is available for review, the NoFA does set forth many material requirements. In addition to the elements discussed above, for example, all BIP and BTOP applications are required to demonstrate an ability to “substantially complete” their projects within two years of award and to “fully complete” them within three years of the award (pp. 24, 26). A BIP project is “substantially complete” when the awardee has received 67% of its award funds, while a BTOP project is “substantially complete” when the awardee has met 67% of the project milestones and has received 67% of its award funds (p. 28). Along similar lines, only projects that RUS and NTIA determine to be technically feasible are eligible for funding, and applications seeking in excess of \$1 million must include a system design and timeline certified by a professional engineer (p. 28). BIP requires that an applicant demonstrate that, upon receipt of the grant and/or loan, the project will be “fully funded” (p. 32) and that the application is financially feasible and sustainable (pp. 32-33). BTOP requires a demonstration that the project advances

A Summary Of The BIP/BTOP Notice Of Funds Availability

July 2, 2009

Page 7

one of the statutory purposes for BTOP<sup>7</sup> and that the applicant can satisfy the 20% matching funds requirement discussed above, unless a waiver is sought (p. 33).

The NoFA provides guidance to BTOP applicants regarding the ARRA requirement that applicants demonstrate the project could not be completed within the grant period absent federal assistance. According to the NoFA, the requisite documentation that must be submitted with the application “may consist of, but is not limited to, such items as a denial of funding from a public or private lending institution, denial of a funding request from RUS for a loan or loan/grant combination, a current fiscal year budget that shows the lack of available revenue options for funding the project, or a business case that demonstrates that the project would not be economically feasible without grant financing” (p. 34). BTOP will only fund projects where the applicant demonstrates that its budget is appropriate, its costs reasonable, and the allocation of funds sufficient to complete the project (pp. 34-35).

The NoFA also specifies certain environmental and historic preservation milestones. Documentation of environmental compliance for broadband infrastructure projects will not be required to accompany initial applications. Although we will not know for certain until the application is released, it appears that applicants may be required to provide some sort of environmental certification in their initial filing. However, applicants for BTOP and BIP broadband infrastructure projects<sup>8</sup> advancing to the step two “due diligence” phase described below will be required to submit additional information by filing a “Completed Environmental Questionnaire,<sup>9</sup> [responding to] other documentation requests, and [providing] required environmental authorizations and permits, including those required by...the National Environmental Policy Act of 1969...the National Historic Preservation Act of 1966, and the Endangered Species Act of 1973” (p. 49). The NoFA also warns that “if additional information is required after an application is accepted for funding” that funds can be withheld under a

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<sup>7</sup> Those purposes include: “a) providing access to broadband service to consumers residing in unserved areas of the country; (b) to provide improved access to broadband service to consumers residing in underserved areas of the country; (c) to provide broadband access, education, awareness, training, equipment, and support to community anchor institutions or organizations and agencies serving vulnerable populations or job creating strategic facilities located in state- or federally-designed economic development areas; (d) to improve access to, and use of, broadband service by public safety agencies; and (e) to stimulate the demand for broadband, economic growth, and job creation” (p. 11).

<sup>8</sup> For Public Computer Centers and Sustainable Broadband Adoption applications, the NoFA handles the environmental requirements somewhat differently. Without mentioning a two-step review process, the NoFA states that these applications must contain an “environmental checklist and applicable certifications.” While there is no mention of an Environmental Questionnaire in the sections dealing specifically with Public Computer Centers and Sustainable Broadband Adoption applications, the NoFA does state that “[a]ll applicants are required to complete the Environmental Questionnaire under the description of program activities and to submit all other required environmental documentation during step two of the application process.” Thus, until the application is released, it is unclear whether the checklist and certifications will be required in the initial filing.

<sup>9</sup> This Environmental Questionnaire is not yet available.

## A Summary Of The BIP/BTOP Notice Of Funds Availability

July 2, 2009

Page 8

special award condition “requiring the awardee to submit additional environmental compliance information” for the agency to make an assessment as to the environmental impact.

Pages 43 through 55 of the NoFA set forth a variety of additional application requirements for various types of projects funded by BIP and BTOP, and should be reviewed carefully by potential applicants. In addition, postings at <http://www.broadbandusa.gov> provide additional guidance as to how to satisfy several of the requirements set forth in this section of the NoFA (such as the mapping requirements) and should be consulted.

The NoFA alerts applicants that while they are “encouraged to identify and label any confidential and proprietary information” in their applications and that the agencies will protect such information to the extent permitted under applicable law, the ARRA requires substantial transparency that mandates certain public disclosures (p. 90).

RUS and NTIA will post a Public Notice of the proposed funded service areas of each broadband infrastructure application 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 own service offerings relating to the accuracy of the applicant’s contention that the proposed service area is actually unserved or underserved (p. 72).

RUS and NTIA intend to begin announcing awards on or about November 7, 2009 (p. 73). Awards will be made on a rolling basis subject to availability of funds (p. 17). The NoFA establishes a variety of administrative, accounting and reporting requirements that will be imposed on awardees (pp. 74-86).

### **How will applications be evaluated?**

RUS and NTIA have adopted somewhat different procedures for evaluating applications for BIP and BTOP funding, although both will employ a two-step evaluation process. They are each summarized below.

#### *BTOP Application Evaluation*

Under the BTOP process (pp 14-15), NTIA will first conduct an initial screen of applications to determine whether an application meets the various mandatory threshold requirements set forth in the NoFA for step one applications. Applicants that fail this review will be notified of the reason, while those that pass will proceed to the step one review process. The applications then will be reviewed by at least three independent peer/expert reviewers against the step one eligibility requirements, as well as against the scoring criteria provided in the NoFA. An outline of the scoring criteria is attached to this summary. Each reviewer will independently score the application, and reviewer scores will be averaged. Based on these scores, applications

A Summary Of The BIP/BTOP Notice Of Funds Availability

July 2, 2009

Page 9

that are considered the most highly qualified will advance to the step two, "due diligence," review for further consideration. All other applications will be rejected, and the applicants notified of the reason. Step two will be announced no earlier than September 14, 2009, and the information required from applicants will be due by October 15, 2009, or, alternatively, 30 days after the applicant has received a request from NTIA to provide such information, whichever is later.

During step two of the BTOP process, the remaining applicants will be asked to submit additional information, as appropriate, such as more detailed plans or supporting documents to further substantiate the representations made in their application. The supplemental information will be reviewed and analyzed by NTIA staff with the support of external engineering, business, and subject-matter experts to evaluate the consistency of the applications with the supporting documents and ensure applications merit awards. Applicants whose supporting documents do not adequately substantiate the representations in their application may be rejected, and the applicants notified of the reason.

Upon completion of its due diligence, NTIA program staff will assign a rating based on its consistency with the representations made in the application and conformity with the information already provided, especially on technical and budget considerations.

Each state will have an opportunity to make recommendations concerning the allocation of BTOP (but not BIP) funds for qualifying projects in or affecting the state during step two of the BTOP application process. During this phase of the BTOP application process, the Governor's office of each state will receive a list of the applications under consideration. States will have 20 days to provide a list and prioritization of recommended projects, along with an explanation of why the selected proposals meet the greatest needs of the state. States are "strongly encouraged," but not required, to provide mapping and planning data to support their recommendations (p. 15). Upon completion of the step two review, NTIA reserves the right to discuss with the applicant specific modifications to the application to resolve any differences that may exist between the applicant's original request and what NTIA is willing to fund (pp. 15-16).

The BTOP Director will then prepare and present a package of recommended grant awards to the Associate Administrator for the Office of Telecommunications and Information Applications (OTIA Associate Administrator) for review and approval. The BTOP Director's recommendations and the OTIA Associate Administrator's review and approval will take into account the following selection factors:

- a. The Evaluation Criteria Review score of the peer/expert reviewers;
- b. The Due Diligence Review rating of the federal reviewers and the analysis of NTIA program staff;

A Summary Of The BIP/BTOP Notice Of Funds Availability

July 2, 2009

Page 10

- c. Satisfaction of the program's purpose and priorities as described in the section entitled "Program Description" (e.g., considering whether the applicant is a socially and economically disadvantaged small business concern; ensuring that service for health care delivery, education, and children is enhanced to the greatest population of users; improve access to and use by public safety; ensuring that the greatest broadband speed is provided to the greatest population of users as set forth in the ARRA; providing broadband access to consumers in unserved areas; improving broadband service in underserved areas);
- d. The geographic distribution of the proposed grant awards and diversity of populations served (e.g., ensuring that, to the extent practical, NTIA award not less than one grant in each state as set forth in the ARRA);
- e. The range of technologies and uses of the technologies employed by the proposed grant awards;
- f. Avoidance of redundancy, conflicts with the initiatives of other federal agencies, including Department of Agriculture loan and grant programs for broadband services, and, to the extent practical, avoidance of unjust enrichment;
- g. The availability of funds; and
- h. If applicable, the recommendations of states, including, but not limited to, such recommendations as described in their application for the State Broadband Data and Development Grant Program or as subsequently provided to NTIA either on its own or along with the submission of state-level broadband maps.

Upon approval by the OTIA Associate Administrator, the BTOP Director's recommendation will then be presented to the Selecting Official, the Assistant Secretary of NTIA. The Assistant Secretary selects the applications for grant awards, taking into consideration the BTOP Director's recommendations and the degree to which the application package, taken as a whole, satisfies the selection factors described above and the program's stated purposes and priorities.

*BIP Application Evaluation*

Like NTIA, RUS has adopted a two-phase application process. Step one of the application process requires the submission of the information described in Section VI.D.1.a of the NoFA. This information will be evaluated by RUS for completeness and eligibility. Ineligible and incomplete applications will be rejected. Eligible applications will be evaluated and ranked based on the applicable scoring criteria summarized in the attachment to this summary. Under step two will engage in a less subjective evaluation, as the scoring criteria is more linear than that NTIA will employ.

The highest scoring applications will be invited to participate in step two of the application process by submitting the additional documentation described in section VI.D.1.b. to further support the applicants' representations made in step one of the application process. As

A Summary Of The BIP/BTOP Notice Of Funds Availability

July 2, 2009

Page 11

with NTIA, step two will be announced no earlier than September 14, 2009, and the information required from applicants will be due by October 15, 2009, or, alternatively, 30 days after the applicant has received a request from RUS to provide such information, whichever is later. If the additional documentation does not adequately verify the first submission, then the application will be rejected.

**What Interconnection and Non-Discrimination requirements apply to awardees?**

BTOP and BIP awardees are required to adhere to five specific non-discrimination and interconnection requirements (pp. 29-31). In each case, the obligations cited apply only to funded deployments, not to a provider's other operations (though, of course, it may be difficult to comply with respect to only some parts of a provider's network). Moreover, these requirements are subject to the needs of law enforcement and to reasonable network management practices. Finally, the conditions apply for the life of the funded facilities, and awardees failing to adhere to them may be considered to be in default or breach of their loan or grant agreements.

First, as ARRA specifically requires, awardees must comply with the terms of the FCC's *Internet Policy Statement*, adopted August 5, 2005 (FCC 05-151).

Second, awardees may not favor any lawful Internet applications or content over others. "This requirement ensures neutral traffic routing. Without a non-discrimination condition, network operators could give preferential treatment to affiliated services, or charge some application and content providers for 'fast lanes' that would put others at a competitive disadvantage." This requirement only applies to Internet applications and content traversing the public Internet, not to managed services using private connections or virtual private networks. Awardees are permitted to employ "generally-accepted technical measures to provide acceptable service levels to all customers," including caching, application-neutral bandwidth allocation, and measures to address spam and other harmful or unlawful content. They also may comply with applicable statutes such as the Communications Assistance to Law Enforcement Act. Parties that believe an awardee has failed to adhere to this non-discrimination requirement should first seek action at the FCC if any FCC rule is implicated. If the FCC does not act, parties seeking recourse are directed to notify RUS or NTIA in writing.

Third, awardees must clearly display any network management policies that depart from "standard best efforts Internet delivery." This information is intended to enable potential users "to make informed decisions regarding how their usage may be impacted by" providers' policies.

Fourth, awardees must connect funded networks to the public Internet directly or indirectly. A provider may, *in addition to* such interconnected service, operate a managed service (*e.g.*, one directed at telemedicine, public safety, or distance learning) using a private network.

## A Summary Of The BIP/BTOP Notice Of Funds Availability

July 2, 2009

Page 12

Fifth, awardees must offer interconnection, where technically feasible, at reasonable rates and terms to be negotiated with requesting parties. An awardee need not offer interconnection at a location where such interconnection would exceed current or anticipated capacity limitations. This interconnection requirement may be satisfied via good-faith negotiation with parties seeking interconnection. If the parties fail to reach agreement, they may seek interpretation by the FCC of relevant FCC rules. If the parties cannot reach agreement within 90 days, they may notify RUS or NTIA in writing of the failure to reach satisfactory agreement.<sup>10</sup> Parties that reach an agreement to interconnect with a BIP-funded network may not use the interconnection agreement to provide a service that duplicates services already provided by projects funded under a Rural Electrification Act loan program. Interconnection may not result in a BIP-funded facility being used for ineligible purposes under the Recovery Act.

Note, too that, the NoFA makes clear that “[a]pplications will be scored on the extent to which the applicant commits to exceeding the minimum requirements for interconnection and nondiscrimination...” For example, as noted in the attachment to this summary, “additional consideration” will be given to projects that “display[] the network’s nondiscrimination and interconnection policies in a prominent location on the service provider’s web page [and] provid[e] notice to customers of changes to these policies,” “commit to offering wholesale access to the project facilities at reasonable rates and terms, “commit to binding private arbitration of disputes concerning the awardees’ interconnection obligations,” or “allow more than one provider to serve end users in the proposed funded service area.” In addition, “[a]dditional consideration will be given to applicants that commit to binding arbitration of disputes concerning its interconnection obligations” (p. 68).

### **What other terms and conditions will apply to awards?**

Commencing at Page 73, the NoFA details a broad range of requirements that will be imposed upon successful applicants. Although it is beyond the scope of this summary to review these requirements in detail, many impose material burdens on award winners and may inform a potential applicant’s election to seek ARRA funding. These include accounting requirements (pp. 75, 89), an obligation to cooperate with additional monitoring (pp. 75, 79), restrictions on the sale or lease of project assets (p. 78), compliance with certain wage requirements (p. 89) and “Buy American” requirements (p. 93-95), to the extent they have not been waived as we have previously reported. Although there is a suggestion in the NoFA that some documentation is flexible (p. 75), key documentation that an awardee must execute will be non-negotiable (p. 76). That documentation apparently will be available at <http://www.broadbandusa.gov> shortly.

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<sup>10</sup> The NoFA is not clear as to what will happen following such notification, but implies that RUS or NTIA will address and resolve the dispute.

A Summary Of The BIP/BTOP Notice Of Funds Availability

July 2, 2009

Page 13

BTOP broadband infrastructure awardees that offer Internet access service to the public for a fee will be required to participate in the State Broadband Data and Development Grant Program (p.79). BIP awardees will be required to provide RUS with specified data that will be turned over to NTIA for use in supporting the broadband mapping project required by section 6001(l) of the ARRA (pp. 79-80). In addition, they will be subject to a variety of reporting obligations specified in the NoFA for BTOP (pp. 84-86) and for BIP (pp. 83-84). In addition to the specific reporting obligations discussed in the NoFA for each program, all recipients of Recovery Act grants and loans (but not recipients of loan guarantees) are subject to reporting obligations set forth by the Office of Management and Budget in a June 22, 2009 “Guidance” available at [http://www.whitehouse.gov/omb/assets/memoranda\\_fy2009/m09-21.pdf](http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-21.pdf).

For BTOP and BIP Last Mile broadband infrastructure projects, “there is a presumption that the applicant will provide service to the entire territory of each census block included in the proposed funded service area, unless the applicant files a waiver and provides a reasoned explanation as to why providing coverage for an entire census block is infeasible” (p. 31).

The NoFA provides that RUS and NTIA may “deobligate” awards to recipients that “demonstrate an insufficient level of performance, or wasteful or fraudulent spending” (p. 90).

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Please feel free to contact us if you have any questions regarding this summary, the NoFA or the ARRA broadband stimulus process.

## SUMMARY OF EVALUATION CRITERIA (SCORING)

The scoring criteria for applications are grouped into four categories: (1) Project Purpose; (2) Project Benefits; (3) Project Viability; and (4) Project Budget and Sustainability. Each application will be scored against the objective criteria, and not against other applications. BIP criteria are addressed first, then BTOP.

### 1. BIP Broadband Infrastructure Projects

#### a. Project Purpose (25 points)

i. **Proportion of Rural Residents Served in Unserved Areas (5 points).** For every 10,000 unserved households that will be served, one point will be awarded up to a maximum of five points.

ii. **Rural Area Targeting (5 points).** For every five percent increase in the rural service area above the 75 percent rural area service requirement, one point will be awarded up to a maximum of five points.

iii. **Remote Area Targeting (5 points).** If at least one proposed funded service area is a minimum of 50 miles from a non-rural area, one point will be awarded. For each additional 50 miles that at least one proposed funded service area is located away from a non-rural area, one additional point will be awarded up to a total of five points.

iv. **RUS Title II Borrowers (5 points).** Five points will be awarded to former borrowers.

v. **Recovery Act and other governmental collaboration (5 points).** Points will be awarded for cooperation with other governmental development programs. One point will be awarded for each partnered governmental or ARRA program that has demonstrated such a partnership is substantive and meaningful up to a maximum of five points.

#### b. Project Benefits (25 points)

i. **Performance of the offered service (10 points).** **For Last Mile Projects:** For wireline projects, ten points will be awarded for 20 mbps service (upstream plus downstream). For wireless projects, ten points will be awarded for a minimum of two mbps service (upstream plus downstream). For projects that are a combination of wireline and wireless projects, both of the above standards must be met to receive the ten points. **For Middle Mile Projects:** For middle mile projects, ten points will be awarded for 100 mbps service to all end points in their network.

ii. **Affordability of services offered (5 points).** RUS will award up to five points for applications that demonstrate that the proposed rates are affordable.

iv. **Critical community facilities (5 points).** Five points will be awarded for applications that are proposing to offer rates at least 25 percent lower than advertised rates to all critical community facilities.

#### c. Project Viability (25 points)

i. **Applicant's organizational capability/strength of management team (12 points).**

ii. **Community support (2 points).** Points will be awarded if letters of support are received from all communities in the proposed funded service area.

iii. **Ability to promptly start project (10 points).** Ten points will be awarded if the applicant can provide evidence that: (1) All licenses, franchises and regulatory approvals required have been received; (2) That the contractors and vendors are available as soon as funds are made available; (3) That all required equity contributions have been made; and (4) That the project milestones are reasonable.

iv. **Disadvantaged small businesses under section 8(a) of the SBA (1 point).**

**d. Project Budget and Sustainability (25 points)**

i. **Reasonableness of the budget (5 points).**

ii. **Leverage of outside resources (10 points).** Up to ten points will be awarded based on the amount of outside resources contributed to the total financing provided under BIP.

iii. **Extent of grant funding (10 points).** Up to ten points will be awarded based on the amount of grants funds requested in relation to the amount of loan funds requested (grant funds/loan funds).

**2. BTOP Broadband Infrastructure, Public Computer Center, and Sustainable Broadband Adoption Projects**

**a. General**

The evaluation criteria differ somewhat across certain BTOP project categories, as indicated below.

**b. Project Purpose (30 points)**

i. **Fit with statutory purposes.** Applications will be evaluated with respect to each of BTOP's statutory purposes: to provide broadband access to unserved areas; to provide improved broadband access to underserved areas; to provide broadband access, education, and support to community anchor institutions, or organizations and agencies serving vulnerable populations, or job-creating strategic facilities located in state- or federally-designated economic development areas; to improve access to, and use of, broadband service by public safety agencies; and to stimulate the demand for broadband, economic growth, and job creation. Applications will be scored on whether the applicant is addressing a compelling problem within statutory purposes, whether the applicant has offered an effective solution to that problem, and whether the proposed solution is of broad significance and includes developments that can be replicated to improve future projects. Additional consideration will be given to projects located partially or wholly unserved or underserved areas of a state as described by the State or as otherwise determined by NTIA. Additional consideration will also be given to applicants that address more than one statutory purpose and project category (*e.g.*, Broadband Infrastructure, Public Computer Centers, or Sustainable Broadband Adoption).

ii. **Recovery Act and other governmental collaboration.** The applicant must demonstrate that leveraging efforts are substantive and meaningful.

iii. **Enhanced service for health care delivery, education, and children.** Reviewers will assess the project's ability to enhance broadband service for health care delivery, education, and children. Projects would need to demonstrate that they go beyond providing access to broadband.

iv. **Socially and economically disadvantaged small businesses.** Reviewers will grant consideration to applicants that certify they meet the statutory definition of a disadvantaged

small business concern, or that have agreements in principle to contract with disadvantaged businesses.

**c. Project Benefits (25 points)**

The specific elements to be evaluated under this heading vary from one project category to another as described below.

**i. BTOP Broadband Infrastructure Last Mile Projects**

(1) **Cost-effectiveness.** Applications will be scored on the project's cost-efficiency based on the ratio of the total cost of the project to households passed.

(2) **Performance of the offered service.** Applications will be scored for the extent to which the advertised speed for the network's highest offered speed tier exceeds the minimum speed requirement for broadband service (768 kbps downstream and 200 kbps upstream). Networks will be graded on a sliding scale, with networks with high latency being viewed unfavorably. Applicants may gain additional consideration with an affordable upgrade path for the network.

(3) **Affordability of services offered.**

(4) **Nondiscrimination, interconnection, and choice of provider.** Applications will be scored on the extent to which the applicant commits to exceeding the minimum requirements for interconnection and nondiscrimination established in the NoFA.

**ii. BTOP Broadband Infrastructure Middle Mile Projects**

Applicants should define the area that will directly benefit from the project, including the community anchor institutions and end users that may received broadband service through the proposed middle mile network.

(1) **Impact on the area.** Applications will be scored on how great an impact they would have on the area, including the number of end-points and points of interconnection the network will offer and the proposed connections to last mile networks, community anchor institutions, or public safety entities, as well as the projected number of new end users served by those proposed connections.

(2) **Level of need in the area.** Applications will be scored on whether there are middle mile providers already present; what proportion of the network's end-points, points of interconnection, and projected end users are located in unserved or underserved areas; and why the proposed project is well-suited to address the needs of the area.

(3) **Network capacity.** Consideration will be given to projects that will be scalable to meet the future needs of the area.

(4) **Affordability of services offered.** Projects will be evaluated on the pricing compared to existing broadband services or, if none, on a demonstration that the proposed pricing is appropriate.

(5) **Nondiscrimination, interconnection, and choice of provider.** Applications will be scored on the extent to which the applicant commits to exceeding the minimum requirements for interconnection and nondiscrimination established in the NoFA.

**iii. BTOP Public Computer Center Projects**

Applications will be scored on:

(1) The availability of the computer center to the public, including capacity, hours of availability, any membership or usage fees charged, restrictions on usage, the proportionality of the computer center's capacity and hours of availability to the population public outreach, and the computer center's accessibility to persons with disabilities.

- (2) The availability, accessibility, and quality of training and educational programs offered.
- (3) The availability and qualifications of consulting and teaching staff.

**iv. BTOP Sustainable Broadband Adoption**

Applications will be scored on:

- (1) Number of new users, both overall and the proportion that new subscribers and users represent of the number of non-subscribers and non-users in the area.
- (2) Cost per new user.
- (3) Innovation.

**d. Project Viability (25 points)**

Applications will be scored on:

**i. The technical feasibility of the proposed project.**

**For BTOP Broadband Infrastructure and Public Computer Center projects:** Applications will be scored on the comprehensiveness and appropriateness of the technical solution and the clarity, level of detail, and coherence of the system designs. In order to receive a full score, applicants must demonstrate that the project includes developments that will be feasible in other situations. **For Sustainable Broadband Adoption projects:** Applications will be scored on the clarity of mechanics and operational details of the project plan and whether they can demonstrate that the plan includes innovative solutions that would be feasible in other situations.

**ii. Applicant's organizational capability and experience and expertise of the project management team.**

**iii. The level of community involvement in the project.** Reviewers will evaluate linkages to unaffiliated organizations in the project area, particularly community anchor institutions and public safety organizations. In order to receive the full score, at least one partner should meet the definition of a disadvantaged small business concern under section 8(a) of the SBA.

**iv. Ability to promptly start project.** Projects will be evaluated on whether they will be able to start promptly and be completed in an appropriate timeframe. Factors include the planned start date, the reasonableness of the project milestones, whether the applicant has secured all required licenses, franchises, and regulatory approvals, and whether the required contractors and vendors are prepared to enter into contracts as soon as the funds are made available.

**e. Project Budget and Sustainability (20 points)**

Applications will be scored on:

**i. Reasonableness of the budget.** Reviewers will evaluate the reasonableness of the budget based on its clarity, level of detail, comprehensiveness, appropriateness to the proposed technical and programmatic solutions.

**ii. Sustainability of the project. For BTOP Broadband Infrastructure and Public Computer Center projects:** Reviewers will consider business plans, market projections, third-party funding commitments, and other data as may be appropriate. **For Sustainable Broadband Adoption projects:** Reviewers will consider both whether the project will be sustained beyond the funding period and whether the increases in broadband adoption will be sustained beyond the conclusion of the project.

**iii. Leverage of outside resources.** The applicant must demonstrate the ability to provide, from non-federal sources, funds required to meet or exceed the 20 percent matching funds requirement unless a waiver of that requirement has been requested. Reviewers will give additional

consideration to proposals that exceed the minimum matching requirement, provide cash matches, or receive matching funds from acceptable federal sources. Applicants that have received a full or partial waiver of the cost-matching requirement will be treated as having provided a 20 percent non-cash match.