

# RUS and NTIA Issue Broadband Stimulus Notice of Funding Availability

July 2, 2009

## Summary

On July 1, 2009, the Commerce Department and the Agriculture Department jointly issued a Notice of Funding Availability ("NOFA") that outlines the rules and evaluation criteria that will govern the distribution of the first \$4 billion in broadband stimulus funds appropriated in the American Recovery and Reinvestment Act of 2009 ("Recovery Act"). The \$4 billion distributed through this NOFA is the first tranche of a total of \$7.2 billion allotted to broadband stimulus in the Recovery Act. The funds will be distributed through two programs, the Broadband Technology Opportunities Program ("BTOP") and the Broadband Initiatives Program ("BIP"), which are administered by the National Telecommunications and Information Administration ("NTIA") and the Rural Utilities Service ("RUS") respectively.

The NOFA describes a two-step application process, which will be repeated over a course of three rounds. The NOFA establishes July 14, 2009 through August 14, 2009 as the window during which the agencies will accept the first round of applications. In this first round, RUS will be distributing \$2.4 billion in grants and loans under BIP, which includes up to \$1.2 billion for last-mile projects, divided among remote areas (\$400 million) and non-remote areas (\$800 million). In addition, the NOFA allocates \$800 million for loans or loan-grant combinations for middle-mile projects through RUS. As part of its first round of funding, NTIA will allocate \$1.6 billion under this NOFA, with \$1.2 billion designated for broadband infrastructure projects, \$50 million for public computer center projects, and \$150 million for sustainable broadband adoption projects.

The agencies anticipate notifying applicants who make it to the second step or "due diligence" phase of the review process on or about September 14, 2009. Award notices will be announced on or about November 7, 2009 and actual funding should start flowing approximately 60 days later. All projects must be substantially completed within 2 years of the award and fully completed within 3 years of the award. Funding from all three tranches will be awarded by September 30, 2010.

## Key Terms Defined

In the Recovery Act, Congress ordered NTIA to define several key terms, including "broadband service," "unserved areas," and "underserved areas." As part of the NOFA, NTIA provided the following definitions:

- "Broadband Service" - the provision of two-way data transmission with advertised speeds of at least 768 kbps downstream and 200 kbps upstream to end users.
- "Unserved Areas" - a proposed service area (consisting of one or more contiguous census

blocks) where at least 90% of households lack access to facilities-based, terrestrial broadband service.

- “Underserved Areas” – a proposed service area (consisting of one or more contiguous census blocks) where (1) no more than 50% of the households in the proposed funded service area have access to facilities-based, terrestrial broadband service; (2) no fixed or mobile broadband service providers advertises broadband transmission speeds of at least 3 mbps downstream in the area; or (3) the rate of broadband subscribership for the proposed funded service area is 40% of households or less.

Additional key definitions include:

- “Last Mile Project” – 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).
- “Middle Mile Project” – 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.

These definitions also likely will guide the FCC in its efforts to formulate a National Broadband Plan, as required by the Recovery Act.

## Eligibility Generally

To be eligible to receive funds from either BIP or BTOP, applicants must:

- submit a complete application and provide all supporting documentation; and
- be able to substantially complete the project within two years of the date of issuance of the funds.

In addition, proposals involving the deployment of infrastructure must:

- offer services meeting the definition of broadband services;
- be technically feasible;
- comply with the nondiscrimination principles contained in the FCC’s Internet Policy statement as well as other nondiscrimination and network neutrality obligations. These obligations include providing customers with access to all lawful internet content; allowing customers to run lawful internet applications, not favoring any lawful internet application and content over others; allowing consumers to connect their choice of internet devices to the network; making easily available any network management policies; connecting to the public internet directly or indirectly; and offering interconnection to third parties where technically feasible and on reasonable rates and terms to be negotiated with requesting parties. All these requirements are subject to the needs of law enforcement and reasonable network management. Further, awardees may offer managed services, such as telemedicine, public safety communications, and distance learning, which use private network connections for enhanced quality of service;

and

- provide coverage for the entire territory of each census block included in the proposed service area.

The agencies will reject applications that fail to comply with these requirements. Furthermore, the rules for both programs prohibit the awarding of funds: (1) for operating expenses; (2) for reimbursement of costs incurred prior to the date on which the application is submitted; (3) for an acquisition of another corporation or entity; (4) to purchase or lease any vehicle other than those used in construction; (5) to fund the leasing of broadband facilities; (6) to fund a merger or consolidation; or (7) for costs incurred acquiring spectrum.

## The Broadband Initiatives Program (“BIP”)

Under BIP, RUS will award grants, loans, and loan/grant combinations for broadband infrastructure projects that service rural areas. Funds will be available on a technologically neutral basis, and includes designated funding for both “middle-mile” (interoffice transport, backhaul, and special access) and “last-mile” solutions.

To qualify for BIP funding, the Recovery Act requires that 75% of a funded area be rural in nature. Grants under BIP are to be used to fund applications servicing exclusively remote, unserved, rural areas. In addition to the “unserved area” definition described above, the NOFA includes the following definitions for “rural area” and “remote area”:

- “Rural Area” – (a) an incorporated area with a population less than 20,000 inhabitants or (2) an urbanized area not adjacent to a city or town with a population greater than 50,000.
- “Remote Area” – a rural area 50 miles or more from a non-rural area.

Projects which include non-remote and underserved rural areas will be funded by loans or loan/grant combinations. Furthermore, RUS will not fund more than one project in a given geographic area (i.e., no duplication of facilities). Finally, only projects that will be fully funded and that RUS determines to be financially feasible and/or sustainable will be eligible for awards.

## The Broadband Technology Opportunities Program (“BTOP”)

The Recovery Act established BTOP to promote five core purposes: (1) to provide access to broadband services in unserved areas; (2) to provide access to broadband services in underserved areas; (3) to provide broadband access, education, training, and equipment to community anchor institutions (schools, libraries, hospitals, etc.); (4) to improve access for public safety agencies; and (5) to stimulate demand for broadband services, economic growth, and job creation.

BTOP funds will be made available through three categories of eligible projects:

- **Broadband Infrastructure Projects** – projects that deliver broadband access to unserved and underserved areas. Funds will be made available on a technologically neutral basis for both “middle-mile” (interoffice transport, backhaul, and special access) and “last-mile” solutions.
- **Public Computer Centers Projects** – projects that expand public access to broadband service and enhance broadband capacity at entities that permit the public to use their computing

centers (e.g., schools, libraries, colleges).

- **Sustainable Broadband Adoption Projects** – projects focused on increasing broadband education, awareness, training, access, equipment, or support, particularly among vulnerable population groups.

All projects funded under BTOP must advance one or more of the five statutory purposes and fall into one of the three categories described above, as well as be viable, sustainable and scalable. The program will give the highest priority for projects that offer the potential for economic growth and job creation and that benefit education, healthcare, and public safety.

Applicants will be required to provide funds amounting to at least 20% of the total eligible project cost. In accordance with statutory provisions, applicants also will be required to provide documentation that the project would not have been implemented during the grant period without federal grant assistance. Finally, applicants must demonstrate that the proposed budget is appropriate for the project, and that its costs are reasonable.

## Application and Submission Information

Complete application packages, including required forms and instructions, will be available soon at <http://www.broadbandusa.gov>. The application process will take place in two steps. In the first step, among other information, applications will be required to include:

- A general description of applicant and an executive summary of the proposed project, including the estimated dollar amount of the funding request, and how the proposed project fulfills the goals of the act;
- Verification that the proposed project meets the required eligibility factors;
- A description of the proposed service offerings and associated pricing plans;
- A description of the system design used to deliver the broadband service, including the technology type, which must be certified by a professional engineer for requested amounts in excess of \$1 million; and
- A timeline including key milestones for implementation of the project.

Applications that are considered to be most highly qualified will advance to a second step of the review process, termed the “due diligence” phase. This phase will be announced no earlier than September 14, 2009, at which time the remaining applicants must submit information including financial information, technological specifications, build-out schedules, and environmental questionnaires that will allow the agencies to measure the veracity of the proposals and the likelihood that they will be completed promptly and on budget.

## Application Selection Process

Both BTOP and BIP will review and analyze applications for funds based on four categories:

### Project Purpose

BIP (25 points): Applications will be evaluated based on: (i) the proportion of rural residents served in

unserved areas; (ii) rural area targeting; (iii) remote area targeting; (iv) whether applicant is currently a RUS borrower; and (iv) whether the proposal includes collaboration with other federal development programs.

BTOP (30 points): Applications will be evaluated based on: (i) each of BTOP's statutory purposes; (ii) whether the proposal includes collaboration with other federal development programs; (iii) the ability of the programs to enhance broadband service for health care delivery, education, and children; and (iv) whether the applicant is a socially or economically disadvantaged small business.

### Project Benefits

BIP (25 points): Applications will be judged based on: (i) the data transfer rate offered; (ii) performance capability of services offered; (iii) whether the proposed project would allow more than one provider to serve end users; and (iv) the applicant's willingness to provide discounts to critical community facilities.

BTOP (25 points): Applications for infrastructure projects will be judged based on: (i) cost effectiveness; (ii) performance capability of services offered; (iii) affordability of services offered; (iv) willingness to comply with nondiscrimination and interconnection obligations; (v) network capacity; and the (vi) level of need in the area. Applications for Computer Center projects will be judged based on: (i) availability to the public; (ii) quality of programs offered; and (iii) the qualifications of teaching staff. Applications for the Sustainable Broadband Adoption projects will be judged on: (i) the number of new broadband users the project will generate; (ii) the cost per new user; and (iii) the innovative nature of the project.

### Project Viability

BIP (25 Points): Applications will be judged based on: (i) the strength of the project's management team; (ii) demonstration of community support; (iii) ability to promptly start project; and (iv) whether the applicant is a socially or economically disadvantaged small business.

BTOP (25 points): Applications will be judged based on: (i) the strength of the project's management team; (ii) demonstration of community support; (iii) ability to promptly start project.

### Project Budget and Sustainability

BIP (25 points): Applications will be judged based on: (i) the reasonableness of the budget; (ii) whether the project leverages outside resources; and (iii) the percentage of funds requested in grant rather than loan.

BTOP (20 points): Applications will be judged on: (i) the reasonableness of the budget; (ii) the sustainability of the project; and (iii) whether the project leverages outside resources.

The agencies intend to announce awards starting on or about November 7, 2009. Successful applicants will receive award documents from the agencies within 30 days of the award announcement. All documentation requirements and closings are to be completed within 60 days of the award announcement. Acceptance of an award will subject an applicant to numerous audit and oversight provisions, some of which are still being developed.

## Questions?

Kelley Drye & Warren's Communications practice group is experienced in supporting clients seeking to influence regulatory decisions or navigate grant processes. For further information on any of these

issues, please contact your usual Kelley Drye attorney or any member of the Communications practice group. For more information on the Communications practice group, please [click here](#).