



March 4, 2009

MEMORANDUM TO CLIENTS

Re: Implementation of the Broadband Deployment Programs under the American Economic Recovery and Reinvestment Act of 2009

The American Recovery and Reinvestment Act of 2009 (the “Stimulus Act”), which was enacted on February 17, 2009, provides \$7.2 Billion of funding for broadband deployment, adoption and mapping. Our February 17, 2009 Memorandum to Clients describes the key provisions of the two broadband programs, one (\$2.5 Billion) consisting of grants, loans and loan guarantees to be administered under the Department of Agriculture’s Rural Utilities Service (“RUS”) and the other (\$4.7 Billion) consisting of grants to be administered by the Department of Commerce’s National Telecommunications and Information Administration (“NTIA”).

The Stimulus Act leaves much discretion to the agencies to define and administer the broadband programs and establish priorities for awarding the funds, which will be granted on a competitive basis. Until the agencies adopt implementing regulations, the dates of the filing windows, exact criteria for competitive selection and other specifics of the application process will remain uncertain. That said, NTIA and RUS are operating under a very tight time frame to get the funds into the hands of service providers and other recipients and have already taken the initial steps to implement their rules governing the programs. Thus, it is not unreasonable to expect that program rules will be put in place, and applications accepted, in a matter of several weeks.

In the meantime, interested parties should begin to consider how to structure their projects and present their applications to maximize their opportunities to receive funds. Applicants are cautioned that the programs under the Stimulus Act will be conducted under the utmost scrutiny and transparency. Therefore, applicants must be very careful to structure their projects to comply with all laws and other requirements, provide complete and accurate information in their applications and not make commitments that cannot be met.

This memorandum summarizes some of the relevant considerations for project design and application submission.

A. General--applicant must demonstrate that its project will start promptly, be completed as promised and on time and create jobs and stimulate the economy:

Both programs are open to a wide range of applicants, including private companies. The final Stimulus Act eliminates the requirement found in some earlier versions of the legislation that a for-profit organization must partner with a state, Indian Tribe or Native Hawaiian organization to gain eligibility. As discussed further below, the Conference Committee comments provide that the public interest and program purposes dictate that “as many entities as possible be eligible to apply for a competitive [NTIA] grant” and list as examples of eligible

entities wireless carriers, wireline carriers, backhaul providers, satellite carriers, public private partnerships, tower companies or any provider offering to construct last-mile, middle-mile or long haul facilities. Similarly, the Stimulus Act does not limit eligibility for RUS funds to certain types of entities, consistent with other RUS telecommunications programs.

Under either program, awards are to be made on a competitive basis. It is expected that applications will be accepted during an announced filing window and that individual applications will be ranked based on a series of comparative criteria. Each applicant must consider that a fundamental purpose of the Stimulus Act is to maximize job creation and economic benefit and should include as much information as possible about how the proposed project will create jobs and stimulate the economy.

Furthermore, the general provisions of Stimulus Act for infrastructure investment establish a specific goal of using at least 50 percent of the funds for projects that can be initiated within 120 days of enactment of the Stimulus Act, and all funds under both the RUS and NTIA programs must be awarded by September 30, 2010. Therefore, “quick start” projects will get preference over projects that are in the planning stages. Applicants should consider, within the constraints of their business objectives, how they might structure their projects to have as early an initiation date as possible (as well as an early completion date and aggressive progress timetables) and provide a well-supported and convincing demonstration to back up the project calendar.

This need for speed also means that priority will be given to projects free of unsatisfied conditions or contingencies or pending governmental, third party or internal review or approval, particularly where substantial uncertainty or long timeframes apply. Thus, applicants are advised to secure any governmental approvals, obtain any other consents, approvals and agreements and complete any necessary studies as quickly as possible and preferably prior to filing their application. Examples of requirements or contingencies that could detract from an application if not finalized, satisfied or secured include formation or joint venture agreements, shareholder approvals, Federal Communications Commission (“FCC”) or other federal, state or local agency approvals, environmental studies, employment arrangements, real estate or facilities selections and vendor contracts. Simply put, in the context of the fast-moving stimulus initiative, the agencies cannot risk committing funds to a project that may not be initiated or completed on schedule or, worse yet, not go forward at all.

To the extent an applicant cannot obtain certain approvals or satisfy certain conditions or requirements prior to filing, it should include timelines for completing outstanding items, descriptions of progress made to date and sufficient supporting information that deadlines will be met. For example, if an applicant expects to need approvals from the FCC to acquire spectrum, the application should include specific information about when the applications have been or will be filed, when grant is anticipated, why the particular application should be eligible for streamlined processing, why no protests are expected, etc.

Finally, a successful application should demonstrate that the contemplated project will be sustainable. Because Stimulus Act funds are primarily for infrastructure and not operation,

applicants should plan to include a demonstration of the source of funds not only for construction but also for long term viability.

B. The \$4.7 Billion Department of Commerce (NTIA) Broadband Technology Opportunities Program:

It has been reported that NTIA will conduct a rulemaking proceeding on an expedited basis to adopt implementing regulations and has already begun drafting the guidelines. Bernadette McGuire-Rivera, NTIA Associate Director overseeing the agency's Office of Telecommunications, has indicated that NTIA will work concurrently on drafting grant application guidelines, seeking public comment and putting the grant administration structure in place and that there will be large public meetings on the program. A joint public meeting on the broadband initiatives among NTIA, RUS and the FCC will be held on March 10 (from 10 to 11:30 am) at the Department of Commerce's headquarters at 1401 Constitution Avenue, NW, Washington, DC. NTIA also has announced that it will meet with interested parties in connection with the broadband grant program (meetings commenced March 2, 2009) and will provide program information on the website <http://www.ntia.doc.gov/broadbandgrants>. Mark Seifert, formerly of the FCC and the House Commerce Committee, has been hired to lead the NTIA broadband grant program. NTIA's prior experience with competitive grant programs such as the Public Safety Interoperable Communications (PSIC) Grant Program should prove helpful in successful administration of the Stimulus Act program.

Key matters for prospective applicants for NTIA grants to address in planning their projects and preparing the most compelling application include the following:

1. Eligibility. The Stimulus Act does not impose eligibility restrictions relating to the type of entity applying for an NTIA grant and provides that the following entities are eligible to apply:

- A state or political subdivision thereof, including the District of Columbia, a U.S. territory or possession, an Indian Tribe or a Native Hawaiian organization;
- A nonprofit foundation, corporation, institution or association; and
- Any other entity, including a broadband service or infrastructure provider.

Diversity of applicants is encouraged. The Conference Committee's Joint Explanatory Statement accompanying the Stimulus Act states that the conferees intended that "as many entities as possible be eligible for a competitive grant, including wireless carriers, wireline carriers, backhaul providers, satellite carriers, public private partnerships, and tower companies." This legislative history also includes a statement that NTIA should select grant recipients that will best meet the broadband access needs of the area to be served, "whether by a wireless provider, a wireline provider, or any provider offering to construct last-mile, middle-mile, or long haul facilities." In view of the express desire for a diverse applicant body and the wide range of purposes for which project funds may be used (see discussion in paragraph 7 below), any party with plans to participate in the expansion of broadband service and use may want to consider structuring an eligible project and applying for NTIA benefits.

2. All awards must be made before September 30, 2010, and all projects must be substantially completed within two years after award. Clearly, preference will be given to projects that can be initiated very quickly and completed in a short time frame. One should not expect to get extensions of the prescribed deadlines. Therefore, parties considering an NTIA grant should design their projects so that that construction can be started, and progress made and completion achieved, as quickly as possible, with as few conditions or contingencies as feasible.

3. The federal share of any project may not exceed 80 percent. The successful applicant should have firm commitments in place for the portion of the funding that will not be provided under the Stimulus Act and be prepared to include detailed descriptions of those arrangements in their applications. Most applicants should not expect to obtain a waiver of the 80 percent limitation.

4. Program purposes are: to provide broadband access in unserved areas and improved access to broadband in underserved areas; to promote broadband service to schools, medical providers, low income, unemployed and aged groups and public safety agencies; and to stimulate broadband demand, economic growth and job creation. Although there is no requirement that an applicant must serve *all* of the program purposes, it should structure its project to promote as many of these program objectives as possible and make a compelling showing in its application to that effect. The terms “unserved area,” “underserved area” and “broadband” are not currently defined, but it is reasonable to assume that projects designed exclusively to serve populations already having access to advanced broadband service are unlikely to be awarded a grant. In the case of projects serving both eligible and ineligible areas, there may be more direction in the implementing regulations. Absent further guidance, however, parties should consider defining separate projects to serve eligible areas and limiting applications solely to those projects. In addition to a showing relating to service to unserved and underserved areas, applicants should include the best possible demonstration that the proposed project will provide broadband support to schools, libraries, medical providers, educational institutions and public safety agencies and that the project will stimulate the demand for broadband, economic growth and job creation.

5. The NTIA program is not restricted to “rural” areas. The Conference Committee clarified that NTIA should award grants to projects that improve broadband service to any parts of the country, including rural, suburban and urban areas, in contrast to the much more rural-centric focus of the RUS program. Accordingly, grants under the NTIA program are expected to be made on the basis of the program purposes described in paragraph 4 above, and applicants are urged to refer to these objectives constantly when designing their projects and preparing their applications.

6. NTIA may consult with states regarding identification of unserved and underserved areas and allocation of grant funds. NTIA is directed to consult with states on the identification of unserved and underserved areas within their boundaries and the allocation of grant funds within each state. NTIA may even seek advice and assistance from the states in reviewing grant applications. NTIA is required by the Stimulus Act to try to make at least one grant per state. Therefore, it is imperative that an applicant establish as strong a relationship as

possible with the appropriate state personnel, such as the governor's office and any broadband and economic development offices, in connection with the design of the project and the preparation and prosecution of its grant application. Projects with strong state support are likely to have a distinct advantage in the receipt of grants.

7. The program admits a wide variety of applicants conducting an array of broadband related businesses. As discussed in paragraph 1 above, the NTIA program is designed so that as many entities as possible are eligible to apply for a grant, including wireless carriers, wireline carriers, backhaul providers, satellite carriers, public private partnerships and tower companies as well as any provider offering to construct last-mile, middle-mile, or long haul facilities. Similarly, competitive grants may be made for a wide variety of purposes relating to broadband deployment, including: acquiring equipment and infrastructure for broadband services; constructing and deploying broadband service related infrastructure; ensuring broadband service by community anchor institutions; facilitating access to broadband service by low-income, unemployed, aged or "otherwise vulnerable" populations to provide educational and employment opportunities to those members; and constructing and deploying broadband facilities that improve public safety broadband communications services. Further, priority is to be given to applications for projects that will increase the affordability of, and subscribership to, service to the greatest population of users in the area.

Reading between the lines of the Stimulus Act, it is apparent that projects promoting broadband to disadvantaged groups and educational, healthcare and public safety institutions are favored. Thus, it is reasonable to expect that between two eligible projects to construct and deploy broadband facilities to unserved and underserved areas, the balance for grant priority will tip in favor of the project maximizing broadband benefits for these designated groups. To the extent possible under their business plans, potential applicants should design their projects to promote these objectives and emphasize these benefits in their applications.

8. The program is technologically neutral. The NTIA program makes no separate allocations for wireless and wireline applications, and there are no definitions of minimum data speeds for the award of funds. The definition of the term "broadband" has been left to NTIA, which is directed to consider the technical differences between wireless and wireline networks and the actual speeds that broadband networks are able to deliver under a variety of circumstances. The Conference Committee stated that NTIA should select the grant recipients that will best meet the broadband access needs of the area to be served, whether a wireless provider, a wireline provider, or any provider offering to construct last-mile, middle-mile or long haul facilities. Further, NTIA is directed to fund projects that provide the highest possible broadband speeds to consumers, and the Stimulus Act includes a specific preference for broadband facilities that are capable of delivering next-generation broadband speeds over projects centered on current-generation speeds. Therefore, an applicant should place priority in project design on the highest possible, next-generation broadband speeds and be prepared to include in its application a demonstration that the intended technology is optimized for the particular service area.

9. Non-discrimination and network interconnection requirements apply. Although the final version of the Stimulus Act does not include the "open access" requirement of

some earlier versions, NTIA must, in coordination with the FCC, publish the non-discrimination and network interconnection obligations to condition each grant, including, at a minimum, adherence to the principles contained in the FCC's broadband policy statement.¹ An applicant should design its network, to the extent possible, to permit customer-chosen equipment and content and be prepared to highlight adherence to the FCC's broadband policy statement in its application.

10. Applicant must show that the project would not have been implemented during the grant period without federal assistance. NTIA is directed to insure that grant funds are used to assist infrastructure investments that would not otherwise be made by the entity applying or, secondarily, that might not be made as quickly. Applicants need to plan to make a convincing showing of this requirement, backed up with convincing economic analyses of the viability of the project both pre- and post-grant (ideally, the analysis will show that the project was not economically feasible without the grant funds).

11. Part of program for commitment to the community. The Conference Committee clarified that part of the program (\$250 Million) is directed towards competitive grants for "innovative programs to encourage sustainable adoption of broadband service in particular by vulnerable populations." Thus, an applicant may receive a grant by showing, as the Conference Committee explains, that they will be involved in "aggregating demand, ensuring community involvement and fostering useful technology applications, thereby stimulating economic growth and job creation." These grant funds may be used to enable the applicant to partner with the community in creative ways to ensure broadband adoption, separate from grants for broadband infrastructure itself.

12. Small business advantage. The Stimulus Act requires that NTIA consider whether a grant applicant is a socially and economically disadvantaged small business, as defined in the Small Business Act. It is possible that larger entities not meeting this definition could improve the priority of their application by entering into partnership or employment relationships with an eligible small businesses and highlighting that relationship in their applications.

13. Post-grant reporting. Because the Stimulus Act requires grant recipients to submit quarterly reports regarding the use of funds and progress of the project, the applicant should include some discussion of company policies for the effective handling of these functions.

C. The \$2.5 Billion RUS Distance Learning, Telemedicine and Broadband Program:

In order to expedite the initiation of the program, RUS will issue a "notice of funds availability" and skip notice and comment rulemaking, according to Ken Kuchno, the Director of RUS's Broadband Division. This streamlined process should enable compliance with the statutory requirement that the Secretary of Agriculture must submit a report of planned spending

¹ See FCC 05-15, adopted August 5, 2005.

and actual obligations describing the use of the funds within 90 days after the enactment of the Stimulus Act.

RUS already has processes in place for making grants and loans in the telecommunications context (*i.e.*, the Rural Development Community Connect Grant Program, the Rural Development Broadband Loan and Loan Guaranty Program and the Distance Learning and Telemedicine Grant Program). It is expected that the RUS program will draw upon the experience of the existing broadband programs. One of the aspects of existing RUS programs expected to apply to the Stimulus Act program is that funds will be provided upon invoice, not in a lump sum (the manner expected under the NTIA program). Because of the tight timeframes it now faces, however, RUS will inevitably make some modifications to its existing procedures to streamline the new grant process.

Some of the aspects of the RUS program potential applicants should address as they plan to prepare their applications are as follows:

1. Eligibility. The Stimulus Act imposes no specific restrictions on the types of entities that are eligible to apply for funds under the Distance Learning, Telemedicine and Broadband program. In this case, existing programs should offer some direction as to the range of entities that will be eligible under the RUS program established by the Stimulus Act. For example, the Distance Learning and Telemedicine Grant Program allows applications by:

- State and local governments;
- School districts and public and private educational institutions;
- Native American tribal governments, housing authorities and other organizations;
- Public housing authorities;
- Nonprofits; and
- For profit organizations, including small businesses.

Therefore, few eligibility restrictions on the type of entity are anticipated, and an applicant should focus instead on the other requirements of the RUS program to maximize the competitive strength of its application.

2. At least 75 percent of service area must be rural. Although the loans, loan guaranties and grants under the RUS program will be available for broadband infrastructure in any area of the United States, at least 75 percent of the area to be served by the project receiving RUS funds must be in rural areas without sufficient access to high speed broadband service, as determined by the Secretary of Agriculture. Key terms such as “rural areas” and “high speed broadband service” have not been defined, and the precise manner of measurement to satisfy the 75 percent rural requirement has not been specified. These and other aspects of the program await definition by the Secretary of Agriculture.

In the meantime, however, the rural focus of the RUS program is clear. Potential applicants with a business plan that includes deployment of broadband infrastructure in

underserved rural communities should consider accelerating their plans to implement such deployment and design their projects to meet the 75 percent rural requirement and the other RUS program requirements described below. Similarly, parties contemplating projects that will serve chiefly urban and other communities currently enjoying advanced broadband service cannot expect to meet the requirements of the RUS program and instead should focus on any benefits that might be available under the NTIA program.

3. Mutual exclusivity with NTIA Broadband Technology Opportunities

Program. An important consideration for potential RUS applicants is that: “No area of a project funded with amounts made available under [the RUS program] may receive funding to provide broadband service under the [NTIA’s] Broadband Technology Opportunities Program.” The term “area of a project” is not defined, but certain language in the description of the NTIA program suggests that “area” means geography, not category of cost.² Until the implementing rules are established that might clarify the mutual exclusivity of the two programs, prospective applicants should assume that no project receiving RUS funds may receive any NTIA funds. It has been reported that NTIA will work closely with RUS to prevent overlapping funding. Therefore, potential applicants should consider at the outset whether they might qualify for both programs and, if so, make a selection between the two programs based on likelihood of selection and maximization of benefits. Certain differences between the two programs could dictate which program is more closely aligned with the applicant’s business plans (*e.g.*, RUS could fund 100 percent of project costs, while the NTIA program is limited to 80 percent). Although there does not appear to be any prohibition against *applying* under both programs (which could maximize the ability to receive some benefit under the Stimulus Act), the mutual exclusivity of the two programs could undercut the merit of both applications.

4. The stated priorities include projects that will deliver end users a choice of more than one service provider, projects providing service to the largest number of rural residents without access to broadband service, and loans to existing borrowers under the Rural Electrification Act of 1936. In addition to the 75 percent rural eligibility requirement discussed above, priority will be given to “project applications for broadband systems that will deliver end users a choice of more than one service provider.” Some might argue that interested parties should consider designing networks that allow some level of access by other service providers, but at present the meaning of the quoted language is uncertain. RUS might clarify this issue in its implementing regulations. Priority is also afforded to applications for projects providing service to the largest number of rural residents without access to broadband service. Finally, applicants from, or including, current or past borrowers under Title II of the Rural Electrification Act of 1936 (“REA Act”) will be given a priority.³ These stated preferences for

² Specifically, the Stimulus Act provides that: “The Assistant Secretary, in awarding grants under this section [NTIA program], shall, to the extent practical . . . consider whether an application to deploy infrastructure in an area . . . will, if approved, not result in unjust enrichment as a result of support for non-recurring costs through another Federal program for service in the area”

³ Title II of the REA Act authorizes loans to persons currently providing or who may provide telephone service in rural areas, to public bodies currently providing telephone service in rural areas and to cooperative, nonprofit, limited dividend or mutual associations for the purpose of financing the improvement, expansion, construction, acquisition and operation of telephone lines, facilities or systems to furnish and improve telephone service in rural areas.

heavily rural projects and current or past REA Act borrowers underscore the rural focus of the RUS program. Parties contemplating broadband deployment in rural areas, to the extent consistent with their business objectives, should design their projects to reach the maximum number of unserved rural areas. Furthermore, applicants that are not existing or past RUS borrowers should consider partnering with an RUS borrower on some basis and highlighting that relationship in their application.

5. Preference for quick-start activities; projects must be fully funded; and funding available until September 30, 2010. As in the case of the NTIA program, priority is given to projects that can “commence promptly” following approval, and funds are available until September 30, 2010. As discussed under the General section of this memorandum above, projects that are closest to “shovel ready” will enjoy priority in the competitive application process. Similarly, projects that have as few contingencies as possible (such as need for governmental approvals) will have a clear advantage, so applicants are urged to finalize and obtain as quickly as possible all agreements, approvals and other arrangements that are conditions precedent to commencement of their projects. They should also include in their applications the timeframe for completion of any unsatisfied items and convincing assurances that deadlines will be met.

D. Conclusion--RUS and NTIA application windows are imminent, so interested parties should design their projects and plan their application strategy now:

Both agencies are working overtime to adopt program rules, put their programs in place and open filing windows. Time is of the essence for interested parties to develop their broadband deployment plans and incorporate as many features as their business plans will allow that might be favored under the stimulus programs. They must also begin to plan their application strategy to enhance their competitive standing and maximize their prospects for obtaining program benefits.

We would be pleased to respond to any questions regarding these matters or to provide further information about the implementation of the Stimulus Act and the application process as it is further defined.

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