Federal Register

Thursday,
July 9, 2009

Part III

# Department of Agriculture

Rural Utilities Service

# Department of Commerce

National Telecommunications and Information Administration

Broadband Initiatives Program; Broadband Technology Opportunities Program; Notice

## DEPARTMENT OF AGRICULTURE

### Rural Utilities Service

**RIN 0572–ZA01**

### Broadband Initiatives Program

## DEPARTMENT OF COMMERCE

### National Telecommunications and Information Administration

**RIN 0660–ZA28**

### Broadband Technology Opportunities Program

**AGENCIES:** Rural Utilities Service (RUS), Department of Agriculture, and National Telecommunications and Information Administration (NTIA), Department of Commerce.

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

**SUMMARY:** RUS and NTIA announce general policy and application procedures for broadband initiatives established pursuant to the American Recovery and Reinvestment Act of 2009 (Recovery Act). RUS is establishing the Broadband Initiatives Program (BIP) which may extend loans, grants, and loan/grant combinations to facilitate broadband deployment in rural areas. NTIA is establishing the Broadband Technology Opportunities Program (BTOP) which makes available grants for deploying broadband infrastructure in unserved and underserved areas in the United States, enhancing broadband capacity at public computer centers, and promoting sustainable broadband adoption projects. In facilitating the expansion of broadband communications services and infrastructure, both programs will advance the objectives of the Recovery Act to spur job creation and stimulate long-term economic growth and opportunity.

**DATES:** Applications will be accepted between July 14, 2009, at 8 a.m. Eastern Time (ET) until August 14, 2009, at 5 p.m. ET.

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

*Electronic submissions:* Electronic submissions of applications will allow for the expeditious review of an applicant's proposal consistent with the goals of the Recovery Act. As a result, all applicants requesting more than $1 million in assistance (in the form of grants, loans, or a combination of grants and loans) must file their application electronically. Applicants whose authorized representatives are individuals with disabilities, however, may submit a paper application irrespective of the funding size of their request.[1] In addition, applicants who are requesting less than $1 million in assistance may forego the electronic filing requirement if filing electronically would impose a hardship on the applicant. Electronic applications must be submitted by 5 p.m. ET on August 14, 2009. The government electronic application system will provide a date and time stamped confirmation number that will serve as proof of submission.

*Paper submissions:* Applicants requesting less than $1 million in assistance (in the form of grants, loans, or a combination of grants and loans) may file their applications in a paper format if filing electronically would impose a hardship on the applicants. Applicants whose authorized representatives are individuals with disabilities may file their applications in a paper format irrespective of the funding size of their request. To the extent that applicants use electronic word processing software to create paper submissions, they should include in their filing, to the extent possible, an electronic copy of the paper application on an appropriate media such as a CD. This will assist the agencies in processing paper applications. Paper submissions must be postmarked no later than August 14, 2009, or hand-delivered no later than 5 p.m. ET on August 14, 2009, to the addresses listed in the **SUPPLEMENTARY INFORMATION** in this NOFA.

*Contact Information:* For general inquiries regarding BIP, contact David J. Villano, Assistant Administrator Telecommunications Program, Rural Utilities Service, U.S. Department of Agriculture (USDA), e-mail: *bip@wdc.usda.gov* telephone: (202) 690–0525. For general inquiries regarding BTOP, contact Anthony Wilhelm, Deputy Associate Administrator, Infrastructure Division, Office of Telecommunications and Information Applications, National Telecommunications and Information Administration, U.S. Department of Commerce (DOC), email: *btop@ntia.doc.gov*, telephone: (202) 482–2048. For inquiries regarding BIP and BTOP compliance requirements, including applicable federal rules and regulations protecting against fraud, waste and abuse, contact *bipcompliance@wdc.usda.gov* for BIP and *btopcompliance@ntia.doc.gov* for BTOP. You may obtain additional information regarding applications for BIP via the Internet at *http://www.usda.gov/rus/telecom/* and for BTOP at *http://www.ntia.doc.gov/broadbandgrants/.*

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

**SUPPLEMENTARY INFORMATION:**

*Catalog of Federal Domestic Assistance (CFDA) Number:* Broadband Initiatives Program (BIP)—10.787; Broadband Technology Opportunities Program (BTOP)—11.557.

### Additional Items in Supplementary Information

*I. Overview:* Describes the purposes of the Recovery Act, the broadband goals of the Recovery Act, and the establishment of BIP and BTOP.

*II. Funding Opportunity Description:* Provides a more thorough description of BIP and BTOP.

*III. Definitions:* Sets forth the key statutory terms and other terms used in BIP and BTOP.

*IV. Award Information:* Describes funding availability, grant and loan terms, as applicable, and other award information.

*V. Eligibility Information for BIP and BTOP:* Establishes eligibility criteria, eligibility factors, eligible and ineligible costs, and other eligibility requirements.

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

*VII. Application Review Information:* Establishes the evaluation criteria for application review.

*VIII. Anticipated Announcement and Award Dates:* Identifies the initial announcement date for certain awards, and provides other information regarding BIP and BTOP.

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

*X. Other Information:* Sets forth guidance on funding, compliance with various laws, confidentiality, discretionary awards, and authorized signatures.

## I. Overview

On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009 (Recovery Act) into law.[2] The essential goal of the Recovery Act is to provide a "direct fiscal boost to help lift our Nation from the greatest economic crisis in our lifetimes and lay the foundation for

[1] *See* Rehabilitation Act of 1973 § 508, 29 U.S.C. 794d.

[2] American Recovery and Reinvestment Act of 2009, Public Law 111–5, 123 Stat. 115 (2009).

future growth."[3] Accordingly, the Recovery Act identifies five overall purposes: A. To preserve and create jobs and promote economic recovery; B. to assist those most impacted by the recession; C. to provide investments needed to increase economic efficiency by spurring technological advances in science and health; D. to invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits; and E. to stabilize state and local government budgets.[4] The Recovery Act further instructs the President and the heads of federal departments and agencies to manage and expend Recovery Act funds to achieve these five purposes, "commencing expenditures and activities as quickly as possible consistent with prudent management."[5]

Consistent with the purposes described above, the Recovery Act provides RUS and NTIA with $7.2 billion to expand access to broadband services in the United States. In so doing, it recognizes the growing importance of access to broadband services to economic development and to the quality of life of all Americans. Specifically, the Recovery Act tasks RUS, NTIA, and the Federal Communications Commission (FCC) with leading the federal government's efforts to begin the process of significantly expanding the reach and quality of broadband services.

RUS, NTIA, and the FCC have worked closely to leverage the authorities and resources provided in the Recovery Act to develop a coordinated federal government approach to addressing the challenge of rapidly expanding the access and quality of broadband services across the country. Each agency brings unique skills and resources to this effort. RUS has been the federal government leader in bringing telecommunications to rural America for decades. NTIA has experience in awarding technology-related grants through the Technology Opportunities Program and serves as the President's principal advisor on telecommunications and information policies.[6] And NTIA and the FCC together are responsible for the development of federal telecommunications policy.

Additionally, to aid in achieving Recovery Act objectives, on March 10, 2009, RUS, NTIA, and the FCC co-sponsored a public meeting to initiate public outreach about the current availability of broadband service in the United States and ways in which the availability of broadband services could be expanded.[7] The March 10 meeting was followed by the release of a Request for Information (RFI) and six days of additional public meetings and field hearings during March.[8] The meetings and hearings included nearly 120 panelists—including representatives from consumer and public interest groups, state and local governments, tribal governments, minority and vulnerable populations, industry, academia, and other institutions—who provided comment on how to make RUS's and NTIA's broadband initiatives effective, equitable, and efficient.[9]

In response to the RFI and the public meetings, RUS and NTIA received over 1,000 comments from institutions and individuals.[10] RUS and NTIA received comments on multiple issues surrounding BIP and BTOP, including how the terms "broadband," "unserved area," and "underserved area" should be defined, resulting in the definitions and program requirements announced in this NOFA. These comments played a crucial role in formulating the structure of the RUS and NTIA broadband programs. For further discussion and explanation of the agencies' reliance on the public comments in the policy decisions involved in BIP and BTOP, see the attached Policy Justification found in the Appendix at the end of this NOFA.

RUS and NTIA Recovery Act programs implement new authorities. Specifically, the Recovery Act expands RUS's existing authority to make loans and provides new authority to make grants to facilitate broadband deployment in rural areas. The Recovery Act appropriates $2.5 billion of budget authority for RUS to extend loans, loan/grant combinations, and grants to projects where at least 75 percent of an RUS-funded area is in a rural area that lacks sufficient access to high speed broadband service to facilitate rural economic development. RUS has developed BIP to fund broadband infrastructure in qualifying areas.[11]

The Recovery Act also appropriates $4.7 billion to NTIA to provide grants for broadband initiatives throughout the United States, including unserved and underserved areas.[12] NTIA is tasked to spur job creation, stimulate long-term economic growth and opportunity, and narrow gaps in broadband deployment and adoption. The NTIA program is titled BTOP. Consistent with its appropriation, BTOP is divided into three categories of projects: Broadband Infrastructure, Public Computer Centers, and Sustainable Broadband Adoption.

Applications to fund broadband infrastructure projects in areas which are at least 75 percent rural are required to be submitted to RUS for consideration under BIP. If such applicants intending to serve rural areas also choose to be considered for BTOP funding, then they must complete the additional elements required of BTOP infrastructure applicants. NTIA may make awards to such applications NTIA determines to be meritorious after RUS has reviewed the application and determined not to fund it. All other applications for Broadband Infrastructure projects, as well as applications for Public Computer Centers or Sustainable Broadband Adoption projects, must be submitted to NTIA for consideration under BTOP.

The purpose of this NOFA is to describe the availability of the BIP and BTOP funds and set forth the application requirements for those entities wishing to participate in one or more of the Recovery Act's broadband programs. Applicants may submit projects that fit within one or more categories. Each application will be compared against objective criteria to determine whether an award is warranted.

In order to balance the burdens on applicants versus the needs of the agencies to efficiently evaluate applications, RUS and NTIA have developed a two-step application process. In step one, the goal is to create a pool of viable and potentially fundable applications. Step two is to fully validate the submissions in step one and identify the most highly qualified applications for funding.

Rapid disbursement of the funds available under this program is important because of the short time frames imposed by the Recovery Act. Additionally, a commitment to transparency in the award process and

[3] President Obama, Statement on Signing the American Recovery and Reinvestment Act of 2009 (Feb. 17, 2009).

[4] Recovery Act § 3(a), 123 Stat. at 115–16.

[5] *See id.* § 3(b), 123 Stat. at 116.

[6] *See* Technology Opportunities Program, *http://www.ntia.doc.gov/otiahome/top/index.html;* NTIA Organization Act of 1992, 47 U.S.C. 901 *et seq.*

[7] *See* Joint Notice of Public Meeting, 74 FR 8914 (Feb. 27, 2009).

[8] *See* Joint Request for Information and Notice of Public Meetings, 74 FR 10716 (Mar. 12, 2009).

[9] Agendas, transcripts, and presentations from each meeting are available on NTIA's Web site at: *http://www.ntia.doc.gov/broadbandgrants/meetings.html.*

[10] Comments may be viewed on NTIA's Web site at: *http://www.ntia.doc.gov/broadbandgrants/comments.*

[11] *See* Recovery Act div. A, tit. I, 123 Stat. at 118.

[12] *See id.* div. A, tit. II, 123 Stat. at 128.

rigorous reporting requirements will help ensure accountability.

Approximately $4 billion of program level funding has been allocated to this NOFA by RUS and NTIA. The remaining funds will be made available under subsequent NOFAs. The requirements for subsequent NOFAs may differ from this NOFA to better achieve the agencies' priorities.

## II. Funding Opportunity Description

### *A. BIP*

#### 1. BIP Objectives

The Recovery Act expands RUS's existing authority to make loans and provides new authority to make grants for the purpose of facilitating broadband deployment in rural communities. Specifically, the Recovery Act requires that 75 percent of a funded area be in a rural area that lacks sufficient access to high speed broadband service to facilitate economic development. Because of the short time frames imposed by the Recovery Act, the requirements outlined in this NOFA will be used to govern program implementation.

Under BIP, RUS will award grants, loans, and loan/grant combinations for broadband infrastructure. Grants under BIP are to be used to fund applications proposing to exclusively serve remote, unserved, rural areas. BIP loan and loan/grant combination funds are to be used to provide funding to applications proposing to serve non-remote and underserved rural areas. Projects which include non-remote and remote areas will be funded by loans or loan/grant combinations. The size of the grant portion of any loan/grant combination award is determined by the applicant, but cannot exceed the amount of the loan portion of the award. RUS will favor applications that propose a higher percentage of loan funds. Applicants may request 100 percent loan funding. RUS will seek to make the extension of broadband infrastructure into difficult-to-serve areas affordable—a key objective of BIP funding—through substantial grant funds and attractive loan terms with reasonable security requirements.

The Recovery Act establishes the rapid disbursement of the funds as an important priority for the BIP program. However, the program also must be administered judiciously to ensure responsible use of public funds. To balance these two objectives, RUS will favor funding projects that can commence construction promptly and demonstrate technical and financial feasibility, organizational capacity, and compliance with other Administration priorities. A commitment to transparency in the award process and rigorous reporting requirements will help ensure accountability.

#### 2. BIP Priorities

The Recovery Act requires that 75 percent of a BIP-funded area be in a rural area that "lacks sufficient access to high speed broadband service to facilitate rural economic development." [13] Additionally, the Recovery Act mandates that priority be given to projects which: a. Give end users a choice of providers; b. Serve the highest proportion of rural residents that lack access to broadband service; c. Are projects of current or former RUS borrowers (Title II borrowers); and d. Are fully funded and ready to start once Recovery Act funding is received. BIP application scoring criteria awards projects that implement these priorities.[14]

#### 3. BIP Application and Selection Process

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. 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 described in section VII. 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. If the additional documentation does not adequately verify the first submission, then the application will be rejected.

### *B. BTOP*

#### 1. BTOP Objectives

Section 6001 of the Recovery Act establishes a national broadband service development and expansion program to promote five core purposes:

a. To provide 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 (*e.g.*, schools, libraries, medical facilities), or organizations and agencies serving vulnerable populations (*e.g.*, low-income, unemployed, aged), or job-creating strategic facilities located in state- or federally designated 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.[15]

The Recovery Act provides $4.7 billion to NTIA for BTOP, to be awarded by September 30, 2010, which represents a significant investment to advance President Obama's national broadband strategy.[16] Of this amount, at least $200 million will be made available for competitive grants for expanding public computer center capacity. In addition, at least $250 million will be available for competitive grants for innovative programs to encourage sustainable adoption of broadband services. Up to $350 million is available from the Recovery Act to fund the State Broadband Data and Development Grant Program authorized by the Broadband Data Improvement Act [17] and to support the development and maintenance of a nationwide broadband map for use by policymakers and consumers. A forthcoming NOFA will outline policies and procedures for the State Broadband Data and Development Grant Program.

BTOP funds are available through three categories of eligible projects: Broadband Infrastructure, Public Computer Centers, and Sustainable Broadband Adoption.[18] The Broadband Infrastructure category consists of two components—Last Mile and Middle Mile—and will fund projects to deliver broadband access to unserved and underserved areas. 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.[19] 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,

[13] *Id.* div. A, tit. I, 123 Stat. at 118.

[14] *Id.* at 118–19.

[15] *See id.* § 6001(b), 123 Stat. at 512–13.

[16] *See id.* div. A, tit. II, 123 Stat. at 128.

[17] Public Law 110–385, 122 Stat. 4096 (to be codified at 47 U.S.C. 1301 *et seq.*).

[18] *See* Recovery Act div. A, tit. II, 123 Stat. at 128.

[19] *Id.* div. A, tit. II & § 6001(b)(3), 123 Stat. at 128, 512–13.

# Page: 4

Sequence number: 1
Author: Jim Bamberger
Subject: Sticky Note
Date: 11/22/2009 10:03:48 AM
insert: , persons with disabilities

Sequence number: 2
Author: Jim Bamberger
Subject: Sticky Note
Date: 11/23/2009 8:51:32 AM
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particularly among vulnerable population groups where broadband technology has traditionally been underutilized.[20]

The Recovery Act also recognizes the valuable role that the states and territories can play in implementing BTOP, and permits NTIA to consult with them in identifying unserved and underserved areas within their borders and in allocating grant funds for projects in or affecting their jurisdictions.[21] Consistent with the Recovery Act, NTIA has consulted with the FCC on this NOFA.

2. BTOP Priorities

All projects funded under BTOP must advance one or more of the five statutory purposes outlined above. The program is designed to extend broadband access to unserved areas, improve access to underserved areas, and expand broadband access to a wide range of institutions and individuals, including vulnerable populations. It will seek to serve the highest priority needs for federal investment—particularly projects that offer the potential for economic growth and job creation, and provide benefits to education, health care, and public safety. The program will support viable, sustainable, and scalable projects. NTIA will favor proposals that satisfy the public-interest objectives specified in the statute and detailed in this NOFA. These projects can serve as models for future investors once economic conditions improve.

NTIA expects to distribute grants across geographic areas addressing these various public purposes. It will issue awards on a technologically neutral basis, and expects to support projects employing a range of technologies (*e.g.*, fixed and mobile wireless, fiber, satellite). In making these awards, NTIA will also take into consideration whether an applicant is a socially and economically disadvantaged small business concern as defined under section 8(a) of the Small Business Act (SBA) (15 U.S.C. 637(a)(4)).[22] Finally, it is also important to highlight the desire of the Recovery Act to extend non-discrimination and network interconnection obligations on awardees. In particular, the Recovery Act directs NTIA to impose contractual conditions on BTOP grants that would, at a minimum, adhere to the principles contained in the FCC's broadband policy statement.[23]

3. BTOP Application and Selection Process

NTIA will employ a two-step application review process. First, however, NTIA will conduct an initial screen of applications to determine whether an application meets the mandatory threshold requirements, such as application completeness, set forth in section V.C. of this NOFA. These are mandatory threshold requirements that qualify an application for further review. Applicants that fail to meet any of the eligibility factors will be notified in writing of the reason for the rejection. Subsequent to this initial screening, applications will proceed to the step one review process. The applications will receive at least three independent reviews (by a three-member review panel) against the eligibility factors as well as against the evaluation criteria provided in this NOFA. This review panel will be comprised of at least three peer/expert reviewers who have demonstrated subject-matter expertise. No consensus advice will be given by the reviewers. Each reviewer will independently score the application, and reviewer scores will be averaged. Based on these scores, applications 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 will be notified in writing of the reason for the rejection.

In step two of the review process, the remaining applicants will be asked to submit additional information, as appropriate, such as more detailed plans or supporting documents[24] 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 will be notified in writing of the reason for the rejection. Upon completion of its due diligence, NTIA program staff will complete its analysis of each application by assigning a rating based on its consistency with the representations made in the application. This rating will be based on a five-point scale (1–5), with a five representing the highest consistency and conformity with the information already provided, especially on technical and budget considerations.

All states will be provided an opportunity to make recommendations concerning the allocation of funds for qualifying projects in or affecting the individual states during step two of the BTOP application process, regardless of their participation in the State Broadband Data and Development Grant Program. During step two of the BTOP application process, the Governor's office of each state will receive a list of the applications under consideration. States may 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 to provide mapping and planning data to support their recommendations. States participating in the State Broadband Data and Development Grant Program may rely on their submission under that program to fulfill this request. All states will have 20 calendar days from the date of notification to submit to NTIA their recommendations.

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. Not all applicants contacted will necessarily receive a BTOP award. The Director of BTOP (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;

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

[20] *Id.* div. A, tit. II & 6001(b)(5), 123 Stat. at 128, 513.

[21] *Id.* § 6001(c), 123 Stat. at 513.

[22] *See id.* § 6001(h)(3), 123 Stat. at 514–15.

[23] *Id.* § 6001(j), 123 Stat. at 515.

[24] *See infra* section VI.D.1.b. for more details regarding the required additional information.

# Page: 5

Sequence number: 1
Author: Jim Bamberger
Subject: Sticky Note
Date: 11/22/2009 10:03:43 AM
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population of users; improving 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 Recovery Act; 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 Recovery Act);

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; [25]

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.[26]

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 as set forth in section II.B of this NOFA. Awards will be made on a rolling basis subject to the availability of funds.

## III. Definitions

The terms and conditions provided in this NOFA are applicable to and for purposes of this NOFA only. These terms, conditions, and definitions may change in subsequent NOFAs issued regarding BIP and BTOP.

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

*Applicant* means an entity requesting approval of an award under this NOFA.

*Assistant Secretary* means the Assistant Secretary for Communications and Information, National Telecommunications and Information Administration, Department of Commerce, or the Assistant Secretary's designee.

*Award documents* mean, collectively, grant agreement, loan documents and/or loan/grant combination documents.

*Award* means a grant, loan, or loan/grant combination made under this NOFA by either RUS or NTIA.

*Awardee* means a grantee, borrower, or borrower/grantee.

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

*Borrower* means the recipient of a RUS loan under this NOFA.

*Borrower/grantee* means the recipient of a RUS loan/grant combination under this NOFA.

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

*BTOP* means the Broadband Technology Opportunities Program, administered by NTIA, under the Recovery Act.

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

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

*Community anchor institutions* means schools, libraries, medical and healthcare providers, public safety entities, community colleges and other institutions of higher education, and other community support organizations and agencies that provide outreach, access, equipment and support services to facilitate greater use of broadband service by vulnerable populations, including low-income, unemployed, and the aged.

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

*Current ratio* means the BIP applicant's current assets divided by the current liabilities; all financial terms are defined by GAAP.

*Economic life* means the estimated useful service life of an asset as determined by RUS in connection with awards made under BIP.

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

*GAAP* means generally accepted accounting principles.

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

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

*Grantee* means the recipient of a grant under this NOFA.

*Last Mile project* means 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).

*Last Mile Non-Remote project* means any broadband infrastructure project (or group of projects) that is not exclusively a last mile remote area project, and that provides broadband service to the end user or end-user devices in a service area eligible for BIP funding.

*Last Mile Remote Area project* means any broadband infrastructure project that provides broadband service to the end user or to end-user devices only in a remote area(s) eligible for BIP funding.

*Loan* means any loan made under this NOFA by RUS.

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

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

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

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

*Loan/grant documents* mean the loan/grant contract, note(s), and security

[25] Recovery Act § 6001(h)(2)(D), 123 Stat. at 515.

[26] Consistent with Recovery Act, the application for the State Broadband Data and Development Grant Program will provide participating states the opportunity to identify unserved and underserved areas in their state. In their Mapping Grant application, states may also make recommendations concerning the allocation of funds for projects in or affecting the individual states at the time the state submits its Mapping Grant application.

# Page: 6

Sequence number: 1
Author: JamesB
Subject: Note
Date: 11/22/2009 10:05:11 AM
insert (including law and justice system related activities)

**Rationale:** Recognizing that neither the Recover Act nor the NOFA priorities are written to exclude naturally related functions and activities, this language protects against an inappropriately narrow reading of the term "public safety" by applicant reviewers.

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Sequence number: 2
Author: JamesB
Subject: Note
Date: 11/10/2009 9:53:35 AM
insert: (including appropriate law and justice system related functions)

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Sequence number: 3
Author: JamesB
Subject: Note
Date: 11/23/2009 8:56:50 AM
insert: "law, justice and"

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Sequence number: 4
Author: JamesB
Subject: Note
Date: 11/22/2009 10:18:08 AM
insert after "healthcare providers": law, justice and public safety entities ...

**Rationale:** Section 6001 of the Recover Act and the NOFA itself offer a description of "community anchor institutions" by way of example (using "e.g."). It is not an exclusive list. While law and justice system functions are inextricably associated with "public safety" it makes sense to clarify this understanding in the NOFA so that courts, prosecuting attorneys, public defenders, legal aid organizations and other law and justice relate institutions have a meaningful opportunity to participate in the BTOP initiative, and through such participation promote the objectives of (a) promoting public safety, and (b) protecting low income and vulnerable populations. Such additional language ensures that reviewers to not employ an unnecessarily narrow interpretation of "public safety".

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Sequence number: 5
Author: JamesB
Subject: Note
Date: 11/23/2009 8:55:41 AM
insert: "community technology centers,"

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Sequence number: 6
Author: Jim Bamberger
Subject: Sticky Note
Date: 11/23/2009 8:40:10 AM
insert: "(including but not limited to state, local and tribal courts, law libraries, and community based legal aid providers)"

Rationale: The BTOP authorizes NTIA to provide broadband education, awareness, training access equipment, and support to a range of core institutions including "community support entities." The Recovery Act does not define "community support entities." NTIA should expressly recognize the foregoing law and justice related entities as falling within the scope and purpose of Congressional intent.

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Author: JamesB
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insert: "persons with disabilities,"

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instrument between the borrower/grantee and RUS and any associated documents pertaining to the loan/grant.

*Middle Mile project* means 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.

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

*Proposed funded service area* means the area (either in all or part of an existing service area or a new service area) where the applicant is requesting BIP or BTOP funds to provide broadband service pursuant to this NOFA.

*Public computer center* means a place, including but not limited to community colleges, libraries, schools, youth centers, employment service centers, Native American chapter houses, community centers, senior centers, assistive technology centers for people with disabilities, community health centers, and Neighborhood Network Centers in public housing developments, that provide broadband access to the general public or a specific vulnerable population, such as low-income, unemployed, aged, children, minorities and people with disabilities.

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

*Recovery Act* means the American Recovery and Reinvestment Act of 2009, Public Law No. 111–5, 123 Stat. 115 (2009).

*Remote area* means an unserved, rural area 50 miles from the limits of a non-rural area.

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

*Security document* means any mortgage, deed of trust, security agreement, financing statement, or other document that RUS determines is necessary to perfect its interest in the security for a loan or loan/grant.

*Service area* means the entire area within which a service provider either offers or intends to offer broadband service and may include the proposed funded service area.

*State* means, for purposes of BTOP, a state or political subdivision thereof, the District of Columbia, or a territory or possession of the United States.

*TIER* means times interest earned ratio. TIER is the ratio of a BIP applicant's net income (after taxes) plus (adding back) interest expense, all divided by interest expense (existing and any new interest expense including the interest expense associated with the proposed loan); all financial terms are defined by GAAP.

*Underserved area* means a proposed funded service area, composed of one or more contiguous census blocks [27] meeting certain criteria that measure the availability of broadband service and the level of advertised broadband speeds. These criteria conform to the two distinct components of the Broadband Infrastructure category of eligible projects—Last Mile and Middle Mile. Specifically, a proposed funded service area may qualify as underserved for last mile projects if at least one of the following factors is met, though the presumption will be that more than one factor is present: 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 the minimum broadband transmission speed (set forth in the definition of broadband above); 2. No fixed or mobile broadband service provider advertises broadband transmission speeds of at least three megabits per second ("mbps") 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 point terminates in a proposed funded service area that qualifies as unserved or underserved for Last Mile projects.

*Unserved area* means a proposed funded service area, composed of one or more contiguous census blocks, where at least 90 percent of households in the proposed funded service area lack access to facilities-based, terrestrial broadband service, either fixed or mobile, at the minimum broadband transmission speed (set forth in the definition of broadband above). A household has access to broadband service if the household can readily subscribe to that service upon request.

[27] Census blocks are the smallest geographic areas for which the U.S. Bureau of the Census collects and tabulates decennial census data. Census blocks are formed by streets, roads, railroads, streams and other bodies of water, other visible physical and cultural features, and the legal boundaries shown on Census Bureau maps. Census data at this level serve as a valuable source for small-area geographic studies. See the Census Bureau's Web site at *http://www.census.gov* for more detailed information on its data gathering methodology.

## IV. Award Information

### *A. Available Funds for BIP*

1. General

Approximately $2,400,000,000 in program level funding has been set aside for funding opportunities under this NOFA.

2. Funding Limits

Award amounts under this NOFA will be limited as follows:

a. Last Mile Projects

Up to $1,200,000,000 is available for Last Mile projects. These projects may consist of Remote Area projects or Non-Remote projects. Up to $400,000,000 is available for grants for Remote Area projects. Up to $800,000,000 is available for loans or loan/grant combinations for Non-Remote projects.

b. Middle Mile Projects

Up to $800,000,000 is available for loans or loan/grant combinations for Middle Mile projects.

3. Repooling

For categories that do not receive applications that request the full amount of allocated funds, excess funds may be directed to another category at RUS's discretion. Additionally, if RUS does not make awards in the full amount allocated to a category, RUS may, at its discretion, direct such excess funds to another category.

4. National Reserve

Up to $325,000,000 is available for a national reserve. These funds may be used to augment the BIP funding categories established above, or remain unused for subsequent NOFAs. In any event, all funds will be awarded no later than September 30, 2010.

5. Unused Funds

Funds made available but not used for this NOFA may be directed to subsequent NOFAs.

6. Award Period

All awards under BIP must be made no later than September 30, 2010. While the completion time will vary depending on the complexity of the project, award recipients must

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insert, "community based legal aid offices and courthouse-based and other public access community justice centers"

**Rationale:** Community based legal aid offices and courthouse-based community justice centers equipped with public access communications can and do offer direct links to essential information, advice and resources necessary to address the civil legal problems of low income and vulnerable people. This language complements the language included in the NOFA and is consistent with the purposes set forth in section 6001 of the Recovery Act.

substantially complete projects supported by this program no later than two years, and projects must be fully completed no later than three years, following the date of issuance of the award.

7. Type of Funding Instrument

The funding instruments for BIP will be a grant, loan, and loan/grant combination.

*B. Available Funds for BTOP*

1. General

Up to $1,600,000,000 in budget authority has been set aside for funding opportunities under this NOFA. Publication of this NOFA does not obligate NTIA to award any specific project or obligate all or any parts of any available funds, although the Recovery Act indicates that the Assistant Secretary shall award at least one grant in each state to the extent practical by September 30, 2010.[28]

2. Funding Limits

Up to $1.4 billion is available to be awarded under this NOFA and will be allocated in the following categories:

a. Broadband Infrastructure projects will be awarded no greater than $1.2 billion;

b. Public Computer Center projects will be awarded no greater than $50 million; and

c. Sustainable Broadband Adoption projects will be awarded no more than $150 million.

3. Repooling

Subject to the statutory thresholds set forth in the Recovery Act, NTIA retains the discretion to divert funds from one category of projects to another.

4. National Reserve

Up to $200 million is available for a national reserve. These funds may be used to augment the BTOP funding categories established above, or remain unused for subsequent NOFAs. In any event, all funds will be awarded no later than September 30, 2010.

5. Unused Funds

Funds not awarded under this NOFA may be used to fund subsequent NOFAs.

6. Award Period

All awards under BTOP must be made no later than September 30, 2010.[29] While the completion time will vary depending on the complexity of the project, grant recipients must substantially complete projects supported by this program no later than two years, and projects must be fully completed no later than three years, following the date of issuance of the grant award.[30]

7. Type of Funding Instrument

The funding instrument for BTOP will be a grant.

## V. Eligibility Information for BIP and BTOP

*A. In General*

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

*B. Eligible Entities*

1. Applicant Organization

The following entities are eligible to apply for assistance:

a. States, local governments, or any agency, subdivision, instrumentality, or political subdivision thereof;

b. The District of Columbia;

c. A territory or possession of the United States;

d. An Indian tribe (as defined in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b));

e. A native Hawaiian organization;

f. A non-profit foundation, a non-profit corporation, a non-profit institution, or a non-profit association;

g. Other non-profit entities;

h. For-profit corporations;

i. Limited liability companies; and

j. Cooperative or mutual organizations.

2. BTOP Public Interest Finding

Section 6001(e)(1)(C) of the Recovery Act authorizes the Assistant Secretary to find by rule that it is in the public interest for any entity not otherwise encompassed by section 6001(e)(1) to be eligible for a BTOP grant to the extent that such finding will promote the purposes of BTOP in a technologically neutral manner. Through this NOFA, the Assistant Secretary has found it to be in the public interest to permit for-profit corporations and non-profit entities (not otherwise encompassed by section 6001(e)(1)(B)) that are willing to promote the goals of the Recovery Act and comply with the statutory requirements of BTOP to be eligible for a grant. By adopting this broad approach, the Assistant Secretary intends to invite a diverse group of applicants to participate in BTOP and to expand broadband capabilities in a technologically neutral manner.[31]

*C. Application Eligibility Factors*

The following eligibility factors establish basic requirements that all applicants must comply with in order to be eligible for an award. Applicants failing to comply with these requirements will not have their applications considered. This section lists eligibility factors (a) shared by BIP and all three BTOP project categories; (b) shared by BIP and BTOP Broadband Infrastructure projects; (c) that apply only to BIP projects; and (d) that apply only to the three BTOP project categories.

1. Eligibility Factors Common to All BIP and BTOP Applicants

a. Fully Completed Application

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

b. Timely Completion

A project is eligible only if the application demonstrates that the project can be substantially completed within two years of the date of issuance of the grant, loan, or loan/grant award and finished within three years of the date of the award. For BIP, a project is considered "substantially complete" when an awardee has received 67 percent of its award funds. For BTOP, a project is considered "substantially complete" when the awardee has met 67 percent of the project milestones and received 67 percent of its award funds.

2. Additional Factors Applicable to BIP and BTOP Broadband Infrastructure Applicants

a. Broadband Service

All Broadband Infrastructure applicants must propose to offer service meeting the definition of Broadband as defined herein.

b. Technical Feasibility

Only projects that RUS and NTIA determine to be technically feasible will be eligible for an award under this NOFA. At minimum, applicants will be required to submit a system design and project timeline, certified by a professional engineer, for any project requesting funds over $1 million.

c. Nondiscrimination and Interconnection

All Broadband Infrastructure (both BIP and BTOP) applicants, must commit to the following Nondiscrimination and Interconnection Obligations: i. Adhere to the principles contained in the FCC's Internet Policy Statement (FCC 05–151, adopted August 5, 2005); ii. not favor

[28] Recovery Act § 6001(h)(1), 123 Stat. at 514.

[29] *Id.* § 6001(d)(2), 123 Stat. at 513.

[30] *Id.* § 6001(d)(3), 123 Stat. at 513.

[31] *Id.* § 6001(e)(1)(C), 123 Stat. at 513.

any lawful Internet applications and content over others; iii. display any network management policies in a prominent location on the service provider's web page and provide notice to customers of changes to these policies (awardees must describe any business practices or technical mechanisms they employ, other than standard best efforts Internet delivery, to allocate capacity; differentiate among applications, providers, or sources; limit usage; and manage illegal or harmful content); iv. connect to the public Internet directly or indirectly, such that the project is not an entirely private closed network; and v. offer interconnection, where technically feasible without exceeding current or reasonably anticipated capacity limitations, on reasonable rates and terms to be negotiated with requesting parties. This includes both the ability to connect to the public Internet and physical interconnection for the exchange of traffic. Applicants must disclose their proposed interconnection, nondiscrimination, and network management practices with the application.

All these requirements shall be subject to the needs of law enforcement and reasonable network management. Thus, awardees may employ generally accepted technical measures to provide acceptable service levels to all customers, such as caching and application-neutral bandwidth allocation, as well as measures to address spam, denial of service attacks, illegal content, and other harmful activities. In addition to providing the required connection to the Internet, awardees may offer managed services, such as telemedicine, public safety communications, and distance learning, which use private network connections for enhanced quality of service, rather than traversing the public Internet.

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

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

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

These conditions will apply for the life of the awardee's facilities used in the project and not to any existing network arrangements. The conditions apply to any contractors or subcontractors of such awardees employed to deploy or operate the network facilities for the infrastructure project. Recipients that fail to accept or comply with the terms listed above may be considered in default or breach of their loan or grant agreements. RUS and NTIA may exercise all available remedies to cure the default.

d. Last Mile Coverage Obligation

An applicant for a Last Mile Broadband Infrastructure project must identify the census block(s) selected for the project and provide documentation supporting the applicant's determination that the proposed funded service area is either unserved or underserved. 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. Applicants may be permitted to serve less than an entire census block under certain conditions. For example, an applicant might request to be relieved of this requirement if the census block exceeds 100 square miles or more or is larger than the applicant's authorized operating territory, *e.g.*, it splits a rural incumbent local exchange carrier's (ILEC's) study area or exceeds the boundaries of a wireless carrier's licensed territory.

3. Additional Factors for BIP

a. Eligible Service Area

A project is eligible only if the applicant demonstrates 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.[32] For the purposes of this NOFA, RUS has determined that "without sufficient broadband access" shall mean without access to broadband, as defined herein. Furthermore, RUS has determined that only rural areas which are unserved or underserved, as defined herein, shall qualify as "areas without sufficient access to broadband service." Therefore, to qualify for BIP funding, projects must serve at least 75 percent unserved or underserved rural areas.

b. Overlapping Service Areas

RUS will not fund more than one project to serve any given geographic area. If more than one application would serve any overlapping geographic area, the application with the highest score will be funded; other applications for the same area will be rejected in their entirety unless RUS, in its discretion, determines that the extent of the overlap is de minimis.

c. Fully Funded

A project is eligible only if, after approval of the grant, loan, or loan/grant combination, all project costs can be fully funded. To demonstrate this, applicants must include with the application evidence of all funding, other than the RUS award, necessary to support the project, such as bank account statements or firm letters of commitment from equity participants or other lenders documenting the timely availability of funds.

d. Financial Feasibility and Sustainability

Only projects that RUS determines to be financially feasible and/or sustainable will be eligible for an award under this NOFA.

*Loans:* A project funded by a loan or loan/grant combination is financially feasible when the applicant is able to generate sufficient revenues to cover its expenses, has sufficient cash flow to service its debts and obligations as they come due, and meet the minimum Times Interest Earned Ratio (TIER) requirement of one by the end of the forecast period, as determined by RUS.

*Grants:* A project funded by a grant is financially sustainable when the applicant is able to generate a minimum

[32] *See id.* div. A, tit. I, 123 Stat. at 118.

current ratio of one by the end of the forecast period and can demonstrate a positive cash balance for each year of the forecast period.

4. Additional Factors for BTOP

a. Conformity With Statutory Purposes

A project is eligible only if it advances at least one of the statutory purposes for BTOP.[33]

b. Cost Sharing/Matching

Awardees under BTOP will be required to provide matching funds of at least 20 percent toward the total eligible project cost. Applicants must document their capacity to provide matching funds. NTIA will provide up to 80 percent of total eligible project costs, unless the applicant petitions the Assistant Secretary for a waiver of the matching requirement and that waiver is granted by the Assistant Secretary based on the applicant's demonstration of financial need.[34] In requesting such a waiver, an applicant should fully explain and document its inability to provide the required 20 percent share of the cost of its proposed project. An applicant should submit complete financial documentation supporting its need for a waiver of the matching requirement. These documents should include the applicant's assets, liabilities, operating expenses and revenues from any existing operations, and any other documents that will demonstrate financial need and sustainability, including such items as a denial of funding from a public or private lending institution. The Assistant Secretary will evaluate the information provided in support of the petition and may increase the federal share if financial need is demonstrated.

Generally, federal funds may not be used as matching funds except as provided by federal statute.[35] In-kind contributions, including third party in-kind contributions, are non-cash donations to a project that may count toward satisfying the non-federal matching requirement of a project's total budget. In-kind contributions must be allowable project expenses. Such contributions may be accepted as part of an applicant's matching when such contributions meet certain criteria,[36]

Applications that propose to provide matching funds of greater than 20 percent and that are all cash will be given additional favorable consideration in step one of the application review process.

c. Demonstration That Project Could Not Be Implemented but for Federal Grant Assistance

Grant applicants must provide documentation that the project would not have been implemented during the grant period without federal grant assistance. This documentation 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.

d. Reasonableness of Project Budget

A project will only be eligible if it demonstrates that its budget is appropriate to the proposed technical and programmatic solutions, its costs are reasonable and eligible consistent with the principles outlined in section V.D below, and that the allocation of funds will be sufficient to complete the tasks outlined in the project plan.

*D. Eligible Cost Purposes*

1. General

Award funds must be used only to pay for eligible costs. Eligible costs are consistent with the cost principles identified in the applicable OMB circulars[37] and in the grant or the loan/grant program's authorizing legislation. In addition, costs must be reasonable, allocable, necessary to the project, and comply with the funding statute requirements. Any application that proposes to use any portion of the award funds for any ineligible cost will be rejected.

2. Eligible and Ineligible Costs for BIP and BTOP Infrastructure Projects

a. Eligible Infrastructure Award Expenses

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

i. To fund the construction or improvement of all facilities required to provide broadband service, and for BIP only, including facilities required for providing other services over the same facilities;

ii. To fund the cost of leasing facilities required to provide broadband service if such lease qualifies as a capital lease under GAAP. Award funds may be used to fund the cost of the capital lease for no more than the first five years after the date of the first advance of award funds;

iii. To fund reasonable pre-application expenses in an amount not to exceed five percent of the award. Pre-application expenses may be reimbursed if they are incurred after the publication date of this NOFA and prior to the date on which the application is submitted to RUS or NTIA; and

iv. For BTOP only undertaking such other projects and activities as the Assistant Secretary finds to be consistent with the purposes for which the program is established.

b. Ineligible Award Expenses

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

i. To fund operating expenses of the project, including fixed and recurring costs of a project;

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

iii. To fund an acquisition, including the acquisition of the stock of an affiliate, or the purchase or acquisition of any facilities or equipment of an affiliate;

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

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

vi. To fund merger or consolidation of entities; and

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[33] *See id.* § 6001(b), 123 Stat. at 512–13.

[34] *See id.* § 6001(f), 123 Stat. at 514.

[35] *See* Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, Other Non-profit, and Commercial Organizations, 15 CFR § 14.23(a)(5); *see also* Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, 24 CFR § 24.24(b)(1).

[36] *See* 15 CFR §§ 14.23(a), 24.24(a).

[37] For example there is a set of federal principles for determining eligible or allowable costs. Allowability of costs will be determined in accordance with the cost principles applicable to the entity incurring the costs. Thus, allowability of costs incurred by state, local or federally-recognized Indian tribal governments is determined in accordance with the provisions of OMB Circular A–87, "Cost Principles for State, Local and Indian Tribal Governments." The allowability of costs incurred by non-profit organizations is determined in accordance with the provisions of OMB Circular A–122, "Cost Principles for Non-Profit Organizations." The allowability of costs incurred by institutions of higher education is determined in accordance with the provisions of OMB Circular A–21, "Cost Principles for Educational Institutions." The allowability of costs incurred by hospitals is determined in accordance with the provisions of Appendix E of 45 CFR pt. 74, "Principles for Determining Costs Applicable to Research and Development under Grants and Contracts with Hospitals." The allowability of costs incurred by commercial organizations and those non-profit organizations listed in Attachment C to Circular
A–122 is determined in accordance with the provisions of the Federal Acquisition Regulation (FAR) at 48 CFR pt. 31. *See* 15 CFR 14.27, 24.22 (governing the Department of Commerce's implementation of OMB requirements).

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

3. Eligible and Ineligible Costs for Public Computer Centers and Sustainable Broadband Adoption

a. General

Grantees for BTOP funds under these two project categories are required to show how such funding serves the stated purposes of: i. Providing broadband education, awareness, training, access, equipment, and support to community anchor institutions (*e.g.*, schools, libraries, m[1] and healthcare providers, community colleges and other institutions of higher education, and other community support organizations), or organizations and agencies serving vulnerable populations (*e.g.*, [2]ncome, unemployed, aged), or job-creating strategic facilities located in state- or federally-designated economic development areas; ii. improving access to, and use of, broadband service by [3]public safety agencies; and iii. stimulating the demand for broadband, economic growth, and job creation.

b. Eligible Costs for Public Computer Centers

Grantees may use BTOP funding under this project category to expand computer center capacity by:

i. Acquiring broadband-related equipment, instrumentation, networking capability, hardware and software, and digital network technology for broadband services;

ii. Developing and providing training, education, support and awareness programs or web-based resources;

iii. Facilitating access to broadband services, including, but not limited to, making public computer centers accessible to the disabled; and

iv. Undertaking such other projects and activities as the Assistant Secretary finds to be consistent with the purposes for which the program is established.

c. Eligible Costs for Sustainable Broadband Adoption

Grantees may use BTOP funding under this project category to encourage sustainable adoption of broadband services by:

i. Acquiring broadband-related equipment, hardware and software, and digital network technology for broadband services;

ii. Developing and providing training, education, support and awareness programs or web-based content;

iii. Conducting broadband-related public education, outreach, support and awareness campaigns;

iv. Implementing innovative programs to facilitate greater access to broadband service, devices, and equipment; and

v. Undertaking such other projects and activities as the Assistant Secretary finds to be consistent with the purposes for which the program is established.

d. Ineligible Costs for Public Computer Centers and Sustainable Broadband Adoption

BTOP grant funds may not be used to fund purchases that are not used predominantly for the provision of broadband education, awareness, training, access, equipment and support.

*E. Use of Program Income*

Grantees are required to account for any program income directly generated by projects financed in whole or in part with federal funds. Given the Recovery Act's objectives to spur job creation and stimulate long-term economic growth and opportunity, projects funded by BIP and BTOP grants are expected to convincingly demonstrate the ability to be sustained beyond the funding period. While grant funds are intended to cover the capital costs of a project as part of the Recovery Act's effort to stimulate the economy, grant recipients for all grant programs are expected to present projects that will sustain long-term growth and viability.

For purposes of BIP and BTOP, any program income generated by a proposed project during the grant period shall be retained by the grant recipient and shall be added to the funds committed to the project by RUS or NTIA and the recipient. The grant recipient should use program income to further eligible project objectives, including reinvestment in project facilities. Program income means gross income earned by the recipient that is either directly generated by a supported activity, or earned as a result of the award during the funding period. Grant recipients shall have no obligation to the federal government regarding program income earned after the end of the project period. However, the federal government retains an interest in property in the event that it is sold, consistent with the guidance outlined in section IX of this NOFA.[38]

## VI. Application and Submission Information

*A. Request for Application Package*

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

*B. Registration*

1. DUNS Number

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

2. Central Contractor Registration (CCR)

All applicants must provide a CCR (CAGE) number evidencing current registration in the Central Contractor Registration (CCR) database. If the applicant does not have a current CCR (CAGE) number, the applicant must register in the CCR system available at *http://www.ccr.gov/StartRegistration.aspx.*

*C. Choosing the Proper Agency and Category for an Application*

1. Broadband Infrastructure

a. Choosing BIP or BTOP Broadband Infrastructure

i. *Applications for Rural Areas.* All applications to fund broadband infrastructure in proposed funded service areas which are at least 75 percent rural are required to be submitted to RUS for consideration under BIP. If such applicants also choose to be considered for BTOP funding, they must complete the additional elements required of BTOP infrastructure applicants. RUS will consider all applications for projects in proposed funded service areas which are at least 75 percent rural in accordance with the BIP procedures outlined in this NOFA. If the applicant also chooses to be considered under BTOP, NTIA will review these applications using its own objective evaluation criteria and in accordance with BTOP procedures outlined in this NOFA. NTIA may make awards with respect to such applications NTIA determines to be meritorious after RUS has reviewed the application and determined not to fund it. RUS and NTIA have adopted these application procedures to reflect the fact that Congress, in the Recovery Act, intended that RUS focus its activities on rural areas and mandated that NTIA funding could not be applied in the same area funded by RUS under the Recovery Act.

[38] 2 CFR 215.24; 15 CFR 14.24, 24.25.

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Sequence number: 1
Author: Jim Bamberger
Subject: Sticky Note
Date: 11/23/2009 8:41:14 AM
Insert: "law, justice and public safety-related entities"

Sequence number: 2
Author: Jim Bamberger
Subject: Sticky Note
Date: 11/23/2009 8:41:10 AM
insert: ",persons with disabilities"

Sequence number: 3
Author: Jim Bamberger
Subject: Sticky Note
Date: 11/22/2009 10:24:33 AM
insert: "law, justice and"

ii. *Applications for All Other Areas.* All applications to fund broadband infrastructure projects in proposed funded service areas that are less than 75 percent rural must be submitted to NTIA for consideration under BTOP. Submissions to BIP of such applications will be rejected.

b. BIP Broadband Infrastructure Categories

i. Last Mile Remote Area

Applications for Last Mile Remote Area projects must predominantly provide broadband directly to the premise or to end users within completely remote areas, as defined herein. The BIP Program will consider applications for grant funds up to 100 percent. For grants receiving greater than 80 percent of eligible costs, the Administrator must determine that the awardee has a specific financial need that justifies funding greater than 80 percent.

ii. Last Mile Non-Remote Projects

Applications for 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, as defined herein. Last Mile Non-Remote Area projects may encompass both remote and non-remote areas, and will be awarded scoring points for remote areas within the application. Only those applications for loans or loan/grant combinations whose total proposed funded service area contains 75 percent or more unserved or underserved rural areas, as defined herein, will be considered for BIP funding.

iii. Broadband Infrastructure Middle Mile Projects

Applications for Middle Mile projects 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. The BIP program will consider only those applications for loans and loan/grant combinations whose total proposed funded service area benefits at least 75 percent or more unserved or underserved rural areas, as defined herein.

c. BTOP Broadband Infrastructure Categories

i. Last Mile

For the purposes of BTOP grant funds, applications for Last Mile projects must be for unserved or underserved areas and have the predominant purpose to provide broadband service to end users or end-user devices (including homes, businesses, schools, libraries, medical and health care providers, community support organizations, public safety entities, vulnerable populations and other institutions and individuals). Highly responsive Last Mile projects should be technically feasible, sustainable, and scalable, and address BTOP's priority needs, including offering substantial economic, educational, health care, and public safety benefits relative to the costs of providing service.

iii. Middle Mile

For the purposes of BTOP grant funds, applications for Middle Mile projects must be for unserved or underserved areas and have a predominant purpose other than providing broadband service to end users or to end-user devices and may include interoffice transport, backhaul, Internet connectivity, or special access. Highly responsive Middle Mile projects should be technically feasible, sustainable, and scalable and offer substantial benefits to unserved and underserved areas relative to the costs of providing service.

2. BTOP—Public Computer Centers

For the purposes of BTOP grant funds, applicants requesting a Public Computer Center grant 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. 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. As described below, NTIA will consider information related to the demographics, size and scope of the populations to be served, as well as the capacity of the proposed centers.

3. BTOP—Sustainable Broadband Adoption

Applications for Sustainable Broadband Adoption projects should demonstrate a sustainable increase in demand for and subscribership to broadband services. Projects should 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. Projects should describe the barriers to adoption in a given area, especially among vulnerable populations, and propose an innovative and persuasive solution to encourage adoption. Applicants might show how variations on one or more proven demand stimulation strategy—such as awareness-building, development of relevant content, and demand aggregation—would promote sustainable adoption.

*D. Contents of the Application*

1. BIP and BTOP Broadband Infrastructure Project Applications

a. Requirements for Step One of the Application Process

A complete application will include the following:

i. The identity of the applicant and general applicant and project information including:

(1) A description of the project that will be made public consistent with the requirements of the Recovery Act;

(2) The Congressional Districts affected by the project;

(3) The estimated dollar amount of the funding request;

ii. Verification that the application meets certain eligibility factors, including submission of a complete application with all supplemental documentation, commitment to substantial completion of the project within two years and project completion within three years of the award date, demonstration that the project is technically feasible, that the applicant will provide broadband service meeting the definition in this NOFA, that the applicant agrees to comply with the nondiscrimination and interconnection obligations in this NOFA, and that the applicant agrees to comply with the last mile coverage obligations in this NOFA; for BIP only, that at least 75% of the proposed funded service area is a rural area, that the project will be fully funded, and that the project is financially feasible; and for BTOP only, demonstration that the project advances at least one of BTOP's five statutory purposes, commitment to or a waiver for the cost matching requirement, demonstration that a project could not be completed in the grant period but for federal funding, and that the budget is reasonable and all costs are eligible;

iii. An executive summary of the project, including but not limited to the opportunity the proposed system seeks to address; a description of the proposed funded service area; number of households and businesses passed; number of community anchor institutions, public safety entities and critical community organizations to be passed and/or involved in the project;

# Page: 12

Sequence number: 1
Author: JamesB
Subject: Note
Date: 11/23/2009 8:42:33 AM
insert: "law, justice and"

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Sequence number: 2
Author: JamesB
Subject: Note
Date: 11/22/2009 10:25:56 AM
insert "civil legal aid delivery"

**Rationale:** civil legal aid delivery is a discrete component of the mix of services necessary to achieve the statutory objectives associated with the underwriting of Public Computer Centers and is consistent with the express purpose of the Recovery Act and the NOFA.

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Sequence number: 3
Author: Jim Bamberger
Subject: Sticky Note
Date: 11/22/2009 10:27:14 AM
insert: (including persons with disabilities)

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Sequence number: 4
Author: JamesB
Subject: Note
Date: 11/10/2009 10:22:05 AM
insert "law and justice"

Rationale: Law and justice services (including legal aid and indigent defense) are consistent with the mix of service objectives and focus set forth in section 6001 of the Recovery Act and the NOFA.

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Sequence number: 5
Author: JamesB
Subject: Note
Date: 11/23/2009 8:57:41 AM
insert "law, justice and" after "community anchor institutions"

Rationale: Consistent with earlier changes suggested in the definitional section.

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Sequence number: 6
Author: JamesB
Subject: Note
Date: 11/23/2009 9:32:10 AM
insert "(including, but not limited to, persons with disabilities)"

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proposed service offerings; how non-discrimination and interconnection requirements will be met; the type of broadband system to be deployed; qualifications of the applicant; overall infrastructure cost of the broadband system; subscriber projections; and the number of jobs the project is expected to create or save;

iv. A description of the proposed funded service area, including: (1) A map; (2) data describing the geography and demographics of the proposed funded service area, including information as to whether the proposed funded service area is unserved or underserved; (3) names of the census designated communities and identification of areas not within a census designated community within the proposed funded service area; (4) information as to whether the communities and areas identified in clause (3) are rural or non-rural, remote and unserved, underserved or served; (5) the methodology for making the above classifications; (6) whether the applicant is seeking a waiver from providing less than 100% coverage of any census block; and; (7) for middle mile projects, identification of the last mile areas to be served;

v. A description of the proposed service offerings, and the associated pricing plan, that the applicant proposes to offer, as well as the advertised prices of service offerings by competitors in the same area; a description of the applicant's nondiscrimination, interconnection, and network management plans; an explanation of why the proposed service offerings are affordable; and for BTOP only, an estimate of the cost of the project per household;

vi. The technology type; a description of the system design used to deliver the broadband service; a network diagram, which must be certified by a professional engineer if the funding request exceeds $1,000,000; whether the applicant is seeking a waiver of the Buy America provision; and whether the project allows more than one provider to serve end users;

vii. A timeline including key milestones for implementation of the project, including a construction schedule, certified by a professional engineer if the funding request exceeds $1,000,000, which identifies potential challenges and establishes the viability of the project timeline and associated milestones for build-out to the census blocks, households, businesses, community anchor institutions, and public safety entities identified in the proposal; a list of all required licenses and regulatory approvals needed for the proposed project; and how much the applicant will rely on contractors or vendors to deploy the network facilities;

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

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

x. Partnerships with public, non-profit, and private sector groups and collaboration with other state and federal development programs including other Recovery Act programs;

xi. An itemized budget of the infrastructure costs of the proposed project, including if applicable, the ratio of loans to grants, and any other source of outside funding, especially any other Recovery Act funds under other federal programs, and an explanation of the reasonableness of the unit price and total number of units required for the project;

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

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

xiv. Certifications required in the application;

xv. For BIP applicants only:

(1) A self-scoring sheet, analyzing the objective scoring criteria set forth in this NOFA;

(2) The pricing package being offered to critical community facilities, if any; and

(3) Evidence that the applicant is a socially and economically disadvantaged small business concern (SDB) as defined under section 8(a) of the SBA.

xvi. For BTOP applicants only:

(1) A description of how the applicant will advance the objectives of the Recovery Act, as well as the specific objectives of BTOP, (a) to provide 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 (*e.g.*, schools, libraries, medical facilities), or organizations and agencies serving vulnerable populations (*e.g.*, low-income, unemployed, aged), or job-creating strategic facilities located in state or federally designated 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;

(2) A demonstration of need for grant funding, including documentation demonstrating that a project would be unfeasible but for federal assistance;

(3) A description of how the applicant will enhance service to health care delivery, education, and children to the greatest population of users in the area;

(4) Additional verification related to the non-discrimination and interconnection obligations set forth in this NOFA;

(5) The percentage of matching funds the applicant will contribute to the project, and its percentage of the total cost, as well as the specific amounts that are in cash or in-kind;

(6) Whether the applicant receives any federal support for non-recurring costs in the proposed funded service area; and

(7) To the extent applicable, evidence of collaboration with any socially and economically disadvantaged small business concern (SDB) as defined under section 8(a) of the SBA, that may include a sub-awardee, contractor, subcontractor, or vendor, and the source and amount of any federal or state funding, including Universal Service Fund funds, that applicant has received, or requested, for the activities or projects to which the application relates.

b. Verification Filing Requirements for Step Two of the Application Process

As discussed above, those applications that are considered to be most highly qualified (*i.e.*, receiving the highest scores), will advance to the second step of the review process. Specifically, in the "due diligence" phase, applicants will be asked to submit additional information, as appropriate, to further substantiate the representations made in their application. Although this "due diligence" phase applies to all three categories of projects—Broadband

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Sequence number: 1
Author: Jim Bamberger
Subject: Sticky Note
Date: 11/22/2009 10:31:23 AM
insert ", law, justice and public safety entities"

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Sequence number: 2
Author: Jim Bamberger
Subject: Sticky Note
Date: 11/22/2009 10:29:36 AM
insert: "persons with disabilities"

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Sequence number: 3
Author: JamesB
Subject: Note
Date: 11/22/2009 10:28:32 AM
insert "law, justice and"

**Rationale:** consistent with prior comments.

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Sequence number: 4
Author: Jim Bamberger
Subject: Sticky Note
Date: 11/22/2009 10:33:03 AM
insert: "law and justice"

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Sequence number: 5
Author: JamesB
Subject: Note
Date: 11/22/2009 10:28:52 AM
insert "law, justice and" after businesses

**Rationale:** consistent with earlier focus -- to clarify that law and justice related institutions serve public safety.

Infrastructure, Public Computer Center, and Sustainable Adoption—it is most applicable to Broadband Infrastructure Projects. This phase will be announced no earlier than September 14, 2009. The following information must then be submitted to the agencies online at *http://www.broadbandusa.gov* by October 15, 2009, or, alternatively, 30 days after the applicant has received a request from RUS or NTIA to provide such information, whichever is later.

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

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

iii. A detailed description of the proposed technology that will be used to provide service at the proposed broadband speed. This description must clearly demonstrate that all households and businesses in the proposed funded service area will be offered service at the proposed broadband speed;

iv. A detailed construction build-out schedule that includes a description of the necessary work force, a timeline demonstrating project completion within the required timeframe, a depreciation schedule for the proposed facilities;

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

vi. For purposes of the step two due diligence verification process, applicants will need to be prepared to provide any of the underlying documentation that is referenced in the application, as appropriate; and

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

2. Public Computer Centers Applications

Applications for Public Computer Center projects must contain the following information:

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

i. A descriptive title of the project that will be made public consistent with the requirements of the Recovery Act,

ii. The Congressional Districts affected by the project,

iii. The dollar amount of the funding request;

b. Verification that the application meets certain eligibility factors, including submission of a complete application with all supplemental documentation, commitment to substantial completion of the project within two years and project completion within three years of the award date, demonstration that the project advances at least one of BTOP's five statutory purposes, commitment to or a waiver for the cost matching requirement, demonstration that a project could not be completed in the grant period but for federal funding, demonstration that the project is technically feasible, and that the budget is reasonable and all costs are eligible;

c. An executive summary of the project, including the problem or need the project addresses and the approach to addressing the need; the area to be served, population and demographics of the target area, and estimated number of potential users of the public computer center(s); qualifications of the applicant; jobs to be created or saved; and overall cost of the project;

d. A description of the project purpose, including the significance of the problem to be addressed and the degree to which the proposed solution effectively addresses the problem and could be replicated by other organizations; the degree to which the problem and proposed solution advance at least one of BTOP's five statutory purposes; and whether and how the project incorporates more than one BTOP program category or BTOP statutory purpose;

e. A description of any collaboration with Recovery Act or other state or federal development programs that leverage the impact of the proposed project;

f. A description of how the program would enhance service for health care delivery, education, or children;

g. Evidence of collaboration with any SDB as defined by section 8(a) of the SBA, that may include a sub-awardee, contractor, subcontractor, or vendor;

h. The capacity of the proposed public computer center(s) and areas and populations to be served, including whether the facility will be available to the general public or specific populations, whether the center(s) charges membership fees and if so how these charges are consistent with the public interest, any restrictions of the use of the center(s), how the center will be accessible to persons with disabilities, the locations and hours of the center(s), current and proposed number of broadband workstations, current and proposed speed of the center(s) broadband connection, the size and scope of the target population and the populations to be served by the center(s), the outreach strategy for the center(s), the equipment and software that will be provided, and the training and educational programs that will be offered;

i. A summary as to the viability of the project, including the overall technology strategy to be deployed by the project; qualifications of the organization and management team, including a description of organizational readiness and an organizational chart; a list of community organizations, partners, vendors, or contributors of in-kind resources involved in the project and whether any of those involved entities are socially or economically disadvantaged partners; a project timeline that established key milestones for implementation of the project as well as potential challenges that could pose delays; a list of needed licensing and regulatory approvals; and a legal opinion addressing the applicant's ability to enter into the award agreement;

j. Proposed budget and sustainability information from the applicant including a narrative explaining the project budget, an explanation of why the proposed costs are reasonable, demonstration that the project could not have been undertaken during the grant period but for federal assistance, organization financial statements for the last two years, explanation of how a project will become self-sustaining, description of the planned matching funds for the project or a waiver, as applicable, whether the project is receiving or has applied for federal support for non-recurring costs, disclosure of other federal or state funding, and whether the applicant is seeking a waiver of the Buy American provision; and

k. Completion of an environmental checklist and applicable certifications.

3. Sustainable Broadband Adoption Applications

Applications for Sustainable Broadband Adoption projects must contain the following information:

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

i. A descriptive title of the project that will be made public consistent with the requirements of the Recovery Act,

ii. The Congressional Districts affected by the project,

iii. The dollar amount of the funding request;

b. Verification that the application meets certain eligibility factors, including submission of a complete application with all supplemental documentation, commitment to substantial completion of the project within two years and project completion within three years of the award date, demonstration that the project advances at least one of BTOP's five statutory purposes, commitment to or a waiver for the cost matching requirement, demonstration that a project could not be completed in the grant period but for federal funding, demonstration that the project is technically feasible, and that the budget is reasonable and all costs are eligible;

c. An executive summary of the project, including the problem or need the project addresses and the approach to addressing the need, and how that approach is innovative; the area to be served, population and demographics of the target area, and estimated number of potential broadband subscribers the project will reach; qualifications of the applicant; jobs to be created or saved; and overall cost of the project;

d. A description of the project purpose, including the significance of the problem to be addressed and the degree to which the proposed solution effectively addresses the problem and could be replicated by other organizations; the degree to which the problem and proposed solution advance at least one of BTOP's five statutory purposes; and whether and how the project incorporates more than one BTOP program category or BTOP statutory purpose;

e. A description of any collaboration with Recovery Act or other state or federal development programs that leverage the impact of the proposed project;

f. A description of how the program would enhance service for health care delivery, education, or children;

g. Evidence of collaboration with any SDB as defined under section 8(a) of the SBA, that may include a sub-awardee, contractor, subcontractor, or vendor;

h. A description of the project benefits, including how the approach to solve the identified problem is innovative; the number of new home, business, and institutional broadband subscribers expected to be generated; the populations to be served by the project; the total cost of the project per new subscriber; if proposing a training or educational program, how many people it will reach, the hours of training per person, the number of instructors to be employed, and planned equipment purchases and overall cost of these devices; if proposing an equipment purchase or loan program, the number of households, businesses, and institutions that will be provided equipment and the total cost to the customer; if proposing an awareness campaign, the number of people expected to be reached, the strategies to be used in the campaign, how impact of the campaign will be measured, and the organization's previous experience with this type of campaign;

i. A summary as to the viability of the project, including an explanation of the innovative operational solution proposed, how it will create sustainable adoption in the target population, and how it could be feasible in other situations; qualifications of the organization and management team, including a description of organizational readiness and an organizational chart; a list of community organizations, partners, vendors, or contributors of in-kind resources involved in the project and whether any of those involved entities are socially or economically disadvantaged partners; a project timeline that established key milestones for implementation of the project as well as potential challenges that could pose delays; a list of needed licensing and regulatory approvals; and a legal opinion addressing the applicant's ability to enter into the award agreement;

j. Proposed budget and sustainability information from the applicant including a narrative explaining the project budget, an explanation of why the proposed costs are reasonable, demonstration that the project could not have been undertaken during the grant period but for federal assistance, organization financial statements for the last two years, explanation of how the project will create sustainable increases in subscribership and how the project itself could be sustained beyond the grant period, description of the planned matching funds for the project or a waiver, as applicable, whether the project is receiving or has applied for federal support for non-recurring costs, disclosure of other federal or state funding, and whether the applicant is seeking a waiver of the Buy American provision; and

k. Completion of an environmental checklist and applicable certifications.

*E. Filing Instructions*

1. Electronic Applications

Electronic submissions of applications will allow for the expeditious review of an applicant's proposal consistent with the goals of the Recovery Act. As a result, all applicants requesting more than $1 million in assistance (in the form of grants, loans, or a combination of grants and loans) must file their application electronically. Applicants whose authorized representatives are individuals with disabilities, however, may submit a paper application irrespective of the funding size of their request. In addition, applicants who are requesting less than $1 million in assistance may forego the electronic filing requirement if filing electronically would impose a hardship on the applicant.

2. Paper Applications

a. Format

Applicants requesting less than $1 million in assistance (in the form of grants, loans, or a combination of grants and loans) may file their applications in a paper format if filing electronically would impose a hardship on the applicants. Applicants whose authorized representatives are individuals with disabilities may file their applications in a paper format irrespective of the funding size of their request. To the extent that applicants use electronic word processing software to create paper submissions, they should include in their filing, to the extent possible, an electronic copy of the paper application on an appropriate media such as a CD.

The application package for paper submissions must be completed in black or blue ink, signed and mailed to the addresses provided in the Mailing Addresses section of this document (section E.2.d.). The application must be typed, single-sided, single-spaced, on 8½″ x 11″ paper, excluding diagrams and charts. Use a font of no less than 12 points with margins of no less than one inch. Reviewers will be instructed to ignore any portion of the application that extends beyond the prescribed page limits provided in the application.

b. Number of Copies

Applicants filing paper copies should submit one original and one copy of the application for efficient processing.

c. Proof of Mailing

Applications must include proof of mailing consisting of one of the following:

i. A legibly dated U.S. Postal Service postmark. Please note that the U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, applicants should check with their local post office.

ii. A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

iii. A dated shipping label, invoice, or receipt from a commercial carrier.

Neither of the following will be accepted as proof of mailing: a private metered postmark; nor a mail receipt that is not dated by the U.S. Postal Service.

Applications with postmarked dates after August 14, 2009, will not be considered in the current grant round and will be returned to the applicant. Applications will NOT be accepted via facsimile machine transmission.

d. Mailing Addresses

Completed applications must be mailed, shipped, or sent overnight express to:

i. NTIA

Broadband Technology Opportunities Program, National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue, NW., HCHB, Room 4812, Washington, DC 20230.

or hand-delivered to:

Broadband Technology Opportunities Program, National Telecommunications and Information Administration, U.S. Department of Commerce, HCHB, Room 1874, 1401 Constitution Avenue, NW., Washington, DC 20230.

Room 1874 is located at entrance #10 on 15th Street, NW., between Pennsylvania and Constitution Avenues.

United States Postal Service Priority Mail, First Class Mail, and Parcel Post packages delivered to the Department of Commerce are irradiated. Irradiation could result in damage to the contents, or delay the delivery of an application to the BTOP Program Office. Thus, applicants are encouraged to consider the impact of these procedures in selecting their chosen method for application delivery.

ii. RUS

Broadband Initiatives Program, Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Stop 1599, Washington, DC 20250.

or hand-delivered to:

Broadband Initiatives Program, Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Room 2868, Washington, DC 20250.

iii. Signatures

Applicants filing in a paper format must submit an original signed copy of their application and certifications. Applicants filing electronically may submit an electronic signature for their application by registering at *http://www.ccr.gov.*

*F. Submission Dates and Times*

Electronic applications must be submitted between July 14, 2009, at 8 a.m. ET and 5 p.m. ET on August 14, 2009. The electronic application system at *http://www.broadbandusa.gov* will provide a date and time stamped confirmation number that will serve as proof of submission. Paper submissions must be postmarked no later than August 14, 2009, or hand-delivered no later than 5 p.m. ET on August 14, 2009. Applications delivered by guaranteed carrier services will be considered postmarked on the date they are submitted to the carrier.

No application will be accepted after the submission date unless: 1. There was a carrier error and the carrier accepted the application for delivery prior to the submission deadline; or 2. there were significant weather delays or natural disasters as declared by federal or state authorities and the applicant submits proper documentation explaining the delay.

*G. Material Representations*

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

*H. Material Revisions*

No material revision will be permitted for any application after the submission deadline, unless such revision is requested by RUS and NTIA. RUS and NTIA, however, may request clarifications or submissions for completeness that are non-material.

**VII. Application Review Information**

*A. Evaluation Criteria*

The scoring criteria used to review and analyze BIP and BTOP 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 following objective criteria, and not against other applications. This section describes the evaluation criteria first for BIP Broadband Infrastructure projects, then for the three BTOP project categories.

1. BIP Broadband Infrastructure Projects

a. General

In accordance with the Recovery Act, the priority for BIP is to provide and improve broadband service to the highest proportion of rural residents who do not have adequate access to broadband service for rural development, which RUS defines to mean rural residents who reside in unserved and underserved rural areas. Additionally, the Recovery Act mandates that priority be given to projects which: i. Give end users a choice of providers; ii. serve the highest proportion of rural residents that lack access to broadband service; iii. are projects of current or former RUS borrowers (Title II borrowers); and iv. are fully funded and ready to start once Recovery Act funding is received. Lastly, coordination with other federal, state, and local programs, including Recovery Act programs, is highly encouraged as a way to more efficiently and effectively achieve program objectives.

b. Project Purpose (25 Points)

i. *Proportion of Rural Residents Served in Unserved Areas* (5 points). Points will be awarded for serving rural residents located in unserved areas. For every 10,000 unserved households that will receive broadband service, one point will be awarded up to a maximum of five points.

ii. *Rural Area Targeting* (5 points). Points will be awarded for exceeding the 75 percent rural area service requirement. 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). Up to five points will be awarded for proposed funded service areas that are at least 50 miles from a non-rural area. 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. *Title II Borrowers* (5 points). Five points will be awarded to applications

which are submitted by entities which have borrowed under Title II of the RE Act.

v. *Recovery Act and other governmental collaboration* (5 points). Points will be awarded for cooperation with other governmental development programs as well as coordination with Recovery Act construction projects. Examples include the Department of Energy's Smart Grid, Investment Program, the Department of Housing and Urban Development's Public Housing Capital Fund, the Department of Transportation's Capital Assistance for High Speed Rail Corridors and Intercity Passenger Service program, and other investments where collaboration would lead to greater project efficiencies. In each case, the applicant must convincingly demonstrate that these leveraging efforts are substantive and meaningful. One point will be awarded for each partnered governmental or Recovery Act program that has demonstrated such a partnership is substantive and meaningful up to a maximum of five points.

c. Project Benefits (25 Points)

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

ii. *Affordability of services offered* (5 points). RUS will evaluate the level of support that is provided and award up to five points for applications that demonstrate that the proposed rates for the broadband service are affordable for the targeted audience. The stronger the level of support that is provided, the higher the number of points that will be awarded.

iii. *Choice of provider* (5 points). Five points will be awarded to applications that propose to construct infrastructure and implement a business plan which would allow more than one provider to serve end users in the proposed funded service area.

iv. *Critical community facilities* (5 points). For applications that are proposing to offer discounted rate packages at least 25 percent lower than the advertised rate packages to all critical community facilities in the proposed funded service area, five points will be awarded.

d. Project Viability (25 Points)

i. *Applicant's organizational capability* (12 points). Up to twelve points will be awarded based on the strength of the project's management team. RUS will evaluate past performance and accomplishments and award points accordingly.

ii. *Community support* (2 points). Up to two points will be awarded if letters of support are received from all communities in the proposed funded service area from the designated community leader.

iii. *Ability to promptly start project* (10 points). Ten points will be awarded if the applicant can provide evidence that the following conditions have been satisfied:

(1) All licenses, franchises and regulatory approvals required to operate the system and provide the proposed services have been received;

(2) That the required contractors and vendors necessary to implement the project are prepared to enter into contracts as soon as funds are made available;

(3) That all required equity contributions have been transferred into the applicant's accounts; and

(4) That the project timeline and milestones are reasonable.

iv. *Disadvantaged small businesses* (1 point). One point will be awarded to applicants that meet the definition of a socially and economically disadvantaged small business concern under section 8(a) of the SBA.

e. Project Budget and Sustainability (25 Points)

i. *Reasonableness of the budget* (5 points). Up to five points will be awarded based on the clarity and reasonableness of the proposed budget.

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:

(1) 10 points if this ratio is greater than 100%

(2) 7 points if this ratio is between 100% and 75%

(3) 5 points if this ratio is between 75% and 50%

(4) 3 points if this ratio is between 50% and 25%

(5) 1 point if this ratio is lower than 25%.

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):

(1) 0 points if grant funds are 100%

(2) 1 point if this ratio is between 100% and 75%

(3) 3 points if this ratio is between 75% and 50%

(4) 5 points if this ratio is lower than 50%

(5) 10 points if this ratio is zero.

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

a. General

The evaluation criteria for BTOP projects will be the same across the BTOP project categories except: i. Under the Project Benefits section, different evaluation criteria and scoring methodologies are applied to each project category; ii. the Technical Feasibility criterion under the Project Viability heading is subdivided between Sustainable Broadband Adoption projects and all other BTOP project categories; and iii. the Sustainability criterion under the Budget and Sustainability heading is similarly subdivided between Sustainable Broadband Adoption projects and all other BTOP project categories. These variations are detailed in the descriptions of the evaluation criteria below.

b. Project Purpose (30 Points)

i. *Fit with statutory purposes.* Applications will be evaluated with respect to each of BTOP's statutory purposes.[39] Reviewers will consider, relative to each purpose, whether the applicant is addressing a compelling problem of the sort that the statute is intended to resolve, 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

[39] *See* Recovery Act § 6001(b), 123 Stat. at 512–13 (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).

of a state as described by the state submission in the State Broadband Data and Development Grant Program 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) in a convincing manner.

ii. *Recovery Act and other governmental collaboration.* Applicants will be evaluated on their collaboration with Recovery Act or other federal or state development programs that leverage the impact of the proposed project. Examples include the Department of Energy's Smart Grid Investment Program, the Department of Housing and Urban Development's Public Housing Capital Fund, the Department of Transportation's Capital Assistance for High-Speed Rail Corridors and Intercity Passenger Service program, and other investments where collaboration would lead to greater project efficiencies. In each case, the applicant must convincingly demonstrate that these leveraging efforts are substantive and meaningful.

iii. *Enhanced service for health care delivery, education, and children.* Reviewers will assess the depth and breadth of the project's ability to enhance broadband service for health care delivery, education, and children as contemplated by the Recovery Act.[40] Projects would need to demonstrate that they go beyond providing access to broadband to include more robust educational, health care, or related broadband service delivery.

iv. *Socially and economically disadvantaged small businesses.* Reviewers will grant consideration to applicants that certify they meet the statutory definition of a socially and economically disadvantaged small business concern, or that have established agreements in principle to contract with socially and economically disadvantaged businesses that meet that definition.

c. Project Benefits (25 Points)

Reviewers will evaluate the various benefits that the proposed project will provide. This criterion will be focused primarily on measuring the benefits of the proposed project. Due to the broad scope of the three project categories and the expected diversity of proposed projects, the specific elements to be evaluated under this heading vary from one project category to another, as described below.

[40] *See id.* § 6001(h)(2)(C), 123 Stat. at 515.

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 higher end-user speeds receiving a higher score. Proposed networks with high latency will be viewed unfavorably. Applicants may gain additional consideration if the applicant can demonstrate a clear and affordable upgrade path for the network.

(3) *Affordability of services offered.* Projects will be evaluated on the pricing of the services offered compared to existing broadband services in the proposed funded service area. If there are no existing broadband services in the proposed funded service area, projects will be evaluated on the ability of the applicant to convincingly demonstrate that their proposed pricing is appropriate for the service area.

(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 section V.C.2.b. of this NOFA. Additional consideration will be given for displaying the network's nondiscrimination and interconnection policies in a prominent location on the service provider's Web page, and providing notice to customers of changes to these policies. Additional consideration will be given to applicants that commit to offering wholesale access to the project facilities at reasonable rates and terms. Additional consideration will also be given to applicants that commit to binding private arbitration of disputes concerning the awardees' interconnection obligations as explained above in section V.C.2.b of this NOFA. Reviewers will also consider whether the application proposes to construct infrastructure and implement a business plan which would allow more than one provider to serve end users in the proposed funded service area.

ii. BTOP Broadband Infrastructure Middle Mile Projects

For purposes of evaluating BTOP 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 receive 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. Reviewers will consider 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 the level of need for a middle mile network in the area. Reviewers will consider whether there are middle mile providers already present in all or part of the area, as well as the pricing and available capacity of those providers. Reviewers will also consider what proportion of the network's end-points, points of interconnection, and projected end users are located in unserved or underserved areas. In addition, reviewers will also consider applicants' explanation of why their proposed project is well-suited to address the needs of the area.

(3) *Network capacity.* Applicants will be evaluated on the capacity of the network. The network should provide capacity sufficient to serve the anticipated last mile networks, community anchor institutions, and public safety entities, and the number of end users served by them, as projected by the applicant, taking into consideration the nature of the services that these institutions and end users are likely to seek to utilize the network for. Reviewers will give additional consideration 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 of the services offered compared to existing broadband services in the proposed funded service area. If there are no existing broadband services in the proposed funded service area, projects will be evaluated on the ability of the applicant to convincingly demonstrate that their proposed pricing for middle mile services is appropriate for the proposed funded service area.

(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

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section V.C.2.b. of this NOFA. Additional consideration will be given for displaying the network's nondiscrimination and interconnection policies in a prominent location on the service provider's web page, and providing notice to customers of changes to these policies. Additional consideration will be given to applicants that commit to offering wholesale access to network components and services such as wavelength or fibers at reasonable rates and terms. Additional consideration will also be given to applicants that commit to binding private arbitration of disputes concerning the awardees' interconnection obligations as explained above in section V.C.2.b of this NOFA. Reviewers will also consider whether the application proposes to construct infrastructure and implement a business plan which would allow more than one provider to serve end users in the proposed funded service area.

iii. BTOP Public Computer Center Projects

(1) *Availability to the public.* Applications will be scored on the availability of the computer center to the public. Reviewers will consider the capacity of the computer center, its 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 the applicant proposes to serve, public outreach, and the computer center's accessibility to persons with disabilities, accounting for both the physical accessibility of the facility and the accessibility of the computer equipment and software.

(2) *Training and educational programs offered.* Applicants will be scored on the availability, accessibility, and quality of training and educational programs offered through the computer center. Reviewers will consider the degree to which the programs meet the relevant needs of the community.

(3) *Availability and qualifications of consulting and teaching staff.* Applications will be evaluated on the strength of the consulting and teaching staff at the computer center. Reviewers will consider the qualifications and training required of such staff as well as whether the number of available staff is sufficient for the capacity of the computer center.

iv. BTOP Sustainable Broadband Adoption

(1) *Number of new users.* Applications will be scored on the number of new broadband subscribers and other regular users the project will generate. Reviewers will take into consideration both the overall number of new subscribers and users and the proportion that these new subscribers and users represent of the number of non-subscribers and non-users in the relevant area.

(2) *Cost per new user.* Applications will be evaluated on the cost-effectiveness of the program. Reviewers will consider cost per projected new subscriber or other regular user, taking into account the applicant's explanation of why the approach selected is a cost-effective approach given the particular circumstances of the project.

(3) *Innovation.* Applications will be evaluated on the degree to which the project demonstrates replicable new ideas, approaches, and methods to encourage sustainable broadband adoption.

d. Project Viability (25 Points)

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: reviewers will assess the mechanics and operational details of the project. Applicants will be scored on the clarity and detail of their project plan, how convincing the rationale behind the plan is, and whether they can demonstrate that the plan includes innovative solutions that would be feasible in other situations.

ii. *Applicant's organizational capability.* Reviewers will assess whether the applicant has the organizational capability necessary to undertake and complete the project. Reviewers will consider the years of experience and expertise of the project management team, and the past track record of the organization with projects of a similar size and scope, as well as the organization's capacity and readiness.

iii. *The level of community involvement in the project.* Reviewers will evaluate linkages to unaffiliated organizations in the project area (from the public, non-profit, and private sectors), particularly community anchor institutions and public safety organizations, as an ongoing and integral part of the project planning and operation. In order to receive the full score for this criterion, at least one partner should meet the definition of a socially and economically disadvantaged small business concern under section 8(a) of the SBA—these partners must be distinct from any contractor or related entity specified for the purposes of the socially disadvantaged small businesses criterion in Project Purpose. Applicants should demonstrate that each linkage is substantial and meaningful.

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 for the size and scope of the project. Reviewers will consider the planned start date of the project, the reasonableness of the project timeline and associated milestones, whether the applicant has secured all licenses, franchises, and regulatory approvals required to complete the project, and whether the required contractors and vendors necessary to implement the project are prepared to enter into contracts as soon as the funds are made available.

e. Project Budget and Sustainability (20 Points)

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, the reasonableness of its costs, and whether the allocation of funds is sufficient to complete the tasks outlined in the project plan.

ii. *Sustainability of the project.* For BTOP Broadband Infrastructure and Public Computer Center projects: Applicants must convincingly demonstrate the ability of the project to be sustained beyond the funding period. Reviewers will consider business plans, market projections, third-party funding commitments, and other data as may be appropriate to the nature of the applicant and the proposed project. 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 rates in the project area caused by the project 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

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additional consideration to proposals that exceed the minimum matching requirement, provide cash matches, or receive matching funds from acceptable federal sources as described in section V.C.4.b of this NOFA. For purposes of this evaluation, 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.

*B. Notice of Proposed Funded Service Areas*

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 service offerings. If an existing service provider submits a response outside the timeframe specified in this NOFA, it will not be considered an existing service provider for determining whether the applicant's service area is eligible, but will still be considered with respect to the agencies' other applicable eligibility requirements. The information submitted by an existing service provider will be treated as proprietary and confidential to the extent permitted under applicable law.

If the information submitted by an existing service provider demonstrates that the applicant's proposed funded service area is not unserved, both RUS and NTIA reserve the right to reclassify the application and consider the proposed area as underserved if the application meets the criteria in the underserved definition. If the information submitted by an existing service provider establishes that the applicant's proposed funded service area is not underserved, both RUS and NTIA may reject the application.

## VIII. Anticipated Announcement and Award Dates

*A. Announcement Date*

RUS and NTIA intend to announce the awards starting on or about November 7, 2009.

*B. RUS Loan and Grant Document Distribution Date*

RUS intends to make grant, loan, and loan/grant combination documents available to successful applicants within 30 days of the award announcement. RUS expects compliance with all documentation requirements from successful applicants, and intends to schedule the closings within 60 days of award announcement.

*C. BTOP Grants*

NTIA intends to make award documents available to successful applicants within 30 days of the award announcement. NTIA expects compliance with all documentation requirements from successful applicants within 60 days of award announcement.

## IX. Award Administration Information

*A. Award Notices*

1. BIP

Successful applicants will receive award documents from RUS following award notification. Applicants may view sample documents on BIP at *http://www.broadbandusa.gov.*

2. BTOP

Applicants will be notified in writing by the DOC's Grants Officer if their applications are selected for an award. If the application is selected for funding, the DOC's Grants Officer will issue the grant award (Form CD–450), which is the authorizing financial assistance award document. By signing the Form CD–450, the awardee agrees to comply with all award provisions. NTIA will provide the Form CD–450 by mail or overnight delivery to the appropriate business office of the recipient's organization. The awardee must sign and return the Form CD–450 without modification within 30 days of receipt.

If an applicant is awarded funding, neither the DOC nor NTIA is under any obligation to provide any additional future funding in connection with that award or to make any future award(s). Amendment or renewal of an award to increase funding or to extend the period of performance is at the discretion of the DOC and of NTIA.

*B. Administrative Requirements*

1. BIP

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

b. *Failure To Comply With Award Requirements.* If an awardee fails to comply with the terms of the award as specified in the award documents, RUS may exercise rights and remedies.

c. *Advance Procedures.* RUS loan and grant advances are made at the request of the awardee according to the procedures stipulated in the award documents. Loan/grant combination funds are advanced in proportion to the amount of the award made in the form of loans and grants. Remote areas project grant funds are advanced independent of the loan/grant combination funds.

d. *Contracting.* Contracting is to be done at the awardee's discretion, using private contracts or RUS's form contracts, however equal employment opportunity, civil rights, etc. requirements must still be met.

e. *Accounting, Monitoring, and Reporting Requirements.* Awardees must follow RUS's accounting, monitoring, and reporting requirements. These requirements, which are specified in the award documents, include, but are not limited to, the following:

i. Awardees must adopt a GAAP system of accounts acceptable to RUS;

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

iii. Awardees must submit to RUS the information as specified in section IX.D.2;

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

f. *Assistance Instruments.*

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

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

iii. Terms of the remote area end-user grant are set forth in a nonnegotiable

grant agreement found at *http://www.broadbandusa.gov.*

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

v. Sample loan documents and grant agreements can be found at *http://www.broadbandusa.gov.*

g. *Loan Terms and Conditions.* For loan/grant combinations, applicants must indicate the amount of the award to be requested in the form of a loan, and the amount to be requested in the form of a grant. The grant component must not exceed the loan component. The scoring criteria reward those applicants that reduce the percentage of the funds requested in the form of a grant. Applicants may request a 100 percent loan. The following terms shall apply to the loans, as well as other terms that are specified in the loan documents:

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

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

iii. *Amortization period.* 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.

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

v. *Security.* The loan portion of the award must be adequately secured, as determined by RUS.

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

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

(3) Unless otherwise approved by the RUS, all property purchased with award funds must be owned by the awardee.

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

2. BTOP

Administrative and national policy requirements for BTOP grant funding, *inter alia,* are contained in the *Pre-Award Notification Requirements for Grants and Cooperative Agreements* (DOC Pre-Award Notification), published in the **Federal Register** on February 11, 2008 (73 FR 7696), as amended. All BTOP applicants are required to comply with all applicable provisions set forth in the DOC Pre-Award Notification.

*C. Award Terms and Conditions*

1. Scope

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

2. Sale or Lease of Project Assets

The sale or lease of any portion of the award-funded broadband facilities during their life is prohibited, except as provided herein. The agencies may approve a sale or lease if it is: a. For adequate consideration; b. the purchaser or lessee agrees to fulfill the terms and conditions relating to the project after such sale or lease; and c. either: i. the sale or lease is set forth in the original application and is part of the applicant's proposal for funds; or ii. the agencies waive this provision for any sale or lease occurring after the tenth year from the date of issuance of the grant, loan or loan/grant award. Awardees are required to notify the agencies in the event of a proposed transfer of award-funded facilities. Nothing in this section is meant to limit Broadband Infrastructure awardees from leasing facilities to another service provider for the provision of broadband services.

3. For BTOP Only, Access to Records for Audits, Site Visits, Monitoring and Law Enforcement Purposes

The Inspector General of the DOC, or any of his or her duly authorized representatives, and NTIA representatives, or any of their duly authorized representatives, shall have access to and the right to inspect the broadband system and any other property funded by the grant, any and all books, records, accounts, invoices, contracts, leases, payrolls, time sheets, canceled checks, statements, and other documents, papers and records of the parties to a grant, including their subsidiaries, if any, whether written, printed, recorded, produced, or reproduced by any electronic, mechanical, magnetic or other process or medium, in order to make audits, inspections, site visits, excerpts, transcripts, copies, or other examinations as authorized by law. An audit of an award may be conducted at any time.[41]

4. Broadband Data Collection

All BTOP Broadband Infrastructure awardees that offer Internet access service to the public for a fee must agree to participate in the State Broadband Data and Development Grant Program pursuant to the BDIA and section 6001(l) of the Recovery Act. With respect to BIP awardees, RUS will provide to NTIA data supplied by awardees to support the development of the broadband mapping project conducted pursuant to section 6001(l) of the Recovery Act. This data would include:

a. The availability of broadband service within service area. For wireline-based systems, the form of the broadband (*e.g.,* DSL) and the advertised speeds up and down available within the service area and the number of residents, small businesses, large businesses, and public facilities. For wireless-based systems, the advertised and typical speeds up and down within the wireless' carriers license area, and the spectrum on which it's provided.

b. The residential average revenue per user.

c. The first point of aggregation for last mile connection points (e.g., remote terminals or cable headends).

d. Middle mile interconnection points.

e. A list of community anchor institutions to which service is provided.

[41] Note that section 1515 of the Recovery Act also authorizes the Inspector General to examine records and interview officers and employees of the grantee and other entities regarding the award of funds. *See* Recovery Act § 1515, 123 Stat. at 289.

5. Certifications

a. The applicant must certify that he or she is authorized to submit the application on behalf of the eligible entity(ies) listed on the application, that the applicant has examined the application, that all of the information in the application, including certifications and forms submitted, all of which are part of the application, are material representations of fact and true and correct to the best of his or her knowledge, that the entity(ies) that is requesting funding pursuant to the application and any subawardees will comply with the terms, conditions, purposes, and federal requirements of the program; that no kickbacks were paid to anyone; and that a false, fictitious, or fradulent statements or claims on this application is grounds for denial or termination of an award, and/or possible punishment by a fine or imprisonment as provided in 18 U.S.C. 1001 and civil violations of the False Claims Act (31 U.S.C. 3729 *et seq.*);

b. The applicant certifies that the entity(ies) he or she represents have and will comply with all applicable Federal, state, and local laws, rules, regulations, ordinances, codes, orders, and programmatic rules and requirements relating to the project.[42] The applicant acknowledges that failure to do so may result in rejection or deobligation of the award. The applicant acknowledges that failure to comply with all federal and program rules could result in civil or criminal prosecution by the appropriate law enforcement authorities;

c. If requesting BTOP funding, the applicant certifies that the entity(ies) he or she represents has and will comply with all applicable administrative and federal statutory, regulatory, and policy requirements set forth in the DOC Pre-Award Notification; DOC Financial Assistance Standard Terms and Conditions (Mar. 8, 2009); DOC American Recovery and Reinvestment Act Award Terms (Apr. 9, 2009); and any Special Award Terms and Conditions that are included by the Grants Officer in the award.

*D. Reporting Requirements*

1. General Recovery Act Requirements

a. OMB Reporting Requirements Implementing the Recovery Act

Any grant, loan, or loan/grant combination awarded under this NOFA shall be subject to the applicable statutes and regulations regarding reporting on Recovery Act funds.[43] If Recovery Act funds are combined with other funds to fund or complete projects and activities, Recovery Act funds must be accounted for separately from other funds and reported to RUS or NTIA or any federal Web site established for Recovery Act reporting purposes. Moreover, recipients of funds under this NOFA must also comply with the accounting requirements as established or referred to in this NOFA.

b. Required Data Elements

The awardee and each contractor engaged by the awardee must submit the following information to the relevant agency:

i. The total amount of Recovery Act funds received;

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

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

iv. Detailed information on any subcontracts or subgrants awarded by the awardee to include the data elements required to comply with the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282, 120 Stat. 1186 (to be codified at 31 U.S.C. § 6101 note)), allowing aggregate reporting on awards below $25,000 or to individuals.[44]

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

c. Reporting Deadlines

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

2. BIP-Specific Reporting Requirements

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

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

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

i. Number of households and businesses subscribing to broadband service;

ii. Number of households and businesses subscribing to broadband service that receive improved access; and

iii. Number of educational, library, health care, and public safety providers receiving either new or improved access to broadband service.

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

3. BTOP-Specific Reporting Requirements

In addition to the general Recovery Act reporting requirements, BTOP awardees must also report quarterly on the information requested below.[45] The information requested will vary depending on the type of project being funded.

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[42] *See* Recovery Act § 6001(e)(4), 123 Stat. at 514.

[43] *See, e.g.*, 2 CFR pt. 176; OMB, Interim Final Guidance for Federal Financial Assistance, 74 FR 18449 (Apr. 23, 2009); Implementing Guidance for Reports on Use of Funds Pursuant to the American Recovery and Reinvestment Act of 2009 (OMB M–09–21 June 22, 2009).

[44] Recovery Act § 1512(c), 123 Stat. at 287.

[45] *See id.* § 6001(i)(2), 123 Stat. at 515.

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a. All BTOP Awardees

All BTOP awardees must report on:

i. Their progress in achieving the project goals, objectives, and milestones as set forth in its application;

ii. Expenditure of grant funds and how much of the award remains;

iii. How much non-federal investment is being added to complete the project;

iv. Whether the awardee is on schedule to substantially complete its projects within two years of the award and complete its project within three years of the award;

v. The number and type of entities (as set forth in section 6001(b)(3) and (4) of the Recovery Act) receiving new access to broadband services; and

vi. The number and type of entities (as set forth in section 6001(b)(3) and (4) of the Recovery Act) receiving improved access to broadband services.

Awardees shall specifically state in the applicable quarter when they have met 67 percent of their milestones and received 67 percent of their award funds. Reaching these thresholds will indicate that the awardees have "substantially completed" their projects consistent with the Recovery Act.[46]

b. BTOP Broadband Infrastructure Awardees

Awardees receiving Last Mile or Middle Mile Broadband Infrastructure grants must report, for each specific BTOP project, on the following:

i. The terms of any interconnection agreements entered into during the reporting period;

ii. Traffic exchange relationships (*e.g.*, peering) and terms;

iii. Broadband equipment purchases;

iv. Total and peak utilization of access links;

v. Total and peak utilization on interconnection links to other networks;

vi. Internet protocol address utilization and IPv6 implementation;

vii. Any changes or updates to their network management practices;

viii. Average end-user and middle mile megabit per second increase;

ix. Availability of their broadband offering (including the technology used, location of infrastructure, area served, and the number of households passed);

x. The total number of households and businesses subscribing to broadband service;

xi. The number of households and businesses subscribing to new broadband service;

xii. The number of households and businesses subscribing to broadband service that receive improved access;

xiii. Advertised and averaged broadband speeds; and

xiv. The price of the broadband services.

c. Public Computer Center Awardees

Awardees receiving Public Computer Center grants must report on:

i. The number of work stations available to the public;

ii. The total hours of operation per week that the public computer center is open;

iii. The speed of broadband to the public computer center;

iv. The primary uses of the public computer center;

v. The average number of users per day in the public computer center;

vi. The total hours per week of training provided at the public computer center; and

vii. the number and cost of any broadband equipment deployed.

d. Sustainable Broadband Adoption Awardees

Awardees receiving Sustainable Broadband Adoption grants must report on:

i. The technology being fostered;

ii. Efforts to aggregate demand for each location, including the role of the local community;

iii. The increase in the number of households, businesses, and community anchor institutions subscribing to broadband service;

iv. The number and type of awareness campaigns provided, including the total number individuals reached; and

v. The number and cost of any broadband customer premises equipment or end-user devices deployed.

**X. Other Information**

*A. Funding Rounds*

Both agencies envision this as the first of three funding rounds. Subsequent rounds will be developed in part based on each agency's experience with this NOFA. While the fundamental nature of subsequent NOFAs is expected to remain similar, some additional targeting is anticipated. Potential applicants are urged to begin planning now in anticipation of future funding availability.

*B. Discretionary Awards*

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

*C. Third Party Beneficiaries*

The BTOP is a discretionary grant program that is not intended to and does not create any rights enforceable by third party beneficiaries.

*D. Limitation on Expenditures*

The Recovery Act imposes an additional limitation on the use of funds expended or obligated from appropriations made pursuant to its provisions. Specifically, for purposes of this NOFA, none of the funds appropriated or otherwise made available under the Recovery Act may be used by any state or local government, or any private entity, for any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool.[47]

*E. Recovery Act Logo*

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

*F. Environmental and National Historic Preservation Requirements*

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

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

Applications will be reviewed to ensure that they contain sufficient information to allow agency staff to conduct a NEPA analysis so that appropriate NEPA documentation can be submitted to the agencies, along with

[46] *Id.* § 6001(d)(3), 123 Stat. at 513.

[47] *Id.* § 1604, 123 Stat. at 303.

the recommendation for funding of the selected applications. Applicants proposing activities that cannot be covered by existing environmental compliance procedures will be informed after the technical review stage whether NEPA compliance and other environmental requirements can otherwise be expeditiously met so that a project can proceed within the timeframes anticipated under the Recovery Act.

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

*G. Davis-Bacon Wage Requirements*

Pursuant to section 1606 of the Recovery Act, any project using Recovery Act funds requires the payment of not less than the prevailing wages for "all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government." [48]

*H. Financial and Audit Requirements*

To maximize the transparency and accountability of funds authorized under the Recovery Act, all applicants are required to comply with the applicable regulations set forth in OMB's Interim Final Guidance for Federal Financial Assistance.[49]

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

*I. Deobligation*

The RUS and NTIA reserve the right to deobligate awards to recipients under this NOFA that demonstrate an insufficient level of performance, or wasteful or fraudulent spending, and award these funds competitively to new or existing applicants.

*J. Confidentiality of Applicant Information*

Applicants are encouraged to identify and label any confidential and proprietary information contained in their applications. The agencies will protect confidential and proprietary information from public disclosure to the fullest extent authorized by applicable law, including the Freedom of Information Act, as amended (5 U.S.C. 552), the Trade Secrets Act, as amended (18 U.S.C. 1905), and the Economic Espionage Act of 1996 (18 U.S.C. 1831 *et seq.*). Applicants should be aware, however, that the Recovery Act requires substantial transparency. For example, RUS and NTIA are required to make publicly available on the Internet a list of each entity that has applied for a grant, a description of each application, the status of each application, the name of each entity receiving funds, the purpose for which the entity is receiving the funds, each quarterly report, and other information.[50]

*K. Policy on Sectarian Activities*

NTIA encourages applications from faith-based organizations. On December 22, 1995, NTIA issued a *Notice* in the **Federal Register** on its policy with regard to sectarian activities. Under NTIA's policy, while religious activities cannot be the essential thrust of a grant, an application will be eligible for a grant under this program where sectarian activities are only incidental or attenuated to the overall project purpose for which funding is requested. Applicants for whom this policy may be relevant can access it through the **Federal Register** at 60 FR 66491 (Dec. 22, 1995).

*L. Disposition of Unsuccessful Applications*

Applications accepted for review for the Fiscal Year 2009 BIP and BTOP programs will be retained for two years, after which they will be destroyed.

*M. State Certifications*

With respect to funds made available under the Recovery Act to state or local governments for infrastructure investments, the governor, mayor, or other chief executive, as appropriate, must certify that the infrastructure investment has received the full review and vetting required by law and that the chief executive accepts responsibility that the infrastructure investment is an appropriate use of taxpayer dollars. This certification must include a description of the investment, the estimated total cost, and the amount of funds to be used, and must be posted on the recipient's Web site and linked to *http://www.recovery.gov.* A state or local agency may not receive infrastructure investment funding from funds made available under the Recovery Act unless this certification is made and posted.[51]

*N. Waiver Authority*

It is the general intent of NTIA not to waive any of the provisions set forth in this NOFA. However, under extraordinary circumstances and when it is in the best interest of the federal government, NTIA, upon its own initiative or when requested, may waive the provisions in this NOFA. Waivers may only be granted for requirements that are discretionary and not mandated by statute or other applicable law. Any request for a waiver must set forth the extraordinary circumstances for the request and be included in the application or sent to the address provided in section VI.E.

*O. Compliance With Applicable Laws*

Any recipient of funds under this NOFA shall be required to comply with all applicable federal and state laws, including but not limited to: i. The nondiscrimination and equal employment opportunity requirements of Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e *et seq.*, 7 CFR pt. 15); ii. section 504 of the Rehabilitation Act (29 U.S.C. 794 *et seq.*; 7 CFR pt. 15b); iii. The Age Discrimination Act of 1975, as amended (42 U.S.C. 6101 *et seq.*; 45 CFR pt. 90); iv. Executive Order 11375, amending Executive Order 11246, Relating to Equal Employment Opportunity (3 CFR pt. 102). *See* 7 CFR pts. 15 and 15b and 45 CFR pt. 90, RUS Bulletin 1790–1 ("Nondiscrimination among Beneficiaries of RUS Programs"), and RUS Bulletin 20–15:320–15 ("Equal Employment Opportunity in Construction Financed with RUS Loans"). The RUS Bulletins are available at *http://www.broadbandusa.gov.*; v. The Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151 *et seq.*); vi. The Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 CFR subpart 101–19.6); and vii. The Council on Environmental Quality Regulations for Implementing the Procedural Provisions of NEPA and

[48] *Id.* § 1606, 123 Stat. at 303.

[49] *See* OMB, Interim Final Guidance for Federal Financial Assistance, 74 FR 18449 (Apr. 23, 2009).

[50] *See* Recovery Act § 6001(i)(5), 123 Stat. at 515.

[51] *See id.* §§ 1511, 1526, 123 Stat. at 287, 293.

certain related federal environmental laws, statutes, regulations, and Executive Orders found in 7 CFR 1794. A more complete list of such requirements can be found in the applicable grant agreement or loan contract.

*P. Communications Laws*

Awardees, and in particular, Broadband Infrastructure awardees, will be required to comply with all applicable federal and state communications laws and regulation as applicable, including, for example, the Communications Act of 1934, as amended (47 U.S.C. 151 *et seq.*), the Telecommunications Act of 1996, as amended (Pub. L. 104–104, 110 Stat. 56 (1996), and the Communications Assistance for Law Enforcement Act (47 U.S.C. 1001 *et seq.*) (CALEA). For further information, *see http://www.fcc.gov.*

*Q. Buy American Notice*

1. General Prohibition and Waiver

None of the funds appropriated or otherwise made available by the Recovery Act may be used for the construction, alteration, maintenance, or repair of a public building or public work (as such terms are defined in 2 CFR 176.140) unless all of the iron, steel, and manufacturing goods used in the project are produced in the United States.[52] On July 1, 2009, the Department of Agriculture and the Department of Commerce published notices in the **Federal Register** stating that the Secretary of Agriculture and Secretary of Commerce have separately reached conclusions that applying the Buy American provision for the use of certain broadband equipment in public BIP and BTOP projects would be inconsistent with the public interest.

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

2. OMB Buy American Notice Requirement

Pursuant to OMB guidance on the Recovery Act,[53] RUS and NTIA are required to provide the following notice:

**Section 176.170 Notice of Required Use of American Iron, Steel, and Manufactured Goods (Covered Under International Agreements)—Section 1605 of the American Recovery and Reinvestment Act of 2009**

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

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

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

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

(d) *Alternate project proposals.*

(1) When a project proposal includes foreign iron, steel, and/or manufactured goods, other than designated country iron, steel, and/or manufactured goods, that are not listed by the Federal Government in this Buy American notice in the request for applications or proposals, the applicant may submit an alternate proposal based on use of equivalent domestic or designated country iron, steel, and/or manufactured goods.

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

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

*R. Executive Order 12866*

This notice has been determined to be "economically significant" under Executive Order 12866. The Recovery Act appropriates $4.7 billion to NTIA for broadband grants and other purposes. The Recovery Act also appropriates $2.5 billion to RUS for broadband grants and loans. Awards must be made no later than September 30, 2010. In accordance with Executive Order 12866, an economic analysis was completed outlining the costs and benefits of implementing each of these programs. The complete analyses are available from RUS and NTIA, respectively, upon request.

*S. Executive Order 13132*

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

*T. Administrative Procedure Act Statement*

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

USDA and the DOC have determined, consistent with the APA that making these funds available under this NOFA for broadband development, as

[52] *Id.* § 1605, 123 Stat. at 303.

[53] *See* 2 CFR pt. 176.

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

For the same reasons, the agencies find good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effectiveness for this action. Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553(d)(3) or any other law, the analytical requirements of the Regulatory Flexibility Act of 1980, as amended (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

*U. Congressional Review Act*

NTIA has submitted this NOFA to the Congress and the Government Accountability Office under the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801 *et seq.* It has been determined that this NOFA is a "major action" within the meaning of the Act because it will result in an annual effect on the economy of $100,000,000 or more. This NOFA sets out the administrative procedures for making grants, loans, and loan/grant combinations totaling $3 billion to implement a nationwide broadband initiative to expand the reach and quality of broadband services in the United States.

With funds made available through the Recovery Act, BIP will provide $2.5 billion of budget authority for RUS to extend grants, loans, and loan/grant combinations to facilitate broadband deployment in rural areas. At the same time, BTOP will provide $4.7 billion through NTIA to provide broadband grants throughout the United States for unserved and underserved communities, to increase public computer center capacity, and to encourage sustainable adoption of broadband services. The Recovery Act provides that BTOP awards must be made no later than September 30, 2010. Moreover, projects funded under these programs must be substantially completed no later than two years following the date of issuance of the award. A 60-day delay in implementing this NOFA would hamper RUS and NTIA's missions to expeditiously provide assistance to eligible entities to begin and complete projects within the statutory requirements of the Recovery Act.

Thus, RUS and NTIA find good cause under 5 U.S.C. 808(2) that prior notice and public procedure are impracticable, unnecessary, and contrary to the public interest. To the extent that RUS and NTIA provided a 60-day delay in effectiveness pursuant to the Congressional Review Act, the agencies would not be able to execute the statutory duties required by the Recovery Act in a timely manner. This finding is consistent with the objectives of the Recovery Act, which specifically provides clear preferences for rapid agency action and quick-start activities designed to spur job creation and economic benefit. Accordingly, this NOFA shall take effect upon publication in the **Federal Register.**

**V. Paperwork Reduction Act**

*1. Reporting and Registration Requirement Under Section 1512 of the Recovery Act*

a. This award requires the recipient to complete projects or activities which are funded under the Recovery Act and to report on use of Recovery Act funds provided through this award. Information from these reports will be made available to the public.

b. The first report is due no later than ten calendar days after the initial calendar quarter in which the recipient receives the assistance award funded in whole or in part by the Recovery Act, or by October 10, 2009. Thereafter, reports shall be submitted no later than the tenth day after the end of each calendar quarter.

c. Recipients and their first-tier recipients must maintain current registrations in the CCR (*http://www.ccr.gov*) at all times during which they have active federal awards funded with Recovery Act funds. A DUNS number is one of the requirements for registration in the CCR.

d. The recipient shall report the information described in section 1512(c) using the reporting instructions and data elements that will be provided online at *http://www.FederalReporting.gov*, unless the information is pre-populated.

*2. Agencies' Additional Paperwork Reduction Act Analysis*

Copies of all forms, regulations, and instructions referenced in this NOFA may be obtained from RUS or NTIA. Data furnished by the applicants will be used to determine eligibility for program benefits. Furnishing the data is voluntary; however, the failure to provide data could result in program benefits being withheld or denied.

The collection of information is vital to RUS and NTIA to ensure compliance with the provisions of this Notice and to fulfill the requirements of the Recovery Act. In summary, the collection of information is necessary in order to implement this program.

The following estimates are based on the average over the first three years the program is in place.

*BIP Infrastructure:*

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 116 hours per response.

*Respondents:* Business or other for profits; Not-for-profit institutions; and State, local, and Tribal.

*Estimated Number of Respondents:* 500.

*Estimated Number of Responses per Respondent:* 3.28.

*Estimated Number of Responses:* 1,639.

*Estimated Total Annual Burden (hours) on Respondents:* 189,837.

*BTOP Infrastructure:*

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 117 hours per response.

*Respondents:* 1,500.

*Estimated Number of Respondents:* 1,500.

*Estimated Number of Responses per Respondent:* 2.11.

*Estimated Number of Responses:* 3,164.

*Estimated Total Annual Burden (hours) on Respondents:* 371,187.

*Public Computer Center:*

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 47.6 hours per response.

*Respondents:* 2,500.

*Estimated Number of Respondents:* 2,500.

*Estimated Number of Responses per Respondent:* 1.1.

*Estimated Number of Responses:* 2,750.

*Estimated Total Annual Burden (hours) on Respondents:* 130,750.

*Sustainable Adoption:*

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 23.9 hours per response.

*Respondents:* 2,500.

*Estimated Number of Respondents:* 2,500.

*Estimated Number of Responses per Respondent:* 1.1.

*Estimated Number of Responses:* 2,750.

*Estimated Total Annual Burden (hours) on Respondents:* 65,750.

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

Rural Utilities Service, at (202) 690–1078 and Gwellnar Banks, DOC/OS, at (202) 482–3781.

*Comments.* Comments are invited regarding: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of RUS or NTIA, including whether the information will have practical utility; (b) the accuracy of the agencies' estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments for BIP may be sent to Michele Brooks, Rural Utilities Service, USDA, Rural Development, Stop 1530, 1400 Independence Ave., SW., Washington, DC 20250–1530 and for BTOP to Gwellnar Banks, 1401 Constitution Avenue, NW., Washington, DC 20230. All responses to this Notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

The grant application forms for BTOP Infrastructure, Public Computer Centers, and Sustainable Broadband Adoption projects and the subsequent step two filing are being reviewed and will be approved by the Office of Management and Budget under the Paperwork Reduction Act of 1995. OMB control numbers will be assigned and published in separate **Federal Register** notices. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the Paperwork Reduction Act unless that collection displays a currently valid OMB Control Number.

*W. Recovery Act*

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

*X. Authorized Signatories*

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

## Appendix to Notice of Funds Availability—Broadband Initiatives Program and Broadband Technology Opportunities Program

*Policy Justification*

Definition of "Broadband"

BTOP contains five core purposes, all of which relate to deployment of, access to, or support for "broadband service." [1] The Recovery Act does not expressly define the term "broadband," instead it tasks NTIA with defining what constitutes a "broadband service" eligible for BTOP support. The Recovery Act expands RUS's existing authority to make loans and provides new authority to make grants to facilitate broadband deployment in rural areas. Thus, the term "broadband" figures prominently in both agencies' statutory purposes and requires that RUS and NTIA agree to a common understanding of the term.

Most commenters suggest a minimum transmission speed, ranging from 200 kilobits per second (kbps) [2] to over 100 megabits per second (mbps).[3] A substantial contingent encourage NTIA to adopt a minimum speed of 768 kbps downstream, equivalent to the "Tier 1" threshold in the current FCC broadband data collection process.[4] Many commenters encourage additional consideration for applicants promising speeds greater than the minimum.[5] Some commenters prefer that NTIA evaluate speed against the project's overall benefits,[6] establish different speeds for rural and urban areas,[7] or establish different speeds for different price points.[8] Some wireless providers argue for different speed thresholds for wireless and fixed services.[9] Other commenters favor a definition of broadband based upon the applications that would be supported.[10] A number of commenters favor symmetrical speeds,[11] but many providers claim that asymmetrical technologies are often more cost effective and efficient.[12] Several commenters encourage NTIA to consider latency in addition to bandwidth when evaluating proposals.[13] Several also encourage NTIA to consider not only current demand, but also the needs of future consumers.[14]

RUS and NTIA conclude that "broadband service" should be defined as the provision of two-way data transmission with advertised speeds of at least 768 kilobits per second (kbps) downstream and 200 kbps upstream to end users, or providing sufficient capacity in a Middle Mile project to support the provision of broadband service to end users.

RUS and NTIA favor this broadband speed threshold because it leverages the FCC's expertise, utilizes an established standard, facilitates the use of many

[1] *See* Recovery Act § 6001(b), 123 Stat. at 512.

[2] *See* Harris Corp. at 8–9 (Apr. 13, 2009); Independent Telephone & Telecommunications Alliance (ITTA) at 4 (Apr. 13, 2009).

[3] *See* Virginia Internet Service Providers Alliance at 5 (Apr. 10, 2009).

[4] *See, e.g.,* Farmers Mutual Telephone Company (Farmers Mutual) at 12 (Apr. 13, 2009); Motorola, Inc. at 9 (Apr. 13, 2009); Gardonville Cooperative Telephone Association (Gardonville Coop.) at 12 (Apr. 13, 2009); Northern Valley Communications (Northern Valley) at 10 (Apr. 13, 2009); AT&T at 10–11 (Apr. 13, 2009); Progress & Freedom Foundation at 5 (Apr. 10, 2009); Telecommunications Industry Association (TIA) at 13 (Apr. 10, 2009); Free Press at 13 (Apr. 13, 2009) (proposing a reduction in points for "networks that are highly asymmetric"); WildBlue Communications at 4–5 (Apr. 13, 2009); Harris Corp. at 8–9; Alcatel-Lucent Corp. (Alcatel-Lucent) at 27 (Apr. 13, 2009); Western Telecommunications Alliance at 4–5 (Apr. 10, 2009); Cricket Communications (Cricket) at 8 (Apr. 13, 2009).

[5] *See, e.g.,* AT&T at 10–11.

[6] *See, e.g.,* Native American Telecom at 5 (Apr. 13, 2009); Alaska Communications Systems at 10 (Apr. 13, 2009).

[7] *See, e.g.,* Joe Cremin of Starwire Technologies in webform (Apr. 8, 2009).

[8] *See, e.g.,* Rural Telecommunications Congress at 9 (Apr. 13, 2009).

[9] *See, e.g.,* Wireless Communications Association International, Inc. (WCA) at 3 (Apr. 9, 2009); Utopian Wireless Corp. at 3 (Apr. 13, 2009); Alvarion, Inc. at 9 (Apr. 14, 2009).

[10] *See, e.g.,* Buck Graham of Occam Networks (Graham) in webform (recommending 5 Mbps bi-directional) (Mar. 18, 2009); EvenLink, LLC at 3 (Apr. 13, 2009) (advocating a standard of 5 mbps bi-directional, but suggesting a lower-speed definition for rural areas); William Wells Jr. of True Broadband Networks (Wells) (Mar. 17, 2009) (advocating a standard of 10 mbps bi-directional to "allow real-time bi-directional transmission of simultaneous voice, video and data services").

[11] *See, e.g.,* Link Shadley at 1 (Mar. 20, 2009); Stratum Broadband at 32 (Mar. 31, 2009); Univ. of Nebraska at 6 (Apr. 10, 2009); Graham at webform; Wells at webform; U.S. TelePacific *et al.* at 3–4, 6 (Apr. 13, 2009) (discussing business users' need for symmetrical speeds for video teleconferencing, multiline VOIP, web hosting, and large email files).

[12] *See, e.g.,* ITTA at 35–36 (arguing that an asymmetrical threshold would be "consistent with the preferences expressed by consumers and providers alike through their behavior in the market"); WCA at 12 ("requiring symmetrical speeds for all product markets would disserve consumers and would not be technologically neutral"); Starwire at webform; General Communication, Inc. (GCI) at 14–15 (Apr. 13, 2009); NetAccess System Technologies (NetAccess) at 9 (Apr. 10, 2009).

[13] *See, e.g.,* Regulatory Commission of Alaska at 12 (Apr. 13, 2009); Michael Blair of Blair Technologies at webform; Univ. of Nebraska at 2 (stating that grant selection "[c]riteria should include speed, price/Mbps, latency, reliability, interoperability, coverage, sustainability, current capacity and growth capacity"); Libbey Scheible of INOSS, Inc. (INOSS) at 6–7, 10 (suggesting a minimum latency of 20 milliseconds) (Apr. 10, 2009); ADTRAN at Appendix 1 (Apr. 13, 2009).

[14] *See, e.g.,* Montana Independent Telecom Systems at 3 (referring to "the anticipated requirements for tomorrow's applications and consumers") (Apr. 13, 2009); Fiber Tower Corp. at 11–12 (Apr. 13, 2009).

currently common broadband applications (*e.g.*, web browsing, VOIP, and one-way video), allows for consideration of cost-effective solutions for difficult-to-serve areas, and is the most technology-neutral option (because it encompasses all major wired and wireless technologies). For these same reasons, RUS and NTIA decline to impose a latency requirement or technology-specific definitions. RUS and NTIA intend to provide additional consideration to applications exceeding the minimum speed threshold or offering superior upgradeability. This approach offers the greatest flexibility for the agencies and simplicity for applicants, while still expressing a preference for higher-capacity projects. An area that has access to service at 768 kbps may still qualify as "underserved," and an area that has only high-latency satellite service will still qualify as "unserved."

Definition of "Unserved"

One of the five core purposes of BTOP is "to provide access to broadband service to consumers residing in unserved areas of the United States." [15] The Recovery Act does not expressly define the term "unserved," instead it tasks NTIA with developing a definition that targets specific geographic areas and advances the program's purposes. Grants under RUS's Broadband Initiatives Program (BIP) are to be used to provide funds to applications proposing to exclusively serve remote, "unserved" rural areas.

The majority of commenters favor defining "unserved area" as a whole area lacking access to a certain quality of Internet service,[16] or lacking access to technologies other than dial-up and satellite service.[17] Some commenters, however, offer definitions based on a percentage of the population lacking such access.[18] Some suggest that an area should be considered unserved if no mobile wireless broadband service is available.[19] Finally, still others encourage the adoption of a definition of "unserved area" that encompasses communities where broadband infrastructure is available, but where barriers such as affordability effectively prevent residents from receiving broadband service.[20]

RUS and NTIA conclude that an appropriate definition of "unserved area" is a proposed funded service area (*i.e.*, one or more contiguous census blocks, as discussed below) 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 of 768 kbps downstream and 200 kbps upstream. A household has access to such broadband service if it can readily subscribe to that service upon request.

Defining an unserved area by reference to the definition of broadband that RUS and NTIA adopt will ensure consistency between the needs in areas targeted for infrastructure funding and the improved access that will be provided by infrastructure projects that receive grants. RUS and NTIA believe that a definition requiring that 100 percent of households lack access to broadband service could prove overly restrictive and risk inadvertently excluding populations that should properly fall within the "unserved" definition. For example, an area should not be considered served merely because one or two households in that area have access to broadband service. Establishing a 90 percent threshold acknowledges that a *de minimis* level of broadband service may exist in portions of the area, while also seeking to minimize the risk of unintentionally excluding an entire area from funding under the BTOP program.

RUS and NTIA do not include existing satellite service in defining whether a given area is unserved, even though such service may meet the threshold speed level to qualify as broadband service under the definition adopted in this NOFA. Because the general reach of satellite service can extend to the entire country, it is excluded as a factor in the unserved definition to avoid a finding that no area in the United States would be considered unserved. Such a finding would render the term meaningless.

Definition of "Underserved"

Another of BTOP's five core purposes is to "provide improved access to broadband service to consumers residing in underserved areas of the United States." [21] The term "underserved" is not a common term in telecommunications, although it is commonly applied in other fields, such as healthcare, education, social services and retail, to denote populations lacking access to critical services. As with the "unserved" definition, the Recovery Act does not define "underserved," instead it tasks NTIA with developing a definition that targets specific geographic areas and advances the program's purposes. Under RUS's BIP program, loan and loan/grant combination funds are to be used to provide funding to applications proposing to serve non-remote and "underserved" rural areas.

The majority of commenters favor definitions based on one or more of the following factors: availability of broadband service at a certain threshold speed,[22] affordability,[23] number of broadband service providers,[24] and

[15] Recovery Act § 6001(b)(1), 123 Stat. at 512.

[16] *See, e.g.*, Farmers Mutual at 12 (less than 768 kbps bi-directional peak load); American Fiber Systems at 4 (Apr. 13, 2009) (10 mbps or less from 2 or fewer providers); ATSI Communications, Inc. at 11 (Apr. 13, 2009) (no provider of duplex broadband at more than 256 kpbs in either direction).

[17] *See, e.g.*, Alaska Federation of Natives at 8 (Apr. 13, 2009); Michigan Public Service Commission (Michigan PSC) at 19 (Apr. 13, 2009); Communications Workers of America (CWA) at 21–22 (Apr. 13, 2009); Univ. of Nebraska at 1; NetAccess at 9.

[18] *See, e.g.*, XO Communications, LLC and Nextlink Wireless, Inc. (XO and Nextlink) at 7 (Apr. 13, 2009) (90% of consumers to be served lack access to a provider of Current Generation Broadband Transmission Service, to be defined separately for wireline/fixed access and mobile wireless); Premium Choice Broadband at 3 (less than 25% availability of 768 kbps); Fiber-to-the-Home Council (FTTH Council) at 9 (Apr. 13, 2009) (20% lack access to broadband).

[19] *See, e.g.*, WCA at 10.

[20] *See, e.g.*, City and County of San Francisco (San Francisco) at 25 (Apr. 13, 2009) ("If broadband service is not affordable, it effectively is not available."); Institute for Local Self-Reliance at 8 (Apr. 13, 2009).

[21] Recovery Act § 6001(b)(2), 123 Stat. at 512.

[22] *See, e.g.*, American Fiber Systems at 4 (defining "underserved area" as a "geographical area where 90% or less of the population currently has access to a service at a speed less than 100 megabits from a single provider"); Gardonville Coop. at 12 (defining "underserved area" as an area "currently only able to receive broadband service at a speed of 768 Kbps to less than 12 Mbps, bi-directional, during peak-hour load"); WCA at 4 (suggesting that a market is underserved if it "does not have access to mobile wireless broadband capable of delivering at least 3 mbps downlink and 768 kbps uplink speeds"); Nebraska Rural Independent Companies at 9 (Apr. 13, 2009) (defining "underserved area" as "any geographical area * * * where only broadband service with download speeds between 56 Kbps and 768 Kbps exist today"); National Cable & Telecommunications Association (NCTA) at 23 (Apr. 13, 2009) ("An 'underserved area' should be defined as an area where no households have access to at least one provider of Internet access with current generation broadband transmission speeds, *e.g.*, maximum transmission speeds of at least 3 Mbps downstream and 768 kbps upstream. Satellite broadband service, which already is available throughout most of the country, should not be considered in applying this definition.").

[23] *See, e.g.*, National Association of Telecommunications Officers and Advisors (NATOA) at 34 ("Unaffordable broadband services are unavailable."); Cricket at 3 ("For millions of Americans * * * both wireline and wireless service options may be available just outside their door, but they nevertheless remain hopelessly out of reach at current prices or terms of service."); Consortium for School Networking et al. at 6 (Apr. 13, 2009).

[24] *See, e.g.*, JAB Wireless, Inc. at 2 (Apr. 9, 2009) ("An underserved area should be defined as an area where a resident does not have a choice of at least 2 broadband service providers providing minimum speeds of 3 Meg down."); segTEL at 7–8 (Apr. 13, 2009); U.S. Telepacific *et al.* at 5.

subscribership or adoption rates.[25] Some commenters also suggest definitions that would include areas where major community institutions lack sufficient broadband access.[26] Several others also encourage the agencies to consider the particular needs of public safety.[27] Many commenters propose multi-pronged definitions that include multiple ways an area could qualify as underserved[28] while others argue that the agencies should adopt a presumption that certain types of areas are underserved.[29]

Several commenters urge the adoption of a separate definition of "underserved" for broadband adoption programs, focusing on the characteristics of the population to be served rather than on the characteristics of a geographic area.[30] Many commenters draw attention to types of users they believe should be considered underserved.[31]

RUS and NTIA conclude that the extent to which a proposed funded service area is underserved will be evaluated using several criteria that are grouped to reflect the two distinct components of the Broadband Infrastructure category of eligible projects—Last Mile and Middle Mile (as defined in this NOFA)—and take account of both advertised broadband speeds and availability of broadband service. Specifically, a proposed funded service area (*i.e.*, one or more contiguous census blocks) may qualify as underserved for Last Mile projects if at least one of the following factors is met, though the presumption will be that more than one factor is present: i) 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 the minimum broadband transmission speed of 768 kbps downstream and 200 kbps upstream; ii) no fixed or mobile broadband service provider advertises broadband transmission speeds of at least three megabits per second ("mbps") downstream in the proposed funded service area; or iii) 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 point terminates in a proposed funded service area that qualifies as unserved or underserved for Last Mile projects.

RUS and NTIA recognize that in some areas of the country, particularly in rural areas, many of the underserved criteria for Last Mile projects will apply. The underserved definition includes a broadband speed criterion to recognize that a proposed funded service area can have the minimum level of broadband service available (defined as 768 kbps downstream and 200 kbps upstream), but still be considered "underserved." NTIA and RUS do not want to exclude proposals to improve the broadband speeds available in a proposed funded service area simply because the threshold broadband speed is already available.

RUS and NTIA decline to define "underserved" according to particular pricing plans, median income, or demographic characteristics because the adopted definition uses the criteria of low levels of broadband subscribership as a proxy for these factors. Studies suggest a strong, direct correlation between income levels and broadband subscribership; thus, lower broadband subscribership rates will tend to reflect lower income households. Low broadband subscribership rates also tend to be seen among seniors, minorities, and other vulnerable or disadvantaged population groups.

NTIA will use the definition of "underserved" only for purposes of evaluating Broadband Infrastructure proposals under BTOP. For Public Computer Center and Sustainable Broadband Adoption proposals, NTIA will evaluate the characteristics of the population to be served, rather than the Internet services available, in the geographic areas where the programs are located. Service to vulnerable (rather than "underserved") populations will be a critical factor in evaluating such proposals. NTIA, therefore, interprets comments advocating inclusion of certain categories of users as "underserved" for the purposes of such programs as arguments for recognition of these categories as "vulnerable populations."[32]

### *Utilizing Census Blocks To Define Proposed Funded Service Areas*

The geographic area used to assess the degree of broadband coverage is a key element in defining the terms "unserved" and "underserved" found in the BTOP provisions discussed in the preceding sections. Additionally, the Recovery Act allows RUS to fund a

[25] *See, e.g.*, Wisconsin Department of Commerce at 2 (Apr. 8, 2009) ("An 'underserved area' should be defined as an applicant area in which at least 50% of households do not subscribe to a cable or DSL broadband service provider, regardless of whether or not broadband service is available, or an applicant area in which at least 50% of households have access to no more than one broadband internet service provider."); New Jersey Division of Rate Counsel at 2 (Apr. 8, 2009); One Economy Corporation at 4 (Apr. 13, 2009); Association of Public Television Stations at 9 (Apr. 13, 2009); San Francisco at 23–24.

[26] *See, e.g.*, FTTH Council at 11 ("Underserved area means * * * a geographic area described by Census Tracts where more than 25% of the Community Anchor Institutions to be served by the project currently lack access to a provider of Advanced Broadband Wireline Service); eCLIC, the Emergency Communications Leadership and Innovation Center at 5 (Apr. 8, 2009) (" 'Underserved' would be any area lacking a digital hub and/or broadband infrastructure connecting LANs inside the rooms and grounds of schools, libraries, public safety and governmental institutions."); AT&T at 12.

[27] *See, e.g.*, Intrado Inc. and Intrado Communications Inc. at 5–6; National Emergency Number Association at 17 (Apr. 13, 2009).

[28] *See, e.g.*, XO and Nextlink at 8 ("Underserved Area means: (1)(i) a geographic area that is not an unserved area where at least 90% of the customers to be served by the project lack access to more than one provider of Current Generation Broadband Transmission Service (which is to be determined separately for wireline/fixed wireless or mobile wireless providers) or (ii) a geographic area that is not an unserved area where at least 90% of the customers to be served by the project lack access to a provider of Advanced Broadband Transmission Service (which is to be determined separately for wireline/fixed wireless or mobile wireless providers); (2) a geographic area where at least 90% of the Community Anchor Institutions to be served by the project lack access to a provider of wireline/fixed wireless Advanced Broadband Transmission Service; or (3) any census tract which is located in (i) an empowerment zone or enterprise community designated under section 1391, (ii) the District of Columbia Enterprise Zone established under section 1400, (iii) a renewal community designated under section 1400E, or (iv) a low-income community designated under section 45D.").

[29] *See, e.g.*, Matthew R. Rantanen, Director of Technology, Southern California Tribal Chairmen's Association in webform (Apr. 13, 2009) (tribal lands); Pulse Broadband LLC at 4–5 (Apr. 13, 2009) (rural areas); Broadpoint, Inc. at 4 (Apr. 13, 2009) (the Gulf of Mexico).

[30] *See, e.g.*, ZeroDivide at 13 (Apr. 13, 2009) (citing "barriers to adoption including, race, ethnicity, language, physical capacity, economic conditions, and geography" and "low-income population as determined by state or federal guidelines, such as residents of low-income housing, area with a high rate of participation in free and reduced price lunch/breakfast program"); Michigan PSC at 19. But see, e.g., Free Press at 6 ("Using the income of an area as the basis for an 'underserved' definition is common in markets such as health care but is perhaps less fitting for infrastructure-based services such as broadband.").

[31] *See, e.g.*, City of Milwaukee in web form (Apr. 13, 2009) (citing "computer literacy, internet literacy, ethnic and language diversity"); Carl and Ruth Shapiro Family National Center for Accessible Media at WGBH (NCAM) and Inclusive Technologies at 5–6 (Apr. 13, 2009) ("People with disabilities MUST be included in the definition of the underserved and unserved population and inclusion of their needs should be explicitly stated in all RFPs issued by NTIA."); Covad Communications Co. at 4 (Apr. 10, 2009) (urging NTIA to deem all small businesses underserved); NCTA at 23 ("[B]efore funding construction in underserved areas, NTIA and RUS should provide funding for programs that assist underserved populations (low-income, seniors) to acquire and make use of broadband service.").

[32] *See, e.g.*, Barling Bay, LLC and Caption Colorado at 13–14 (Apr. 13, 2009) (arguing for recognition of deaf and hard of hearing students and rural students in poor school districts as unserved or underserved for purposes of broadband adoption programs).

broadband project with Recovery Act funds only if "at least 75 percent of the area to be served [is] in a rural area without sufficient access to high speed broadband service to facilitate rural economic development, as determined by the Secretary of Agriculture." [33] As a result, RUS must also define the relevant "area" to which it would apply the criteria for sufficiency of access to broadband service.

Most commenters suggest defining "area" according to government-recognized boundaries. For example, multiple commenters suggest the use of census tracts,[34] pointing out that the FCC already collects service data at the census tract level [35] and that census tracts are relatively small.[36] Rural Cellular Association also points out that government-defined boundaries are technologically neutral because they do not correspond to the existing service areas for any particular technology.[37] Multiple commenters also state a preference for census blocks, or the smallest geographic designation possible, so that proposals for service to all truly underserved geographic locations qualify for BTOP funding.[38]

In contrast, some commenters encourage the agencies to allow applicants to define their own service areas to be evaluated against the criteria established for "unserved" or "underserved" areas.[39] Many of these commenters express concern that requiring pre-defined geographic units to qualify as "unserved" or "underserved" areas will exclude regions within those geographic units that actually lack access to broadband service.[40]

RUS and NTIA conclude that applicants should be allowed to define their own proposed funded service areas, which are composed of one or more contiguous census blocks. RUS and NTIA believe that employing census blocks, a standardized, technologically neutral geographic unit, will facilitate the comparison of data from applicants proposing to serve overlapping regions and will facilitate compliance with the statutory prohibition against providing BTOP and BIP funding for the same project in the same area.[41] RUS and NTIA have attempted to accommodate commenters' concerns about the inadvertent exclusion of areas in need of broadband service by adopting a very granular definition of proposed funded service area and defining "unserved" and "underserved," and "without sufficient access to high speed broadband service to facilitate rural economic development" in terms of the percentages of a proposed funded service area meeting the definitional criteria.

An applicant must identify the census block(s) selected for the project and provide documentation supporting the applicant's determination that the proposed funded service area is either unserved or underserved. 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 the entire census block is infeasible. Applicants may be permitted to serve less than the entire census block under certain conditions. For example, an applicant might seek a waiver if the census block exceeds 100 square miles or more or is larger than the applicant's authorized operating territory, *e.g.*, it splits a rural incumbent local exchange carrier's (ILEC) study area or exceeds the boundaries of a wireless carrier's licensed territory.

### *Interconnection and Non-Discrimination Requirements*

The Recovery Act requires NTIA to establish "non-discrimination and network interconnection obligations that shall be contractual conditions of grants * * * including, at a minimum, adherence to the principles contained in the [FCC's] broadband policy statement." [42] The Recovery Act does not require RUS to impose these obligations on its grantees or borrowers.

Major incumbent service providers, rural carriers, and their trade associations urge that the interconnection and non-discrimination obligations be limited to the FCC Internet Policy Statement.[43] These operators emphasize that imposing new requirements in the BTOP process would cause uncertainty and deter applicants from applying for grants. Major equipment manufacturers share this view.[44] Cellular operators and CTIA assert that wireless networks need the ability to prioritize traffic due to limited capacity.[45] Content owners argue that non-discrimination obligations should not preclude copyright enforcement.[46] On the other side, public interest groups [47] and potential new entrants [48] advocate additional obligations, generally some combination of interconnection language from Title II of the Communications Act and non-discrimination requirements precluding degradation or inferior treatment of applications, content, and services. Many states [49] and most of the cities filing comments [50] urge the inclusion of some open access or non-discrimination obligations.

RUS and NTIA require applicants to commit to five obligations. These requirements, discussed in more depth below, are subject to the needs of law enforcement and reasonable network management practices.

(1) *Adhere to the principles contained in the FCC's Broadband Policy Statement (FCC 05–151 adopted Aug. 5, 2005).*

This requirement is specified in the Recovery Act.[51]

(2) *Not favor any lawful Internet applications or content over others.*

This requirement ensures neutral traffic routing. Without a non-discrimination condition, network

[33] Recovery Act div. A, tit. I, 123 Stat. at 118.

[34] *See, e.g.*, FTTH Council at 10–11.

[35] *See, e.g.*, American Cable Association at 6 (Apr. 14, 2009); Rural Cellular Association at 42 (Apr. 13, 2009); XO and Nextlink at 6, n. 14.

[36] *See, e.g.*, American Cable Association at 6; Rural Cellular Association at 42.

[37] Rural Cellular Association at 42.

[38] *See, e.g.*, Wireless Internet Service Providers Association (WISPA) at 8 (Apr. 10, 2009) (supporting census blocks as the basic geographical unit and stating, "No 'unserved' or 'underserved' community should be disqualified because it is too small."); Frontier Communications at 12 (Apr. 13, 2009) ("An 'area' should be determined at as small a geographic level as possible. Using entire census communities or census blocks will disadvantage many unserved areas that are adjacent to served areas."). *See also* Smith Bagley, Inc. at 3–4 (Apr. 13, 2009) (suggesting that NTIA require applicants to submit a spreadsheet of census blocks with estimates of unserved and underserved households and businesses).

[39] *See, e.g.*, ITTA at 2–3 ("Each applicant should be able to define its proposed service area, including aggregating both adjacent and non-contiguous clusters of unserved homes."); Embarq at 18 (Apr. 13, 2009); CWA at 22.

[40] *See, e.g.*, Windstream Communications, Inc., (Windstream) at 28 (Apr. 14, 2009) ("Pockets of unserved and underserved customers are unlikely to fall neatly within existing, arbitrary geographic units, such as ZIP codes or census blocks.").

[41] *See* Recovery Act div. A, tit. I, 123 Stat. at 119.

[42] Recovery Act § 6001(j), 123 Stat. at 512.

[43] *See, e.g.*, Verizon at 13 (Apr. 13, 2009); AT&T at 14–16; OPASTCO at 11–12 (Apr. 13, 2009); National Exchange Carrier Assoc. (NECA) at 6 (Apr. 13, 2009).

[44] *See, e.g.*, Motorola at 13–15; Cisco at 9 (Apr. 13, 2009).

[45] *See, e.g.*, CTIA at 8 (Apr. 13, 2009).

[46] *See, e.g.*, MPAA, RIAA *et al.* at 3 (Apr. 13, 2009).

[47] *See, e.g.*, Free Press at 18; Open Internet Coalition at 2 (Mar. 10, 2009); Center for Democracy & Technology at 3–5 (Apr. 13, 2009); EDUCAUSE at 4–5 (Apr. 13, 2009).

[48] *See* Clearwire Corp. at 14–15 (Apr. 10, 2009); Earthlink and NewEdge at 4–5 (Apr. 13, 2009).

[49] *See, e.g.*, Michigan PSC at 8; State of Arizona at 11 (Apr. 13, 2009).

[50] *See, e.g.*, City of Palo Alto at 19–20 (Apr. 13, 2009).

[51] Recovery Act § 6001(j), 123 Stat. at 515.

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. The standard used here is a more general version of the one the FCC imposed in the AT&T/BellSouth merger conditions, which specified no differential treatment of packets based on source, destination, or ownership.[52] Awardees may employ generally accepted technical measures to provide acceptable service levels to all customers, such as caching and application-neutral bandwidth allocation, as well as measures to address spam, denial of service attacks, illegal content, and other harmful activities. They also may comply with applicable statutes such as the Communications Assistance to Law Enforcement Act (CALEA).[53]

Furthermore, this requirement applies only to Internet applications and content, that is, those that traverse the public Internet. Awardees may offer managed services such as telemedicine, public safety communications, and distance learning, which use private connections or virtual private networks, rather than the public Internet. This approach ensures that awardees do not distort the Internet's neutral environment for applications and content, while giving them the flexibility to design their networks in a technically efficient manner and the ability to provide services that may require enhanced quality of service or separate connections for privacy and security reasons.

(3) *Display network management policies in a prominent location on the service provider's Web page and provide notice to customers of changes to these policies (awardees must describe any business practices or technical mechanisms they employ, other than standard best efforts Internet delivery, to allocate capacity; differentiate among applications, providers, or sources; limit usage; and manage or block access to illegal or harmful content).*

This public notice requirement is intended to provide full disclosure of these network management practices to users and potential users to enable them to make informed decisions regarding how their usage may be impacted by current policies and any modifications that are subsequently made.

(4) *Connect to the public Internet directly or indirectly, such that the project is not an entirely private closed network.*

An entirely private closed network would make the interconnection and non-discrimination obligations moot, since the project would not offer access to Internet applications and content.

(5) *Offer interconnection, where technically feasible, on reasonable rates and terms to be negotiated with requesting parties. This includes both the ability to connect to the public Internet and physical interconnection for the exchange of traffic.*

The Recovery Act mandates conditions for "network interconnection,"[54] which the FCC Policy Statement and non-discrimination conditions alone do not address. Moreover, an interconnection condition promotes competition in end-user service provision, consistent with the Recovery Act's directives. Specifically, the fourth prong of the FCC Policy Statement states that users are entitled to a choice of service providers.[55] The Recovery Act incorporates this element by reference, because it requires applicants to meet the Policy Statement's principles as a minimum condition. The Recovery Act also requires RUS to give priority to projects offering a choice of end-user service providers,[56] which is only possible if funded projects offer interconnection. As a general policy matter, interconnection allows synergies where others can benefit from subsidized infrastructure. Wholesale service may also generate additional revenue for recipients, and increase capital efficiency by maximizing utilization of network capacity. Where not inconsistent with other Recovery Act goals, RUS and NTIA will seek the greatest possible expansion of broadband from its investment.

An awardee may satisfy the requirement for interconnection by negotiating in good faith with all bona fide requesting parties that wish to connect to the public Internet using the awardee's network or to exchange traffic. Interconnection must take place where technically feasible and without exceeding current or anticipated capacity limitations. The awardee and requesting party may negotiate terms such as business arrangements, capacity limits, financial terms, and technical conditions for interconnection. If the awardee and requesting party cannot reach agreement, they may voluntarily seek an interpretation by the FCC of any FCC rules implicated in the dispute. If an agreement cannot be reached within 90 days, the party requesting interconnection may *notify* RUS or NTIA in writing of the failure to reach satisfactory terms with the awardee. The 90-day limit is to encourage the parties to resolve differences through negotiation.

This approach encourages interconnection without requiring micromanagement of private negotiations. Appropriate interconnection terms will vary depending on the type of project, the technologies involved, the type of provider requesting interconnection, and the dynamics of the local market. There is no need to enforce uniform terms or pricing standards, so long as parties negotiate in good faith to reach mutually-beneficial business agreements. A more formal interconnection regime would require enforcement resources beyond the scope of BTOP.

Entities that successfully reach an agreement to interconnect with a system funded under BIP may not use that interconnection agreement to provide services that duplicate services provided by projects funded by outstanding telecommunications loans made under the Rural Electrification Act. Further, interconnection may not result in a BIP-funded facility being used for ineligible purposes under the Recovery Act. These limitations are needed to comply with pre-existing loan agreements and Recovery Act language for RUS, but do not apply to BTOP.

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

Overall, these five requirements ensure that public funds will support the public goal of open networks. The standards chosen echo established FCC rules, but avoid detailed regulation and allow for flexibility when network management requires differential treatment or exclusivity. The standards chosen are technologically neutral and appropriate for the widest possible range of applications, because the definition of reasonable network management may differ based on the

[52] *See* In the Matter of AT&T Inc. and BellSouth Corporation, WC Docket No. 06–74, *Memorandum Opinion and Order*, FCC 06–189, App. F at 154 (Mar. 26, 2007), *http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-189A1.pdf.*

[53] *See* 47 U.S.C. 1001 *et seq.*

[54] Recovery Act § 6001(j), 123 Stat. at 512.

[55] Internet Policy Statement, FCC 05–15, adopted Aug. 5, 2005.

[56] Recovery Act div. A, tit. I, 123 Stat. at 118. This language does not appear in the BTOP section of the Recovery Act, but is consistent with the network interconnection and non-discrimination obligations specified there.

network technology used and other dimensions of the project. Applicants are required to disclose interconnection, nondiscrimination, and network management plans with their applications, and provide regular network reporting, to facilitate compliance and better understanding of appropriate network management techniques. As noted above, applicants are required to provide clear and prominent public disclosure of network management policies to customers. Additional scoring points will be awarded for clear and prominent public disclosure of interconnection and nondiscrimination policies to customers.

These conditions will apply for the life of the awardee's facilities used in the project and not to any existing network arrangements. The conditions apply to any contractors or subcontractors of such awardees employed to deploy or operate the network facilities for the infrastructure project. To the extent that the FCC takes action in this area, such as by modifying its Internet Policy Statement or by adopting additional or different rules or policies, awardees will become subject to FCC rules and policies in lieu of the conditions set forth only to the extent that the FCC rules or policies effectively supersede the conditions set forth above. Recipients that fail to accept or comply with the terms listed above may be considered in default or breach of their loan or grant agreements. RUS and NTIA may exercise all available remedies to cure the default.

*Eligibility*

Section 6001(e)(1) of the Recovery Act expressly identifies the types of entities that are eligible for BTOP grants and authorizes the Assistant Secretary to find by rule that it may be in the public interest for any other entity, including a broadband service or infrastructure provider, to be eligible. Section 6001(e)(1)(C) also requires that "[i]n establishing such rule, the Assistant Secretary shall to the extent practicable promote the purposes of [BTOP] in a technologically neutral manner." The Recovery Act does not explicitly identify the entities that are eligible for RUS broadband funding.

The comments of service providers of all types,[57] equipment suppliers,[58] and various other entities[59] state that private, for-profit companies should generally be eligible for BTOP funding. Some service providers propose automatic eligibility for service providers who already hold a license or franchise or who already provide broadband service.[60] Several non-profits, government entities, and small providers argue that no for-profit entity should be eligible without a public interest showing, either individualized[61] or based on its agreement to adhere to additional conditions,[62] or otherwise favor only limited for-profit eligibility.[63]

Through this NOFA, the Assistant Secretary of Commerce for Communications and Information has found it to be in the public interest to permit for-profit corporations and non-profit entities (not otherwise encompassed by section 6001(e)(1)(A)) that are willing to promote the goals of the Recovery Act and comply with the statutory requirements of BTOP to be eligible for a grant. By adopting this broad approach, the Assistant Secretary intends to invite a diverse group of applicants to participate in BTOP, which reflects his desire to expand broadband capabilities in the United States in a technology-neutral manner. This approach is consistent with Congressional intent in this regard.[64] This finding is reasonable because of the positive impact that the inclusion of for-profit corporations will have on the administrative and programmatic requirements of this program. Many for-profit corporations have expertise in deployment and sustainable operation of telecommunications facilities,[65] which may lead to the creation of more efficient and sophisticated broadband networks that consumers will be able to access in a shorter period of time. In some cases, for-profit corporations also may have the resources to deploy new infrastructure more quickly or efficiently than other types of entities.[66] Moreover, for-profit corporations provide economic growth and job creation, which is consistent with many of the key purposes of the Recovery Act.[67]

Dated: July 1, 2009.

**James R. Newby,**

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[57] *See, e.g.*, Qwest Communications (Qwest) at 9–13 (Apr. 13, 2009); NCTA at 6; Bresnan Communications *et al.*, at 5 (Apr. 13, 2009).

[58] *See, e.g.*, Alcatel-Lucent at 15.

[59] *See, e.g.*, CWA at 6; EDUCAUSE at 4; Georgia Technology Authority at 4 (Apr. 13, 2009); State of Alabama at 7 (Apr. 13, 2009); State of Wyoming at 2 (Apr. 10, 2009).

[60] *See, e.g.*, Windstream at 8–9; American Cable Association at 5–6.

[61] *See, e.g.*, Kentucky Municipal Utilities Association at 7–8 (Apr. 13, 2009); National Rural Electrical Cooperative Association at 8–9 (Apr. 13, 2009); NATOA at 8–11.

[62] *See, e.g.*, The Benton Foundation at 14–19 (Mar. 20, 2009).

[63] For example, several commenters proposed that private firms should receive grants only in areas where government or non-profit entities do not apply. *See, e.g.*, SEDA Council of Governments at 1 (Mar. 24, 2009); NATOA at 9. Some small rural telephone companies favored limiting eligibility for large providers. *See, e.g.*, National Telecommunications Cooperative Association at 3–4 (Apr. 13, 2009).

[64] *See* Conf. Rep. at 775 (stating that "as many entities as possible [should] be eligible to apply for a competitive grant, including wireless carriers, wireline carriers, backhaul providers, satellite carriers, private-public partnerships, and tower companies").

[65] *See* Qwest at 10–12; NCTA at 6; Windstream at 9.

[66] *See* Qwest at 10–14; Windstream at 9.

[67] *See* State of Alabama at 7.