

more of the homes are already passed by an existing provider. That fact does not provide any benefit to, or make it any easier to reach, the homes that are themselves not currently served.

BendBroadband's proposed project would deliver the fastest wireless broadband speeds in the nation to some of these areas, giving them next-generation wireless broadband speeds that exceed any wireless service now available in New York City, London or Seoul. BendBroadband could deliver such service on a very cost-efficient basis, for far less money per home passed than many projects. But since the projects must be viable without a guarantee of any ongoing subsidy, the company has also determined that it cannot reliably expect to generate sufficient revenues from these thinly-populated areas to cover ongoing operational expenses *and* pay off a significant loan as required to qualify for RUS BIP funding. BendBroadband therefore determined that the BIP program was not a financially feasible option for its project, despite the otherwise strong showing it could have made to RUS of the benefits its project would deliver to rural communities. It therefore determined that it could only accept an award from NTIA, and only applied to RUS as well because the NOFA required it to do so.

BendBroadband understands that it makes sense for RUS to award loans where loans are sufficient to increase the number of projects that can be funded. But it could do so by allotting scoring preferences to applications that include a partial loan component. There is no statutory mandate or compelling reason for RUS to preclude itself from considering a more flexible approach on a case-by-case basis. Accordingly, BendBroadband proposes that RUS lift this self-imposed restriction for the second round.

II. NTIA Should Not Require Rural Applicants to Apply to RUS

The RFI asks: "Should these kinds of rural infrastructure applications continue to be required to be submitted to RUS or should the agencies permit rural applications to be submitted directly to NTIA, without having to be submitted to RUS as well?" The answer is yes.

The perverse results of RUS' reservation of grant-only awards to remote and unserved areas spilled over to NTIA as well. We are aware that some BTOP applicants decided to exclude adjacent underserved areas from their overall project service areas because their inclusion would have rendered the proposed project as "rural" and thus required them to apply to BIP. Some BTOP project applications could have been better if they were not trying to avoid BIP. This result is at odds with the goals of the Recovery Act and good government.

BendBroadband hopes that RUS will reduce its restrictions on non-remote and underserved areas. Nonetheless, NTIA is an independent agency with an independent mandate from Congress to effectuate the goals of the Recovery Act and advance broadband adoption in underserved areas. While NTIA cannot grant an award to a project that also receives funding from RUS, one means of complying with that restriction is to permit a rural applicant to apply only to NTIA if it certifies that it has not also applied to RUS.

This change would improve both the BTOP and BIP programs by eliminating the wasteful and dilatory intervening step of forcing applicants to apply for a BIP award that they do not want and are not eligible to receive, and forcing NTIA to wait to receive confirmation from RUS that an application has been rejected. Joint applicants and the Agencies both lost limited resources responding to and reviewing BIP-specific application questions. Therefore, NTIA should treat rural applicants on the same level playing field as non-rural applicants by allowing them to apply directly and only to NTIA. And, most importantly, such a change would have the beneficial effect of encouraging rather than discouraging worthy rural grant applications. The proposed change therefore would encourage a broader and more diverse, rather than more constricted, pool of worthy rural applicants.

III. Reasonable Pre-application Expenses Incurred After Issuance of the First NOFA Should be Eligible for Reimbursement In the Upcoming Funding Round

Section V(D)(iii) of the July 2009 NOFA allowed grantees to recover pre-application expenses “not to exceed five percent” of a grant award. Such expenses may only be reimbursed, however, if they were incurred after the NOFA’s publication date.¹

In the second funding round, the Agencies should allow applicants to receive reimbursement for preapplication expenses incurred since the date of the first NOFA if they filed a similar application in the first round. It would be unfair to not allow such recovery simply because a new application builds off of a prior application effort rather than being newly conceived after the second NOFA. Alternatively, all applicants could be permitted to include such expenses, which could be justified since, at least in the prior round, an applicant was effectively required to begin preparation well before the release of the NOFA to be able to submit a comprehensive application within the short window of time provided.

This modification would not place any unreasonable additional burden on the program since all preapplication expenses, whenever incurred, would still be subject to the 5% limit. In addition, adoption of this recommended change would foster the development of stronger applications and projects that are truly “shovel ready.”

IV. The Agencies Should Provide for Greater Flexibility With Respect to the Sale or Lease of Project Assets

The ten-year moratorium before a sale of project assets will even be considered for approval is excessive, and it nearly deterred BendBroadband from applying in the first round. In the end, the company elected to apply while hoping that the Agencies would eventually recognize that additional flexibility can and should be afforded to recipients to undertake good faith transactions.

¹ See NOFA, 74 Fed. Reg. at 33112.

BendBroadband instead proposes that the Agencies exempt from this requirement transactions that are approved by the FCC, provided that the recipient notify the awarding agency and disclose the existence of the prior award in their application to the FCC to approve the transaction. The FCC already determines whether such transactions involving regulated companies satisfy the public interest. NTIA and RUS are free to submit comments to the FCC to question or oppose a transaction. The FCC would no doubt take such comments seriously, and the FCC's "public interest" standard is sufficiently broad to encompass consideration of misuse of federal stimulus funding. This option would preserve the Government's legitimate interest in ensuring that a future sale or lease does not result in unjust enrichment, while assuaging applicants' legitimate concerns in accepting a condition that would allow the government to impose undue restraints or delays on a company's necessary or legitimate business decisions.

In addition, or alternatively at a minimum, the Agencies should provide themselves latitude to approve any transaction whether or not it is proposed within ten years of the award, and it should assure applicants that approval will not be unreasonably withheld or conditioned upon requirements not applicable to all program participants, and that the Agencies will rule on such requests within 90 days. These changes would give the Agencies sufficient leverage to protect the programs from misuse without unduly discouraging program participation, as does this existing rule.

Finally, any such change as described above should be offered to round one awardees as an alternative to the existing rules set forth in the first NOFA.

Respectfully submitted,



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