
**Before the
DEPARTMENT OF AGRICULTURE
Rural Utilities Service
Washington, D.C. 20250**

In the Matter of)	
Proposed Rule)	7CFR 1738
)	
Rural Broadband Access Loans)	RIN 0572-ACO6
And Loan Guarantees)	

**COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION**

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July 10, 2007

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USTelecom is pleased to submit its comments regarding the proposed rule concerning amendments to the Rural Broadband Access Loan and Loan Guarantee Program (Broadband Loan Program).¹ USTelecom firmly believes that the targeted assistance offered by a strong RUS broadband loan program is an essential part of a suite of government policies that can help ensure the universal availability of broadband service to all Americans. USTelecom supports the proposition that all Americans should have access to high speed, high quality, affordable broadband services, whether they live in rural, urban or suburban areas. However, the current rules governing the broadband loan program do not efficiently target scarce government funds, resulting in the failure of the program to fulfill the goals envisioned by Congress upon its inception in 2002.² Unfortunately, many of the proposed changes to the current rules are inadequate and do not remedy the problems with the program or are not authorized by the

¹ USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks.

² See Congressional Research Service Report for Congress titled “Broadband Loan and Grant Programs in the USDA’s Rural Utilities Service”, Updated February 6, 2007, and U.S. Department of Agriculture Office of Inspector General Southwest Region “Audit Report”, Rural Utilities Service Broadband Grant and Loan Programs, Audit Report 09601-4-Te, September 2005.

underlying statute.³ Furthermore, there are troublesome aspects of the current regulations which RUS does not propose to modify.

The RUS broadband program is a very important element in bringing broadband to all Americans, and therefore USTelecom recommends that RUS carefully examine the comments received in response to these proposed rules and issue a further revised set of proposed rules which will be subject to public review and comment prior to being finalized.

I. THE PRIMARY GOAL OF THE BROADBAND PROGRAM IS TO ENABLE BROADBAND SERVICE TO BE PROVIDED TO RESIDENTIAL CUSTOMERS IN AREAS THAT ARE CURRENTLY NOT SERVED

Section (c)(2) of Title VI of the Rural Electrification Act, Priority, states that “In making or guaranteeing loans under paragraph (1), the Secretary shall give priority to eligible rural communities in which broadband service is not available to residential customers.”

Unfortunately, the current rules as well as many of the proposed modifications fail to efficiently enable loans and loan guarantees to be made for the provision of service to residential customers in areas that are currently not served.

The RUS broadband loan program rules can be improved in two major ways. First, funding for duplicative broadband service and facilities should be minimized, and second, barriers to entities that potentially could qualify for financing to build broadband facilities should be removed. While a certain amount of duplication may be necessary in order for loans or loan guarantees to be feasible, such duplication should be kept to an absolute minimum through a stringent prioritization process. It is also important to remember that the RUS broadband program is voluntary. It is a public private partnership in which the borrowers are the conduits for the federal government benefits that flow to rural customers, the true beneficiaries of the

³ The current Rural Utilities Service Broadband Program is authorized by title VI of the Rural Electrification Act, codified at 7 USC Sec. 950bb.

RUS program. Unnecessary and burdensome rules and policies that discourage potential providers from participating in the broadband loan program deny rural Americans the benefits of broadband service.

II. MANY OF THE PROPOSED REVISIONS TO BETTER TARGET FUNDING TO UNSERVED AREAS ARE EITHER INADEQUATE OR NOT AUTHORIZED BY THE STATUTE

RUS has properly focused proposed rule revisions on better targeting of funding under the broadband loan program to rural and unserved areas. However, many of the proposed rule revisions are either inadequate or not authorized by the statute.

While RUS will not provide broadband loan funds to a competitor in areas which current RUS borrowers provide broadband service, presumably because of the recognition that this would diminish the security of the current RUS loan, RUS has no compunction about lending for competition in areas in which private capital has been used to finance broadband facilities. As RUS recognizes, and Congress has recognized through the establishment of the broadband program, it is financially challenging to provide broadband service to many areas in rural America. Companies taking the business risk of meeting that challenge and the financial institutions that support such efforts should not be penalized by having to compete with government supported entities. RUS should seek to minimize duplication as much as possible and focus the broadband program on serving heretofore unserved areas.

While USTelecom acknowledges that the definition of “Eligible Rural Community” currently contained in the statute has resulted in less than optimal targeting of funds, the proposed change to the definition of “Eligible Rural Community” is not authorized by the current statute.

Congress has the opportunity to address this issue in the reauthorization of the Farm Bill, and

USTelecom is supportive of legislative efforts to refine the targeting of the broadband program via changes to the statute.

RUS notes that the only test of a community's status as rural is if the population of the community is less than 20,000 inhabitants – whether inside or outside a metro area.⁴ RUS proposed to fund only those communities located outside the boundaries of an Urban Area (as defined by the U.S. Census) and having 20,000 or fewer inhabitants. If Congress had intended to further restrict the definition of “Eligible Rural Community” it would have done so explicitly. RUS has no legal authority to read into the law the additional criterion of the community being located outside the boundaries of an Urban Area. RUS is well aware that the original statutory definition of “Eligible Rural Community” included a criterion that the community is not located in an area designated as a standard metropolitan statistical area (SMSA) and that this criterion was subsequently repealed by Congress. The Congressional focus on this definition is incontrovertible. Whether or not modifying the definition of eligible rural community is good public policy or not, and regardless of the form such a modification should take, RUS has no legal authority to replace the repealed criterion of the “Eligible Rural Community” being located outside of an SMSA with the criterion of the “Eligible Rural Community” being located outside of an Urban Area.

RUS properly recognizes that funding duplicative service while other areas go without service is wasteful. The agency makes several positive suggestions as to better target scarce government funding. However, the proposed change to the current policy regarding funding in a competitive marketplace is an inadequate response to the problem of funding for duplicative broadband service and facilities. Any duplication of facilities should be necessary and incidental

⁴ See Sec. 950bb (b)(2), Eligible Rural Community, which reads in its entirety “The term “eligible rural community” means any incorporated or unincorporated place that has not more than 20,000 inhabitants, based on the most recent available populations statistics of the Bureau of the Census”.

to providing service to unserved areas, and RUS should develop objective criteria to define those terms. RUS is correct to identify the current policy allowing for the funding of applications where service already exists, without regard to the number of providers, as problematic. However, the proposed response of RUS, to prohibit the use of funds to serve areas with 4 or more Existing Broadband Service Providers (excluding resellers and the applicant) is arbitrary and inadequate. There are many useful and efficient ways to target broadband funding which will better serve rural residential customers who currently have no access to broadband service and facilities – these will be discussed further below. Financing a fourth broadband provider in an area is a waste of scarce government resources. In combination with other prioritization criteria, RUS should direct funding to areas with no current broadband facilities, then areas with only one provider, etc.

RUS properly recognizes the need to establish requirements and incentives to serve areas with no service, but does not distinguish between such areas and areas with one service provider. The proposed regulation institutes minimum service requirements for project eligibility including that 40 percent of households proposed must have no access or access to only one existing service provider. First, the distinction between areas with no access to broadband service and access to one existing service provider is significant. Clearly, priority must be given to areas in which households have access to no broadband service. Second, there is no rationale provided for the criterion that 40 percent of households proposed must have no access or access to only one existing service provider. RUS is on the right track in attempting to develop feasible loan proposals by trying to attract providers willing to exchange the benefits of RUS financing, an explicit subsidy, for the implicit subsidization inherent in the leveraging of revenues from users within a served community (the “doughnut hole”) to provision of service to households usually

located outside of town (the “doughnut”). However, RUS provides no rationale for the proposed requirement of a 40 percent service level in the doughnut. It certainly does not seem unreasonable for RUS to require that at least a majority of the funding go to areas that are unserved. Furthermore, the 40 percent criterion must be read in combination with the restriction on funding in areas with multiple existing broadband service providers.

Instead of establishing a hard and fast rule as to the amount of unserved households to be served in a loan proposal, or an absolute limit on the permissible number of competing providers, RUS should explore establishing criteria, perhaps using a sliding scale, that combines both elements – the number of unserved households and the number of competing providers. The goal should be to provide service to the highest possible proportion of unserved households in each project. A companion goal should be to provide funding in areas with the least amount of duplication of facilities and service. A sliding scale might view these measures in direct proportion to each other – for example, the higher level of unserved households proposed in a project, the higher the number of duplicative providers permitted in the area in which households are served. Such an approach would best fulfill the broadband program goal – funding financially feasible projects which serve the greatest number of currently unserved households. If absolute limits are deemed necessary, the number of competing providers in an eligible area should certainly be less than the three permitted in the rule, and the service requirement should be no less than 50 percent, with a target of at least 60 percent, instead of the 40 percent proposed in the rule. And the threshold should apply to households with no access to broadband, not access to “only one” existing broadband provider.

Finally, the minimum service requirement rule should apply to all applications for funding. The proposed rule carves out a loophole for funding for which the sole purpose is to upgrade

existing facilities. While improving current service is an admirable goal, particularly for a service which has the benefit of constantly improving technology leading to improved service at higher speeds, funding which does not extend the availability of broadband to any new residential customers should rank at the bottom of the priorities of the RUS broadband program. The program's funds are not infinite, and the highest priority should be given to bringing the broadband access to those who do not have it. This can be accomplished not only by better targeting of funds, discussed above, but by enhancing the feasibility of loans to providers wishing to build facilities in areas bereft of access to broadband service, which will be discussed below. RUS should be attempting to avoid funding duplicative facilities, not creating loopholes for unnecessary continuation of such funding.

In the RUS telephone program, funding for duplicative service is prohibited where the current service is adequate. Yet in the RUS broadband program, RUS will properly fund as broadband a service with a speed of 256kbps while lending for improvements to broadband service in an area where a competitor could be providing 1.3 mbps to 3 mbps or higher, thereby implying that such service is inadequate. RUS should be avoiding to the greatest extent possible funding for duplicative service where the current service is adequate. The definition of adequacy should be the same as the definition of broadband required to obtain an RUS broadband loan or loan guarantee.

III. STRONGER CREDIT INCENTIVES CAN ENHANCE LOAN AND LOAN GUARANTEE FEASIBILITY RESULTING IN GREATER TARGETING OF LOANS TO AREAS WITH NO ACCESS TO BROADBAND SERVICE

One of the reasons for the poor targeting of funding in the broadband program to date has been the lack of credit incentives for applicants proposing to construct facilities for the provision of broadband access in areas with no service. RUS proposes to address this problem by reducing

the minimum equity requirement from 20% to 10% for applicants proposing to serve an area where at least 40 percent of the households have no access to broadband service or only one existing broadband service provider. This is a constructive proposal, however, USTelecom again urges RUS to modify it by focusing its funding on areas with no access to broadband service, not those with an existing broadband service provider, and establish a minimum service requirement of at least 50 percent, and preferably 60 percent, of residential customers without access to broadband.

USTelecom strongly endorses the proposal to provide a lower, 4 percent interest rate to applicants proposing to serve eligible rural communities with no access to broadband service. Historically the RUS telecom programs have proven to be highly interest rate sensitive and with the current cost of money rate hovering in the 5 percent range, with the potential for an increase, a 4 percent rate could prove very valuable in attracting borrowers willing to provide broadband access in challenging rural areas. Furthermore, the lower interest rate will serve to enhance feasibility. RUS properly targets this funding to communities with no access to broadband service, but again makes no distinction between such communities and those with one broadband provider. Scarce below cost of money funding should go to the highest priority projects – provision of broadband access where none existed previously.

USTelecom's support for direct 4 percent loans does not extend to the extra-statutory criteria for such loans proposed in the rule. RUS proposes eligibility standards for 4 percent loans tied to areas with a population of less than 5,000 inhabitants and within a county with per capita personal income equal to or less than a number which RUS will determine each year. None of the RUS telecom programs, including the broadband program, has been means tested as far as the income of potential customers is concerned, and there is no indication anywhere in the Title

VI of the Rural Electrification Act that RUS intended the broadband program to be subject to customer means testing. Furthermore, RUS provides no information demonstrating that this eligibility standard correlates to a lack of feasibility at the cost of money interest rate level. Also, in rural America, counties can be quite geographically large and diverse as far as income levels are concerned. It would be unfair to deprive customers with average or lower incomes from receiving the benefits of the RUS broadband program because of an enclave of other higher income residents of the same county but tens of miles away create a county wide average that would disqualify the county from the 4 percent program. Similarly, the population restriction is nowhere to be seen in the statute and bears no rational relationship to the feasibility of the loan or the presence of broadband access. It should be deleted from the proposed rule along with the income criterion. The proper standard for 4 percent loans should involve establishing financial feasibility for provision of service to the highest proportion of unserved residential customers when such feasibility is insufficient at the cost of money interest rate.

The focus on enhancing financial feasibility in the proposed rules is commendable; however, RUS ignores several other opportunities to accomplish that goal. A great hindrance to feasibility is the definition of financial feasibility through the application of the 1.25 TIER requirement. By making the TIER requirement unnecessarily high, RUS refuses potentially feasible loans and exacerbates the duplication problem. The TIER (Times Interest Earned Ratio) is defined by RUS as the ratio of an applicant's net income (after taxes) plus (adding back) interest expense, all divided by interest expense and is used by RUS in determining feasibility in its telecom programs, including the broadband program. The cost of money telecom program has used a TIER of 1.00 for decades and has a perfect repayment record. USTelecom sees no reason for the TIER to exceed 1.00 and recommends that the proposed rule change to definition of financial

feasibility reflect the lower TIER requirement. Not only should RUS modify the rule, but it should also refrain from its current practice of imposing TIER maintenance requirements higher than 1.00 on current borrowers seeking additional funding for legacy telecom purposes and/or for provision of access to broadband services. For example, a current RUS legacy telecom borrower may have a lower TIER maintenance requirement but be required to meet an increased level on all borrowed funds when approved for a RUS broadband loan. This is essentially changing the terms of the borrower's current financing because of the new loan.

Another barrier to feasibility is the RUS interpretation of Section (g)(2), "Technological Neutrality", of Title VI of the Rural Electrification Act, which states that a loan or loan guarantee under subsection (c) of this section shall "have a term not to exceed the useful life of the assets constructed, improved, or acquired with the proceeds of the loan or extension of credit." Given the new technology being used in providing broadband service over a variety of platforms, any estimate of the useful life of assets providing such service can be merely speculative. Obviously the longer the term of the loan, the lower the periodic payments, thereby enhancing feasibility. RUS must abide by this statutory condition governing loan terms, but has the discretion to determine the useful lives of assets. It should use that discretion wisely to extend the useful life of assets to the highest reasonable number of years, particularly for borrowers who have other assets which provide RUS more than sufficient loan security, in order to enhance the feasibility of loans.

A further barrier to loan feasibility is the limitation that loan guarantees be no more than 80 percent of the principal amount. Loan guarantees in the RUS telephone program cover 100 percent of the principal amount. There is more than adequate funding in the program to cover 100 percent loan guarantees. Presumably having a higher proportion of the loan guaranteed will

result in a lower interest rate and a greater probability of a loan proposal being determined to be worthy of funding by a private lender. The 80 percent loan guarantee ceiling should be removed.

Finally, RUS should ensure that its rules governing liens, and particularly accommodation of liens for borrowers with other current sources of debt financing, do not discourage rural providers from participating in the RUS broadband loan program. Flexible approaches to accommodating RUS lien requirements, particularly for financially strong borrowers, will bring more entities that are otherwise eager to provide broadband to unserved areas, into the program.

IV. RUS SHOULD REVISIT ITS INTERPRETATION OF ITS ELIGIBILITY CRITERIA UNDER THE “SUBSCRIBER LINES” PORTION OF TITLE VI

Another obstacle to most efficiently using available RUS funds to bring broadband access to rural residential customers is the interpretation of both “entity” and of “subscriber lines” in Section (d)(3) of Title VI, “Subscriber Lines”. The section reads as follows “An entity shall not be eligible to obtain a loan or loan guarantee under this section if the entity serves more than 2 percent of the telephone subscriber lines installed in the aggregate in the United States.” RUS reads this definition in the most restrictive way possible, disqualifying rural carriers such as Embarq, which is a rural telephone company under the definition in the Telecom Act of 1996 in 17 of the 18 states in which it provides service, as well as other potential applicants to the broadband program. There is no reason that an operating unit, such as an individual operating entity and tariff filing entity of a holding company, as a potential loan or loan guarantee recipient, cannot be considered an “entity” for purposes of eligibility under Section (d)(3), instead of the current RUS interpretation of the entity being the holding company. The current interpretation is contrary to RUS precedent in the telephone program where individual operating subsidiaries were treated as separate entities for loan purposes. RUS should review its interpretation of “entity” to treat each operating subsidiary independently for purposes of

meeting the (d)(3) eligibility test. Similarly, RUS is using the most restrictive definition of subscriber lines in its determination of the denominator in the calculation of whether an entity serves more than 2 percent of the telephone subscriber lines. Circuit switched ILEC landlines are now a minority of all telephone subscriber lines installed in the United States. A complete calculation of telephone subscriber lines should include CLEC lines, VoIP lines as well as wireless voice lines. This calculation would yield in almost 600 million lines⁵, more than tripling the denominator currently in use in the RUS eligibility calculation.

V. RUS SHOULD NOT REDUCE THE BUILD OUT TIME LIMIT

Throughout the history of the RUS telecom program, RUS has employed a five year time frame for build out of projects. RUS acknowledges that generally it has allowed a five year build out period for projects funded under the broadband program. Given the new technology being employed by many borrowers, and potentially delays from suppliers, as well as the lack of familiarity of many borrowers with the procedures involved in constructing facilities with government funds (environmental and historical preservation requirements, among others), it would seem that a longer build out period would encourage a prudent and deliberative approach by borrowers, which would best use scarce government resources in the most effective way possible. Furthermore, the change to the build out time limit would make it no longer congruent with the forecast period used in the feasibility study to determine if an application is financially feasible. RUS is not proposing to change the current five year projection used to determine feasibility. The rationale RUS provides for the change to the build out period is to accelerate the deployment of broadband services to rural communities, and enhance a borrower's viability in

⁵ Numbers of lines as measured by assigned telephone numbers. *See* Numbering Resource Utilization in the United States, Industry Analysis and Technology Division, Wireline Competition Bureau, January 2007, Table 1, p. 14 (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269517A1.pdf) for ILEC, CLEC and Cellular/PCS number. *See* NCTA website for VoIP numbers.

the highly competitive broadband industry. RUS should be focusing on improving the targeting of funds to unserved customers, not on providing its borrowers a competitive advantage in areas which already have service from one or more providers.

VI. TRANSPARENCY REGULATIONS SHOULD BE IMPROVED -- RUS ITSELF HAS A KEY ROLE TO PLAY IN INCREASING TRANSPARENCY

USTelecom endorses the new legal notice requirements proposed by RUS to increase transparency. Along with these requirements on loan applicants, RUS is proposing new “responsibilities” for incumbent providers as well. RUS characterizing these requirements as responsibilities since it recognizes that the incumbent providers have no privity with the RUS program and thus no reason to be subject to its requirements. However, incumbent providers clearly have an interest in making RUS aware of their presence and the services that they offer. Since these providers have no particular obligation to the RUS broadband program, their responsibilities should be as limited as possible in accomplishing the intended result. As such, there is no reason to require the provision of the rates of data transmission being offered, and the cost of each level of broadband service, as long as the incumbent provider certifies that its level of service comports with the definition of broadband being used by RUS for loan eligibility. Similarly, the only rate that need be provided is that for the level of broadband service which meets the definition of broadband being use by RUS for loan eligibility. Finally, RUS ignores its own responsibility in this area, preferring to pawn it off on the incumbent providers. RUS has the benefit of an excellent field staff which should be visiting areas of prospective loan applicants, determining the presence of incumbent providers, and notifying such providers of an application for an RUS loan or loan guarantee. All incumbent providers could submit a single point of contact to RUS whether or not there is an application to serve their area so that when an

application is received for an incumbent provider's service area, that provider could be quickly and easily notified.

VII. CONCLUSION

RUS should consider a thorough revision of the regulations governing the broadband program per USTelecom's recommendations. The current rules governing the broadband loan program do not efficiently target scarce government funds and thus unnecessarily deprive rural Americans of the benefits of access to broadband service.

Respectfully submitted,

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