

**Before the  
RURAL UTILITIES SERVICE  
UNITED STATES DEPARTMENT OF AGRICULTURE  
Washington, D.C. 20250**

In the Matter of	)	
	)	
7 C.F.R. Part 1738	)	RUS-06-Agency-0052
	)	
Rural Broadband Access Loans and Loan Guarantees	)	RIN 0572-AC06
	)	
Proposed Rules	)	

**JOINT COMMENTS OF THE  
CABLE TELEVISION ASSOCIATION OF GEORGIA,  
THE SOUTH CAROLINA CABLE TELEVISION ASSOCIATION AND  
THE KENTUCKY CABLE TELECOMMUNICATIONS ASSOCIATION**

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CABLE TELEVISION ASSOCIATION, AND  
THE KENTUCKY CABLE  
TELECOMMUNICATIONS ASSOCIATION**

July 10, 2007

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The Cable Television Association of Georgia, the South Carolina Cable Television Association and the Kentucky Cable Telecommunications Association (collectively, the “Associations”) hereby submit these comments in the above-captioned proceeding in which the Rural Utilities Service (“RUS”) seeks to amend the Rural Broadband Access Loan and Loan Guarantee program (“Broadband Loan Program”) rules to accelerate the deployment of broadband service to rural America.<sup>1</sup>

The Associations are non-profit trade associations organized to advance the common interests of the cable industries in Georgia, South Carolina and Kentucky. Collectively, they represent approximately 85 cable companies that serve almost four million households. Many of the Associations’ members are small operators that have invested significantly to deploy broadband facilities in rural areas in Georgia, South Carolina and Kentucky. For this reason, the

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<sup>1</sup> Proposed Rules, Rural Broadband Access Loans and Loan Guarantees, Rural Utilities Service, USDA, 72 Fed. Reg. 26742 (May 11, 2007) (amending 7 C.F.R. §§ 1738.1, *et seq.*) (hereinafter “Notice”).

Associations are concerned that federally subsidized “new entrants” will not advance RUS’ goal of accelerating the deployment of broadband facilities to rural communities.

Indeed, the Associations believe that the proposed rules regarding loan eligibility and priority would actually increase the number of instances in which federal funds are used to duplicate providers in markets where broadband service is already available. Because the Broadband Loan Program is and should be focused on communities that tend to have too few customers to support active competition among multiple providers, grants made by the program would threaten the investments that existing private providers have already made to deploy facilities in these areas. The presence of one or more new, subsidized entrants will only discourage future entrepreneurial investments and deployment in rural areas.

In addition, while the Associations believe that RUS’ proposed legal notice rules are a move in the right direction, they nonetheless will fall short of creating much needed transparency in the Broadband Loan Program unless and until a formal notice and comment procedure is adopted by the agency. Finally, the Associations believe that RUS must implement managerial controls that will improve the agency’s administration of the program and bolster the public’s confidence that the Broadband Loan Program funds are distributed to Congress’ intended recipients – providers in *unserved* rural communities.<sup>2</sup> The Associations’ recommended modifications to RUS’ proposed rules are described below.<sup>3</sup>

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<sup>2</sup> See 153 Cong. Rec. S6951, 2007 WL 1521267 (May 25, 2007) (statement of Sen. Roberts) (stating “RUS . . . was charged with the responsibility of administering the broadband loan program and using it to promote access in unserved rural areas.” (Emphasis Added).

<sup>3</sup> The Associations’ recommendations are consistent with the rule changes proposed by the National Cable and Telecommunications Association (“NCTA”). See Comments of the National Cable and Telecommunications Association, RUS 06-Agency-0052 (filed July 10, 2007) (hereinafter “NCTA Comments”). The Associations urge RUS to adopt NCTA’s proposed amendments.

## I. BROADBAND LOANS SHOULD NOT BE GRANTED TO COMMUNITIES WITH ACCESS TO BROADBAND SERVICES

RUS proposes to modify its definition of “Eligible Rural Community” to exclude Urban Areas,<sup>4</sup> an incorporated city or town with a population of more than 20,000, or “an area that has four or more Existing Broadband Service Providers.”<sup>5</sup> With regard to the third criterion, RUS posits that “where there are four or more existing providers, the market is sufficiently served and does not warrant an additional market entrant subsidized through Federal fundings.”<sup>6</sup>

RUS would thus permit a rural community with up to three Existing Broadband Service Providers to be eligible for loan consideration. RUS does not state why a rural community is presumptively “sufficiently served” by four providers but may not be by three, two or even one, or give examples of communities where there are existing providers but those communities are not “sufficiently served” unless there are at least four.<sup>7</sup> Indeed, a community could have one preexisting service provider that provides broadband access to 100% of households, or two that each service 50%. Under RUS’ proposed rule, new providers in these communities would be eligible for loans. That approach cannot be reconciled with Congress’ intent in creating the Broadband Loan Program,<sup>8</sup> which was to provide funding for the *build out* of broadband facilities to *unserved* areas to ensure that rural America has the same *access* to broadband

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<sup>4</sup> The Associations do not object to RUS’ proposed definition of Urban Area. See Notice at 26752, Proposed Rule § 1738.2.

<sup>5</sup> Notice at 26751, Proposed Rule § 1738.2. The term “Existing Broadband Service Provider” is a new term proposed by RUS and is discussed later in these comments.

<sup>6</sup> Notice at 26749.

<sup>7</sup> The Administrative Procedure Act prohibits federal agency actions that are “arbitrary and capricious.” 5 U.S.C. § 706(2)(A). In the context of a rulemaking, that standard requires that the administrative record support the factual conclusions underlying the proposed rule, that the policy determinations underlying the rule are rational, and that the agency adequately explain the basis for its conclusions. See, e.g., *McGregor Printing Corp. v. Kemp*, 20 F.3d 1188, 1193-94 (D.C. Cir. 1994). RUS has drawn two conclusions in the Notice that conspicuously lack explanations and are consequently arbitrary and capricious – the “four or more” rule in its definition of “Eligible Rural Community” and the 40% threshold proposed in its service level requirement for expanded service, which is discussed later in these comments.

<sup>8</sup> The Broadband Loan Program was created as part of the 2002 Farm Bill. See 7 U.S.C. § 950bb.

services as the residents of urban communities.<sup>9</sup> As the USDA Office of Inspector General noted in a September 2005 audit of the Broadband Loan Program, the 2002 Farm Bill “does not mention or condone the practice of making loans to competing providers [and] certainly does not require RUS to make such loans.”<sup>10</sup> In fact, as Senator Roberts (R-KS) recently explained, the consequences of doing so are quite severe:

When RUS makes loans in areas that already have broadband service, it has a twofold negative affect.

First, it undermines the market. Often, rural towns may enjoy broadband availability. Small, independent providers that are already present in rural towns have their subscribers pulled out from under them by a competitor who, because they have an RUS loan, have an unfair advantage with which to offer lower rates. This can threaten the very existence of some locally owned, independent broadband providers that invested in rural towns without an RUS loan.

Second, when loans are going to areas that already have service, it means that truly unserved, rural areas for which this program was created continue to be neglected. Indeed, it is the outlying, sparsely populated areas that are in need of broadband service. These are the areas broadband loans should be made to serve—not overbuilding towns where the service is already present.<sup>11</sup>

Accordingly, RUS should be focused on whether the residents of a small, rural community have *access* to broadband services, not how many broadband providers the residents have access to.<sup>12</sup> The Associations recommend that RUS amend its definition of Eligible Rural

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<sup>9</sup> See, e.g., 149 CONG. REC. S13957, 2003 WL 22508632 (Nov. 5, 2003) (statement of Sen. Dorgan) (stating that the “broadband loan program . . . is the first and only program in the country designed to spur the development of the build out of broadband capabilities to rural areas.”); 148 CONG. REC. S4023, S4037 (daily ed. May 8, 2002) (statement of Sen. Dorgan) (stating that the broadband loan program will “ensure Rural America has the same access to broadband service as its urban neighbors.”); 153 CONG. REC. S6951, 2007 WL 1521267 (May 25, 2007) (statement of Sen. Roberts) (stating “[i]n the 2002 farm bill, Congress created a loan and loan guarantee program to help build broadband out to rural areas that lacked this crucial service.”).

<sup>10</sup> United States Department of Agriculture, Office of Inspector General Southwest Region, Audit Report 09601-4-Te, Audit Report: Rural Utilities Service Broadband Grant and Loan Programs at 15 (September 2005) (hereinafter “OIG Report”).

<sup>11</sup> 153 CONG. REC. S6951, 2007 WL 1521267 (May 25, 2007) (statement of Sen. Roberts).

<sup>12</sup> The White House has adopted this position as well. As President George W. Bush explained, “[t]his country needs a national goal for broadband technology, for the *spread* of broadband technology. We ought to have . . . universal, affordable access for broadband technology by the year 2007, and *then* we should make sure as soon as

Community to exclude a community where broadband service is being provided by *any* Existing Broadband Service Provider. Otherwise, RUS will continue to fund “companies in highly competitive business environments where multiple providers compete[] for relatively few customers,”<sup>13</sup> and prevent – rather than promote – broadband service to residents in truly unserved areas of rural America.

In addition, RUS’ proposed definition of Existing Broadband Service Provider, which would require an incumbent to certify that 10% of the homes passed by its facilities purchase its broadband service,<sup>14</sup> should be modified to strike the take-rate requirement. As NCTA points out in its comments, there are any number of good reasons why an incumbent may not meet the 10% threshold,<sup>15</sup> and bringing in a new provider would result in needless duplication of services in a market that would not necessarily provide for any increase in the take-rate. Indeed, the 10% take-rate threshold would more likely *discourage* the deployment of facilities by entrepreneurs. New private entrants will not assume the risk of building out facilities and covering start-up costs if the RUS could disregard their promotion period and put a federally subsidized competitor in their service areas while the service is still nascent.<sup>16</sup>

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possible *thereafter*, consumers have plenty of choices when it comes to purchasing the broadband carrier.” President George W. Bush, Remarks on Homeownership, Albuquerque, N.M. (March 21, 2004).

<sup>13</sup> OIG Report at 15.

<sup>14</sup> Notice at 26751, Proposed Rule § 1738.2.

<sup>15</sup> NCTA Comments at 7. Among the reasons stated by NCTA are that the provider is engaged in a competitive market war for subscribers or located in a market where few homes have personal computers.

<sup>16</sup> The Associations note that RUS’ current rules and pending legislation take into account the future business plans of broadband providers when determining whether broadband service is available in a market, rendering federal funding unnecessary. For instance, under the current rules, broadband service is not available in a community if service “is not being provided to residential customers *and no entity is committed to provide such service before the applicant would reasonably be able to pursuant to the loan.*” 7 C.F.R. § 1738.11(b) (Emphasis Added). The Rural Broadband Improvement Act of 2007, currently under review by the House Subcommittee on Specialty Crops, Rural Development, and Foreign Agriculture, contains a definition of “unserved” that states: “‘unserved’ means, with respect to a household, that broadband service is unavailable to the household, *and that broadband facilities that would serve the household are not under construction.*” H.R. 2035, 110<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2007) (Emphasis Added).

Finally, RUS proposes that any applicant seeking funding of a project extending beyond its current territory must establish that the project “[c]ontains at least 40 percent of households with no access to Broadband Service *or access to only one Existing Broadband Service Provider.*”<sup>17</sup> The Associations’ agree that there should be a service level requirement to extend service beyond an applicant’s current territory, but RUS’ proposed rule should be modified in two respects.

First, for all of the reasons stated above, the presence of one Existing Broadband Service Provider should not be considered “limited access” as RUS contends,<sup>18</sup> and that portion of the proposed rule should be struck. Second, the “no-service” level should be increased from 40% to 75%. RUS has not provided a rationale for funding a project for a community where the majority of households actually have access to broadband service. While the Associations’ understand that RUS is attempting to enhance the economic viability of its loans by permitting service to more lucrative areas,<sup>19</sup> RUS should understand that the same pitfalls discussed above with regard to its definition of Eligible Rural Community apply in this context. This is why recently introduced legislation seeking to amend the Broadband Loan Program includes “no-service” levels ranging from 50% to 75%.<sup>20</sup> The Associations urge RUS to act in accordance with Congress’ clear message on this point.

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<sup>17</sup> Notice at 26753, § 1738.21(a)(2) (Emphasis Added).

<sup>18</sup> Notice at 26749.

<sup>19</sup> *Id.*

<sup>20</sup> *See, e.g.*, Rural Broadband Improvement Act of 2007, S. 1439 110<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2007); H.R. 2035, 110<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2007).



## II. UNSERVED COMMUNITIES SHOULD BE RUS' TOP PRIORITY

RUS seeks to modify the Broadband Loan Program's priority rule to give top priority to "[a]pplications for service areas that include only households that have no broadband access or receive Broadband Service from only one Existing Broadband Service Provider."<sup>21</sup> When it enacted the 2002 Farm Bill and created the Broadband Loan Program, Congress explicitly instructed that when "making or guaranteeing loans . . . the Secretary *shall* give priority to eligible rural communities *in which broadband service is not available to residential customers.*"<sup>22</sup> The statute is not ambiguous and therefore the plain meaning of its terms controls.<sup>23</sup> Accordingly, RUS' proposed rule that would give priority to an application seeking to serve a community with a preexisting provider would necessarily be arbitrary and capricious and exceed the scope of authority conferred to it by Congress. It must thus be amended to give top priority to unserved communities. "Unserved" in this context could only mean that broadband service is unavailable to the households in a community from any provider, and that no broadband provider has committed to provide such service before a project funded by the Broadband Loan Program could reasonably begin to operate. Communities entitled to "top priority" must contain only *unserved* households.

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<sup>21</sup> Notice at 26758, Proposed Rule § 1738.61(a)(1).

<sup>22</sup> 7 U.S.C. § 950bb(c)(2) (emphasis added). A federal agency may not take action that exceeds the authority Congress conferred to it by statute. See *Independent Bankers Ass'n of America v. Farm Credit Administration*, 164 F.3d 661, 666-67 (D.C. Cir. 1999); *Aid Assoc. for Lutherans v. United States Postal Service*, 321 F.3d 1166, 1168 (D.C. Cir. 2003)

<sup>23</sup> See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (stating "[w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"); *New York v. United States EPA*, 413 F.3d 3, 40 (D.C. Cir. 2005) (stating "[b]ecause EPA fails to present evidence of such congressional intent, the plain meaning of the statute is conclusive.").

### III. THE PUBLIC SHOULD BE ABLE TO REVIEW BROADBAND LOAN APPLICATIONS AND COMMENT DURING THE LOAN REVIEW PROCESS

RUS seeks to modify its legal notice rules “to increase transparency, reach a broader range of interested parties, and provide more detailed information on the extent of broadband deployment by incumbent providers.”<sup>24</sup> It proposes to do so by requiring an applicant to file with its application a notice providing information about the services the applicant will offer and a service area map. It will also require that incumbents provide the following information to RUS within 30 days of posting the notice on RUS’ website: (1) the number of residential and business customers capable of receiving broadband service in the applicant’s proposed service area; (2) the number of residential and business customers purchasing broadband service in the applicant’s proposed service area, the rates of data transmission being offered, and the cost of each level of broadband service; (3) the number of residential and business customers receiving other services that will be offered the applicant’s proposed service area and the associated rates for these services; and (4) a map of its service territory.<sup>25</sup> This notice is to remain on the RUS website for 30 days. If an incumbent does not provide the requested information within the 30 day time period, RUS will not consider the incumbent an Existing Broadband Service Provider when determining whether the proposed service area is an Eligible Rural Community or whether the loan should receive priority consideration.<sup>26</sup>

The Associations agree with RUS that it must make greater efforts to obtain information about incumbent service providers in the communities considered for funding. However, RUS’ proposal does not adequately guarantee that the agency will makes its lending decisions based on

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<sup>24</sup> Notice at 26750.

<sup>25</sup> Notice at 26750, Proposed Rule § 1738.33(a).

<sup>26</sup> Notice at 26750, Proposed Rule § 1738.33(b). While an incumbent that fails to provide a timely response will not be considered an Existing Broadband Service Provider, RUS states that all incumbents will be considered in the lending decision.

complete and accurate information. Indeed, incumbents have voluntarily provided the information sought by RUS' proposed rule when loan applications have been filed for their service areas, and the receipt of such information appears to have had little effect in reducing the duplication of broadband service providers in markets already served by incumbents.<sup>27</sup> Moreover, RUS makes its decisions based upon market data submitted by the applicant, including certifications about broadband availability and a market analysis that draws conclusions regarding projected subscriber levels, taking into account each community's individual circumstances.<sup>28</sup> These submissions make representations about the incumbent providers (or fail to do so), and because the public cannot access the broadband loan applications, the incumbents cannot know what information has (or has not) been communicated to RUS about their businesses, rebut inaccuracies if necessary, and protect their investments by providing research and analyses regarding the market to counter what may be misstated by loan applicants. As a consequence, RUS is not receiving the best information possible to be considered in making its lending decisions, causing RUS' focus to "shift away from . . . rural communities that would not, without Government assistance, have access to broadband technologies."<sup>29</sup>

To remedy these faults in the system and achieve the transparency that RUS describes in the Notice, the Associations recommend that RUS adopt a formal notice and comment procedure that includes the following:

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<sup>27</sup> See *Iowa Cable and Telecommunications Assn. v. United States Department of Agriculture*, Case No. 4:06-cv-256, Order (Pratt, C.J.) (filed Dec. 11, 2006)

<sup>28</sup> See RUS Bulletin 1738-1, *Rural Broadband Access Loan and Loan Guarantee Program Application Guide* at 13, 17 (issued June 17, 2004).

<sup>29</sup> OIG Report at i.

- RUS should post a copy of each broadband loan application on its website along with the proposed legal notice form. The Associations' understand that the applications may contain confidential and proprietary information about the applications. Therefore, RUS should redact such information before posting, but post all other information.
- In addition to the information about the applicant that RUS' proposed rule would require in the legal notice (e.g., proposed services and information about the service area), RUS should require that the legal notice form include contact information for the application, the number of households the applicant proposes to serve upon the completion of construction, the loan amount requested, and a summary of the representations and certifications made about preexisting service providers in the community.
- RUS should require every broadband loan applicant to serve each incumbent provider serving the same or adjacent service areas with a notice that an application has been or is being filed, where further information can be obtained, and a contact name and number. RUS should also require all broadband loan applicants to certify that all incumbents have been served with the requisite notice.
- RUS should invite public comment on each posted application. Comments should be accepted for up to 60 days after the posting of legal notice on RUS' website and should address the status of broadband availability in the proposed service area, the data speeds and price points of existing service, any inaccurate or misrepresented information in the loan application, and any other information that would assist RUS in determining whether funding the project would promote the build-out of facilities to an unserved rural community.

In addition, the Associations do not believe that the deployment of facilities to unserved communities would be advanced by the 30-day time limit that RUS imposes on incumbents to respond to the legal notice. For many incumbents, particularly small providers operated by few managers, 30 days may be insufficient time to learn about and respond to the posted notice. The Associations' are confident that RUS would prefer to make a *correct* loan decision in favor of unserved communities rather than an administratively convenient decision. Therefore, if RUS adopts a rule imposing a deadline on Existing Broadband Service Providers to respond to the legal notice, the Associations recommend that the response period be coextensive with the deadline proposed for the submission of public comments – 60 days.

#### IV. RUS MUST IMPROVE THE PERFORMANCE OF ITS DUTIES UNDER THE BROADBAND LOAN PROGRAM RULES

The problems RUS has experienced in applying Broadband Loan Program funds to the *build-out* of broadband facilities to rural communities is not a consequence of rules that instruct it to do so. Rather, as the USDA Office of Inspector General found, “RUS has not satisfactorily implemented statutory requirements for serving rural instead of suburban areas [and] it does not have a system that can guarantee that communities without preexisting service receive priority.”<sup>30</sup> Certainly, enacting rules that more clearly spell out RUS’ objectives in implementing the program would be an important step forward. But new rules will not be effective if RUS does not also improve its management systems. For instance, the audit by the Office of Inspector General discovered that:

The loan program’s lack of focus on rural communities without preexisting service has been paralleled by RUS’ continuing need to create a management structure able to make necessary judgments for a program of this size and scope. Since the loan and grant programs’ inception, RUS personnel have functioned without written standard operating procedures specific to the broadband programs for approving and servicing loans and grants; without standard written procedures, personnel did not always process and service grants and loans consistently and correctly. Due to these irregularities, \$236.6 million in loans and grants intended to bring broadband service to rural communities was either not used as intended, not used at all, or did not provide the expected return in service.<sup>31</sup>

It is imperative that RUS install the sophisticated management structure required to operate a federal subsidy program of this magnitude. This includes hiring employees that have experience dealing with the economics of the communications industries, broadband service technologies, and loan applications that require significant investigation. Moreover, RUS should establish a system of accountability to ensure that applications are processed correctly. In

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<sup>30</sup> OIG Report at i.

<sup>31</sup> OIG Report at ii.

addition to an internal review process, the Associations suggest that RUS may achieve the greatest degree of personnel accountability if it adopts a rule creating an appeal process for Existing Broadband Service Providers to challenge the approval of broadband loan applications.

Finally, the Associations have heard from a number of its members that RUS rarely responds to Freedom of Information Act (“FOIA”) requests within the time limits established by the statute and USDA regulations.<sup>32</sup> Indeed, testimony before Congressional committees indicates that this is the national experience,<sup>33</sup> and that when FOIA requests are finally fulfilled, most of the information is redacted to an extent that it is not helpful to an Existing Broadband Service Provider.<sup>34</sup> The Associations believe that RUS’ handling of its FOIA obligations has increased cynicism and public distrust of the agency’s administration of the Broadband Loan Program. The Associations urge RUS to hire and train the personnel necessary to timely respond to FOIA requests and redact *only* that information that is properly withheld under an applicable FOIA exemption.

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<sup>32</sup> The FOIA and USDA regulations require RUS to notify a requester within 20 days as to whether it will grant or deny a request for records. 5 U.S.C. § 552(a)(6)(A)(i). No extension will be granted absent unusual circumstances. 5 U.S.C. § 552(a)(6)(iii). No extension beyond 10 days may be granted unless “exceptional circumstances exist,” and “exceptional circumstances do not include delays from predictable backlogs.” 5 U.S.C. § 552(a)(6)(B)(ii); 7 C.F.R. § 1.16(a)(2). The Associations’ note that in most cases, requesters have received a boiler plate letter within 20 days that does *not* state whether the request will be granted or denied, and warns of delays because of an unspecified backlog. As this appears to be the standard boilerplate response by RUS’ FOIA Specialist, it is unlikely that the backlog referenced is “unpredictable.”

<sup>33</sup> See Testimony of Tom Simmons, Vice President of Public Policy, Midcontinent Communications, before the Senate Agriculture Committee, Hearing on the Rural Broadband Loan Program (May 17, 2006).

<sup>34</sup> *Id.*; see also Freedom of Information Requests, available at <http://www.usda.gov/rus/index2/RDUPFOIAInfo.html> (last visited July 8, 2007) (implementing FOIA’s Electronic Reading Room requirements and posting only two broadband loan applications that are heavily redacted); NCTA Comments at 15

## CONCLUSION

Although RUS properly recognizes the importance of accelerating the deployment of broadband facilities to rural America and increasing transparency in the loan review process, RUS' proposed rules will only exacerbate many of the problems that have caused the Broadband Loan Program to be severely and frequently criticized.<sup>35</sup> The Associations urge RUS to refocus its attention on the *unserved* rural communities that the program was intended to benefit and move away from proposals that would simply add new subsidized providers in markets that are already served. Further, RUS should provide Existing Broadband Service Providers a more level playing field by requiring notice, allowing for public review of broadband loan applications and an opportunity for public comment. The Broadband Loan Program could become the great advocate for small rural communities that Congress intended it to be with the changes proposed by the Associations and NCTA.

Respectfully submitted:

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<sup>35</sup> See, e.g., Press Release, Senator Claire McCaskill, McCaskill Fights to Expand Rural Access to Broadband (April 24, 2007) (stating “[w]hy isn’t [the Broadband Loan Program] being used in a way [that provides service to small rural communities] instead of being another example of where a government program isn’t doing what it was designed to do and giving money to folks it wasn’t designed to give money to?”).