

**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)	

**COMMENTS OF
CEQUEL COMMUNICATIONS, LLC D/B/A SUDDENLINK COMMUNICATIONS**

Cequel Communications, LLC d/b/a Suddenlink Communications (“Suddenlink”) hereby submits these comments in the above-referenced proceeding. Suddenlink serves approximately 1.4 million cable television and approximately 560,000 cable modem service subscribers in Arkansas, Louisiana, Texas, West Virginia and a number of other states. As a provider of broadband service to rural communities, Suddenlink supports the primary objective of the Rural Broadband Access and Loan Guarantee program (“Broadband Loan Program”) to finance the deployment of broadband capacity to unserved rural communities.¹ Suddenlink appreciates the opportunity to advise the Rural Utilities Service (“RUS”) regarding amendments to its rules that will refocus the agency’s commitment to funding the build-out of broadband facilities to rural America.² To that end, Suddenlink recommends that RUS adopt the rule modifications proposed in the Comments filed by the National Cable and Telecommunications Association

¹ 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).

² Proposed Rule, Rural Broadband Access Loans and Loan Guarantees, Rural Utilities Service, USDA, 72 Fed. Reg. 26742 (proposed May 11, 2007) (to be codified at 7 C.F.R. pt. 1838) (hereinafter “Notice”).

(“NCTA”) in this proceeding.³ In particular, RUS should follow NCTA’s guidance with regard to loan eligibility and priorities, funding for facility upgrades, legal notice and public comment procedures, and RUS’ accountability for the program’s administration.

FACTUAL BACKGROUND

Because Suddenlink provides service to numerous rural areas, it closely tracks the broadband loan reports posted on RUS’ Web site. RUS’ recent grants of funding in West Virginia exemplify the need for change in the administration of the Broadband Loan Program. Suddenlink is one of the largest providers of broadband services in West Virginia,⁴ and offers its 225,000 statewide customers some of the fastest internet speeds available in the state.⁵ Suddenlink’s customers include the residents of the City of Beckley, West Virginia (“Beckley”),⁶ which has a population of approximately 17,254.⁷ Beckley is also served by three digital subscriber line (“DSL”) providers (Verizon, Fibernet and NTELOS, Inc.).⁸ This robust local market competition reflects the findings of a June 2005 study published by Marshall University’s Center for Business and Economic Research, which concluded that:

“West Virginia is enjoying the economic benefits associated with the currently available technologies that are similar in nature and magnitude to the benefits

³ Comments of the National Cable and Telecommunications Association, RUS 06-Agency-0052 (filed July 10, 2007) (hereinafter “NCTA Comments”).

⁴ Suddenlink acquired Charter Communications, Inc.’s cable systems in West Virginia on July 1, 2006.

⁵ Suddenlink offers its customers in West Virginia a 1.5 Mbps service package for \$29.99/month and a 6 Mbps service package for \$39.99/month. Suddenlink intends to launch a new 12 Mbps service in the near future.

⁶ Suddenlink services 15,399 households in the City of Beckley.

⁷ See 2000 Report of the U.S. Census Bureau, available at <http://censtats.census.gov/data/WV/1605405332.pdf> (last visited July 5, 2007).

⁸ Verizon, Fibernet and NTELOS have been providing DSL service in Beckley since at least March 16, 2005. See Consumer Advocate Division, Public Service Commission of West Virginia, General Investigation into the Deployment of Advanced Telecommunications in West Virginia at 10-17 (March 16, 2005); Consumer Advocate Division, Public Service Commission of West Virginia, General Investigation into the Deployment of Advanced Telecommunications in West Virginia at Attach. F-K (April 24, 2007).

accruing to the nation as a whole. *For this reason, we have suggested that direct, broad-based State intervention in broadband markets is not warranted at this time.*⁹”

Nevertheless, on or about October 19, 2005 – just four months after the Marshall University study was published -- RUS accepted a broadband loan application from Beckley Service Area Access Company, Inc. d/b/a iTown (“iTown”) to serve Beckley.¹⁰ On November 16, 2005, Charter, the owner of the Beckley cable system at the time, informed RUS of the status of competitive broadband services in the market, specifically noting that at least 4 broadband companies provided service in Beckley.¹¹ Notwithstanding this information, RUS approved iTown’s application on March 6, 2007.¹²

Upon learning of the loan approval, Suddenlink contacted RUS on March 26, 2007 and asked that it explain the determination that Beckley is an underserved community when there are 4 broadband providers actively serving the community.¹³ More than three months later, Suddenlink has not received a response to the inquiry. On May 15, 2007, Suddenlink submitted a request pursuant to the Freedom of Information Act (“FOIA”) seeking records and data

⁹ Center for Business and Economic Research, Marshall University, *The Residential and Commercial Benefits of Rural Broadband: Evidence from Central Appalachia* 43 (June 2005) (Emphasis Added).

¹⁰ See RUS Pending and Approved Broadband Loan Report for West Virginia, which may be accessed using RUS Broadband Search Tool at <http://broadbandsearch.sc.egov.usda.gov/SearchTabs.aspx> (last visited July 5, 2007).

¹¹ Letter from Michael Kelemen, Director of Government Relations, Charter Communications, Inc., to Ken Kuchno, Director, Broadband Division, USDA/Rural Utilities Service (Nov. 16, 2005).

¹² See *supra* n. 10.

¹³ Email from Pete Abel, Vice President of Government Relations, Suddenlink Communications, to Deborah Jackson, Northern Operations Branch Chief, Broadband Division, USDA/Rural Utilities Service (March 26, 2007).

including and related to iTown's application. RUS' FOIA Specialist has only acknowledged receipt of the request and warned of response delays caused by an unspecified backlog.¹⁴

I. COMMUNITIES WITH BROADBAND ACCESS SHOULD NOT BE ELIGIBLE FOR BROADBAND LOANS

RUS' approval of the iTown application is evidence that RUS' "focus *has shifted away* from . . . rural communities that would not, without Government assistance, have access to broadband technologies."¹⁵ Rather than bridging the gap, RUS' proposed definition of "eligible rural community" would enable areas with up to three Existing Broadband Service Providers to be eligible for loan consideration.¹⁶ Suddenlink agrees with NCTA that "[t]he relevant issue is not the number of providers in the area, but whether the households in the proposed area have access to broadband service from any provider."¹⁷ Any other approach would perpetuate RUS' funding of "companies in highly competitive business environments where multiple providers compete . . . for relatively few customers,"¹⁸ such as Beckley, compromise the investments that privately funded providers have made in rural America,¹⁹ and divert funds from Congress' intended recipients – unserved rural communities.²⁰

¹⁴ Letter from Adrienne Stinnett, FOIA Specialist, USDA RD-Rural Utilities Program, to Wendy Knudsen, Executive Vice President and General Counsel, Cequel III, Management Company of Suddenlink Communications (May 22, 2007).

¹⁵ 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 i (September 2005) (hereinafter "OIG Report").

¹⁶ Notice at 26751, Proposed Rule § 1738.2.

¹⁷ NCTA Comments at 6.

¹⁸ OIG Report at 15.

¹⁹ RUS should accord private facility investments by incumbent broadband service providers the same protection that it affords its loan recipients. *See* 7 C.F.R. §§ 1738.20(g), (h).

²⁰ *See* 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

Further, Suddenlink agrees with NCTA that RUS should eliminate the 10% take-rate requirement in the proposed definition of “Existing Broadband Service Provider.”²¹ NCTA is correct that disregarding providers that fail to meet that threshold could result in an absurd overlap of broadband service.²² Moreover, new entrants certainly will be discouraged from investing private funds to build facilities in, and deploy services to, rural communities if they believe that RUS will disregard their start-up/promotion period and drop a fully subsidized competitor in the same service area.

Finally, Suddenlink agrees with NCTA that RUS’ proposed service level requirement for projects to extend service beyond an applicant’s current territory must be modified.²³ For the reasons stated above and in NCTA’s submission, the existence of one Existing Broadband Service Provider should *prevent* RUS from subsidizing a market entrant.²⁴ Suddenlink concurs with NCTA that the project must serve at least 50% of homes that do not receive service from *any* provider.

II. TOP PRIORITY SHOULD BE GIVEN TO PROJECTS THAT BRING BROADBAND SERVICE TO UNSERVED HOUSEHOLDS

Congress could not have made its intentions regarding the prioritization of broadband loan applications more clear: “In making or guaranteeing loans . . . the Secretary *shall* give priority to eligible rural communities *in which broadband service is not available to residential*

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?”).

²¹ Notice at 26751, Proposed Rule § 1738.2

²² See NCTA Comments at 7-8

²³ See Notice at 26753, Proposed Rule § 1738.21.

²⁴ RUS’ proposed rules would consider Beckley underserved if Suddenlink were the only provider in the market, even though it is one of the largest providers of broadband services in West Virginia and supplies Beckley with the some of the highest internet speeds available in the state. This cannot be reconciled with the purpose of the Broadband Loan Program. See *supra* n. 1.

*customers.*²⁵ It is axiomatic that, absent legislative history to the contrary, Congressional intent is derived from the plain language of a statute.²⁶ The 2002 Farm Bill was unambiguous, and as the OIG Report points out, “[t]he law itself . . . does not mention or condone the practice of making loans to competing providers.”²⁷ RUS’ proposed rule that would allow a community with one provider to receive priority funding directly contradicts a Congressional mandate for the Broadband Loan Program. Accordingly, Suddenlink recommends that RUS adopt NCTA’s proposed priority rule, which gives priority “first, to applications proposing to deploy broadband to unserved areas only; and . . . second, to applications proposing to deploy broadband to the most unserved households.”²⁸

III. LOANS SHOULD NOT BE GRANTED SOLELY TO UPGRADE EXISTING FACILITIES

Suddenlink agrees with NCTA that broadband loans should not be granted to an incumbent provider to upgrade its facilities without concomitantly extending broadband service to unserved households. NCTA’s recommendation that loans only be granted to applicants meeting the minimum unserved household service requirement would guarantee that the federal subsidy extends broadband service to new customers rather than merely giving an existing provider a competitive edge in an already served market.²⁹

²⁵ 7 U.S.C. § 950bb(c)(2) (Emphasis Added).

²⁶ See *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.”)

²⁷ OIG Report at 15.

²⁸ NCTA Comments at 19.

²⁹ 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 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) (Emphasis Added).

IV. THE PROPOSED LEGAL NOTICE RULES MUST INCREASE ACCESS TO APPLICATION INFORMATION AND PROVIDE A COMMENT PROCEDURE

Suddenlink believes that the notice and comment process proposed by NCTA is the *minimum* effort required to increase transparency in the Broadband Loan Program. Contrary to RUS' proposal, NCTA outlines a two-way flow of information that would better inform RUS' decision-making by ensuring the completeness and accuracy of market data, and provide a mechanism for incumbents to publicly advocate for the investments they have made in rural America. Accordingly, Suddenlink believes that public comment is needed, and that RUS should be required to consider all comments filed when making a lending decision. Further, to increase transparency and public confidence in the Broadband Loan Program, Suddenlink recommends that RUS publicly release a report on its website that summarizes the comments received in response to a loan application and responds to the concerns raised.

By way of example, Suddenlink believes that iTown's application for the project in Beckley would not have been approved if it had been evaluated after public review and comment, and RUS had thus been more fully informed of the competitive landscape in Beckley.³⁰ Instead, funds have been granted for a project that will compete for customers with four preexisting broadband providers. This is a waste of government resources that could (and should) have remained available to deploy broadband facilities in rural areas that are unserved by any broadband provider.

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

RUS' approval of iTown's broadband loan application for Beckley is not a product of insufficient rules. Rather, "RUS . . . does not have a system that can guarantee that communities

³⁰ Although Charter informally submitted relevant data to RUS by letter after iTown filed its application, *see supra* n. 11, Suddenlink has no way of knowing whether RUS reviewed the data or factored it into the loan review process.

without preexisting service receive priority.”³¹ RUS must take additional steps to ensure that it has sufficient personnel and an appropriate management structure required to implement a government subsidy program of this magnitude.³² As NCTA suggests, this includes hiring personnel with the expertise required to more effectively and accurately evaluate the data submitted with and relating to each application, and a system of accountability to ensure that applications are processed correctly. It also requires maintaining a sufficient workforce to meet the Broadband Loan Program’s obligations, including responding to Freedom of Information Act requests within the time limits established by statute.³³ Absent such measures, “RUS cannot be confident that Federal funds are being used to bring broadband service to those rural communities most in need of assistance.”³⁴

³¹ OIG Report at i. Suddenlink doubts that a reasonable examination of the facts applicable to iTown’s application would lead the Broadband Division to conclude that broadband service is not available in Beckley under the current priority rules. *See* 7 C.F.R. §§ 1738.11, 1738.15.

³² OIG Report at p. ii.

³³ 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).


³⁴ OIG Report at p. iii.

CONCLUSION

The greatest criticism of the Broadband Loan Program is that the federal subsidies are not going to unserved communities as Congress intended. Rather, RUS is administering the program in a way that duplicates broadband service providers in small communities that have too few customers to support such competition. This discourages private investment in, and the build out of facilities to, rural America. NCTA's modifications to RUS' proposed rules would better establish the substantive and managerial controls necessary to avoid such results. Suddenlink urges RUS to amend its rules to comport with NCTA's proposals.

Respectfully submitted,

**CEQUEL COMMUNICATIONS, LLC D/B/A
SUDDENLINK COMMUNICATIONS**

By: 

Adam S. Caldwell
Elizabeth A. Drogula
DAVIS WRIGHT TREMAINE, LLP
1919 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006

Its Attorneys

July 10, 2002