

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



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**COMMENTS**

**I. Introduction**

The American Cable Association (“ACA”) represents nearly 1,100 small and medium-sized cable companies that serve more than 8 million cable subscribers, primarily in smaller markets and rural areas. More than half of ACA’s members serve fewer than 1,000 subscribers and all face the challenges of upgrading and operating broadband networks in lower-density markets.

Accordingly, this proceeding to reform the Rural Broadband Access Loan and Loan Guarantee Program (“Rural Broadband Loan Program” or “Program”) rules is significant to ACA members. ACA members lead the way in bringing broadband services to rural America. In a recent survey of ACA members, 80% of those

responding indicated that they provided broadband service.<sup>1</sup> The smallest reporting broadband provider served as few as 70 subscribers.

ACA members have invested significant amounts of private capital in the rural markets they serve to upgrade facilities and deploy broadband services. ACA member companies range from family-run cable businesses serving a single town to multiple system operators that focus on serving smaller markets. Few ACA members have sought assistance through the Rural Broadband Loan Program — the systems have been built primarily through private investment.

## **II. Summary**

ACA supports reform of the Rural Broadband Loan Program. Reforms should be undertaken to assure that the RUS Broadband Loan Program accomplishes its intended purpose which is to bring broadband services to rural areas that are without service today.<sup>2</sup> Funds should not be used to subsidize those looking for an advantage in competing with existing providers.

The proposed changes to the Rural Broadband Loan Program rules should be modified to further the Program's intended purpose and to reflect and protect the existing private capital investment in rural America made by various entities, including ACA members. Specifically, ACA proposes the following modifications.

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<sup>1</sup> Approximately 20% of ACA's members responded to the survey taken in May, 2007.

<sup>2</sup> See, e.g., 148 CONG. REC. S4023, S4037 (daily ed. May 8, 2002) (statement of Sen. Dorgan) (the broadband loan provisions will "ensure Rural America has the same access to broadband service as its urban neighbors"); 152 CONG. REC. S6951 (daily ed. May 25, 2007) (statement of Sen. Roberts) ("In 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.").

- **Eligible Rural Community Definition** The definition of an Eligible Rural Community should focus on the number of homes without broadband access, not the number of Existing Broadband Service Providers. The proposed rule seeks to allow the use of agency funds to serve areas with up to four Existing Broadband Service Providers. Using tax-payer money to subsidize the fifth competitor, or even a second or third competitor, is unnecessary and inconsistent with the purpose of the Program. The definition should be modified to focus on the number of unserved homes that the applicant is going to reach.
- **Existing Service Provider Definition** The definition of an Existing Broadband Service Provider should be based on the presence of the broadband provider--not minimum penetration levels and self-identification certification. The proposed rule seeks to define Existing Broadband Service Provider based on an incumbent provider certifying that it has a penetration rate of at least 10% of the households passed. Minimum penetration levels and certification requirements should not be used to determine whether an Existing Broadband Service Provider exists. The purpose of the Program is access to service.
- **Minimum Service Requirements for Funding** Projects should include an unserved area with at least 50% of the households having no access to broadband to be eligible for funding. The proposed rule institutes minimum service requirements for funding based on the number of households that have no access to broadband service or access to only one (1) broadband provider. ACA strongly supports the concept that there must be a minimum number of unserved households in an area for the project to be eligible for funding. ACA opposes eligibility based solely on a concept of bringing multiple competitors to an area through government subsidies.
- **Upgrades** Tax payer money should not be used to subsidize the upgrade of one competitor over another. The proposed rules would allow for subsidies for an upgrade of existing broadband facilities. Such funding should only be allowed if the applicant meets the minimum unserved household requirements or if the upgrade includes an extension so as to meet the minimum unserved household requirements. The Program should not pick winners and losers in a competitive market by subsidizing one competitor over another.
- **Transparency** The rules should be modified to require 1) written notification to all existing broadband service providers in the project area, 2) provision of sufficient non-confidential information on the website to confirm eligibility requirements and 3) the ability to file comments in response to the application. The proposed rule establishes requirements for posting information on the RUS website and a 30-day notice period. ACA supports greater visibility and transparency and believes the proposed rule should go further and require notification to existing broadband service providers in the area, provision of adequate non-confidential information to determine eligibility and a public comment period.

Finally, ACA supports the proposed three-year build out rule and the RUS' efforts to clarify and make the rules more user-friendly.

**III. The definition of Eligible Rural Community should be based on the number of homes without access to broadband services.**

The USDA's Office of Inspector General noted in a recent Audit of the Rural Broadband Loan Program that the Program's focus has seemed to shift away from "those communities that would not, without government assistance, have access to broadband technologies".<sup>3</sup> The Audit recommended clarifying the definition of "eligible rural area" to more effectively implement the statutory objectives.<sup>4</sup>

The proposed "Eligible Rural Community" definition is a legitimate first step; however, the limitations contained in the definition do not go far enough to assure that areas with existing broadband access are not being subsidized. The proposed rules define an Eligible Rural Community as an area which is not located within:

- 1) the boundaries of an Urban Area;
- 2) an incorporated city or town with a population of 20,000 or less; or
- 3) an area that has four or less Existing Broadband Service Providers.<sup>5</sup>

Allowing eligibility where there is up to four Existing Broadband Service Providers is contrary to the RUS's goal of assuring funds do not go to markets that are sufficiently served.<sup>6</sup> Such communities do not require an additional competitor, especially one

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<sup>3</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 p. i. ("OIG Audit Report").

<sup>4</sup> Id. at p. iii.

<sup>5</sup> Proposed Rule Section 1738.2.

<sup>6</sup> Notice at 76749.

subsidized through federal funding. The focus for determining an eligible community should be the number of households that do not have access to broadband service from any provider—not the number of providers already in the community.

As previously noted, ACA members have invested significant amounts of private capital in bringing broadband services to rural communities. Ignoring such private investment and subsidizing a new entrant with Federal funding simply because there are not multiple competitors serving the area is a disservice to those companies who invested private capital.

The Rural Broadband Loan Program should not use tax payer dollars to undermine the broadband deployment efforts of ACA members by subsidizing competitors. The RUS acknowledges the fierce nature of the broadband market.<sup>7</sup> The Office of Inspector General rightly questions whether the Government should be loaning money for competing services.<sup>8</sup> The Office of Inspector General specifically states that “from a perspective of equity, why should the Government subsidize some providers in a given market but not others?”<sup>9</sup> The RUS should recognize the investment of private capital undertaken by ACA members and others who have deployed broadband in rural areas and should focus the Rural Broadband Loan Program on bringing broadband services to unserved areas. The definition of an Eligible Rural Community should be determined by the number of households without broadband access — not a requirement of multiple competitors.

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<sup>7</sup> Proposed Rule, Rural Broadband Access Loans and loan Guarantees, Rural Utilities Service, USDA, 72 Fed. Reg. 26742. (“RUS NPRM”)

<sup>8</sup> OIG Audit Report at p. 24.

<sup>9</sup> Id.

The use of a “four or more criteria” to determine if an area is “sufficiently served” is even contrary to the RUS’s own view of what is “sufficiently served” for purposes of subsequent loans into an area. The RUS will not approve a loan to more than one provider in an area.<sup>10</sup> If the RUS is treating the existence of one provider receiving funds as indicating that the area is “sufficiently served” for purpose of protecting its investment, the same should be true of private investments made by ACA members and others. The inquiry needs to be on the number of households without access to broadband service — not the number of entities providing such access.

The proposed definition of “Eligible Rural Community” should be modified by replacing the requirement that there be “four or less Existing Broadband Service Providers” with a requirement that the “number of households without access to Broadband Services is 50% or more.”

**IV. Determination of an “Existing Broadband Service Provider” should be based on actual existence and households with access to the service — not minimum penetration levels and self-certification.**

The proposed definition of an Existing Service Provider totally undermines the RUS’ attempt to reform the Program and assure that the statutory goals are being met. The proposed rules define an “Existing Service Provider” as one that certifies and provides evidence to the RUS that it serves at least 10% of the households it passes.

The proposed definition fails on two points: 1) it requires a certain penetration level before an existing provider in the area will be recognized; and, 2) it forces such providers to self-identify and prove that they are meeting such penetration rates. The existence of an incumbent provider is determinative of whether a household has access to broadband services, not whether the incumbent provider files certifications and meets

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<sup>10</sup> Proposed Rule Section 1738.19.



a minimum penetration level.

The rule as written would allow loans where households already have access to multiple broadband service providers. There are a number of reasons why a provider may not yet serve 10% or more of the households passed, including a recent launch of the service, fierce competition amongst multiple providers, and the demographics of the area served.

The existence of a broadband provider, not the penetration level of the provider, should determine an Existing Broadband Service Provider. In testimony before Congress the USDA's Inspector General noted that a past problem with the definitions had been a failure to determine whether "existing, private Internet providers, could provide service to the Community without a subsidized government loan".<sup>11</sup> The rule as proposed would continue this failure by focusing on a provider's penetration level rather than on whether the provider actually exists.

Ignoring the existence of a broadband competitor merely because the entity does not certify its existence, either because of a lack of notice or lack of resources, makes no sense and fails to carry out the purpose of the Program. The burden of proof of demonstrating eligibility for the Program should be on the applicant. Reality, not whether or not certification is made, should determine the existence of an Existing Broadband Service Provider.

The proposed definition of an Existing Broadband Service Provider should be based on actual existence and households passed by the service, not penetration levels and certifications. The applicant should be required to certify the absence or presence

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<sup>11</sup> Statement of the Honorable Phyllis K. Fong, Inspector General before the House Appropriations Subcommittee on Agriculture, Rural Development, Food and Drug Administration and related Agencies, May 1, 2006, p. 18. ("emphasis added").

of broadband service providers in the project area – self-identification by an incumbent provider should not be required for the incumbent provider to be acknowledged as providing broadband access.

**V. Projects should include 50% of households with no access to broadband service.**

The rules propose that a project in an area not currently served by an applicant must contain at least 40% of households with no access to broadband service or access to only one existing Broadband Rural Service Provider.<sup>12</sup> ACA members welcome the establishment of a minimum level of unserved households prior to a project being approved. The proper measure, however, should be 50%, consistent with proposed legislation,<sup>13</sup> and should be determined solely by whether the household is unserved, not whether broadband service can be obtained from multiple providers.

Again, ACA members and other incumbent providers have made significant private investments in deploying broadband in rural America — they should not be subjected to government subsidized overbuilds. Requiring a minimum level of unserved households of 50% of the project, consistent with pending legislation, would be a rationale compromise.

Eligibility must be determined based on households without any access to broadband services, not whether access is being provided by only one provider. As the USDA's Office of Inspector General acknowledges, there is a real question whether sparsely populated rural areas for which the loans are intended can reasonably support

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<sup>12</sup> Proposed Rule Section 1738.21 (a)(2).

<sup>13</sup> See H.R. 2035 110<sup>th</sup> Cong. (1<sup>st</sup> Session 2007). Under the resolution, if the applicant proposes a project where less than 50% is unserved, the applicant would get an amount proportional to that part of the project which is unserved.

multiple broadband service providers.<sup>14</sup> The RUS recognizes this risk as demonstrated by the fact that it will not loan to more than one provider in a particular area. This recognition of the risk associated with investing in a rural market where a competitor already exists exemplifies the concern of ACA members regarding their investment and their objection to competing against a government subsidized competitor. The minimum service requirements should be based on households without any access to broadband service.

**VI. The RUS should not subsidize one competitor over another in a market by granting upgrade loans that would not otherwise meet eligibility requirements.**

The proposed rules would allow loans for the upgrading of existing facilities by an existing provider solely for the purposes of enhancing existing service by providing or improving broadband service or related services.<sup>15</sup> The RUS should clarify that eligibility for upgrade funding is subject to the minimum service requirements of the proposed rule.<sup>16</sup> In other words, the applicant would still need to show that the upgrade would include an unserved area of approximately 50% of households without access to broadband service. The loan should only be allowed if the applicant meets the minimum unserved household requirements or if the upgrade includes an extension so as to meet the minimum unserved household requirements.

Without requiring compliance with the minimum unserved household service requirements the RUS would be subsidizing one competitor over another in the

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<sup>14</sup> USDA OIG Audit Report, p. 24.

<sup>15</sup> Proposed Rule Section 1738.21(b).

<sup>16</sup> Proposed Rule Section 1738.21(a).

marketplace. As previously noted, the RUS acknowledges the fierce competitive nature of the broadband market.<sup>17</sup> There is no reason why the RUS should favor one competitor over another given the competitive nature of the broadband market. An applicant seeking money to upgrade should be required to meet the minimum unserved household service requirements.

**VII. The rules should provide for notice of the filing of an application to existing broadband service providers in the project area, posting of non-confidential portions of the application on the RUS webpage and an opportunity to comment on pending applications.**

The proposed rule requires the posting of a legal notice on the RUS webpage setting forth the applicant's total proposed service area, including a service map, information regarding the offering of other services and a request for any Incumbent Service provider to submit certain information.<sup>18</sup> ACA strongly supports greater transparency regarding the loan application process. The proposed rule, however, should be modified to provide greater transparency and information exchange to avoid reliance on inaccurate information and to better enable the RUS to carry out the purpose of the Program.

The rules should require the applicant to give written notice of the posting to all broadband service providers within the proposed service area. As part of its planning the applicant obviously has identified the incumbent providers. A short written notification will better assure the incumbent's participation in the process.

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<sup>17</sup> RUS NPRM, p. 26472.

<sup>18</sup> Proposed Rule Section 1738.33. ACA understands why information regarding broadband services offered may be required by the RUS in processing a loan application but the reason for information regarding other services is less clear. An incumbent who does not wish to provide such information should not be ignored as an Existing broadband Services Provider based on a failure to provide information regarding other services. Further, as explained in Section IV above, the existence of the provider, not the provision of any information, should be sufficient to establish an incumbent provider as an Existing Broadband Services Provider.

The RUS should also post non-confidential portions of the application, including any statements regarding the existence of incumbent broadband service providers or regarding the incumbent's services and service areas. In addition, the rules should provide for a comment period wherein incumbent providers and the public in general can file comments and correct any misstatements or omissions in the application. The rules should also require the RUS to publish its final decision regarding the loan application and explain how it dealt with any disputed statements between the applicant and those providing comments.

**VIII. A three-year build out plan and the RUS' effort to clarify the rules and make them more user-friendly supports the goals of the Program.**

The proposed rules provide that the system design must demonstrate that the project will be completed within three (3) years from the date of the loan contract. ACA supports the three-year build-out plan as being consistent with the goals of the Program by requiring all unserved areas to be built out in a reasonable time frame.

ACA also supports the RUS' effort to clarify the rules and make the rules more user-friendly. Again, this is consistent with the statutory goal of providing broadband access to rural service areas.

**IX. Conclusion**

ACA supports reform of the Rural Broadband Loan Program. Reforms should be undertaken to assure that the RUS Broadband Loan Program accomplishes its intended purpose, which is to bring broadband services to rural areas that are without service today. The Rural Broadband Loan Program should not be used to subsidize those looking for an advantage in competing with existing providers, including ACA members.

The proposed changes to the Rural Broadband Loan Program rules should be

modified to further the Program's intended purpose and to reflect and protect the existing private capital investment in rural America made by various entities, including ACA members, and to better protect the integrity of the Program. The proposed rules should be modified as set forth herein.

Respectfully submitted,

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