



July 10, 2007

Via Federal eRulemaking Portal

Ms. Michele Brooks
Acting Director
Program Development and Regulatory Analysis
USDA Rural Development
1400 Independence Ave.
STOP 1522, Room 5159
Washington, DC 20250-1522

Re: Dkt No. RUS-06-Agency-0052

Dear Ms. Brooks:

NextWave Wireless Inc. (“NextWave”), on behalf of its family of companies,¹ hereby submits comments in response to the proposed rules in the above-referenced docket regarding the Rural Utilities Service (“RUS” or “the Agency”) rural broadband loan program. We are enthusiastic supporters of the RUS broadband loan program and offer these comments based on our experience in the broadband market, our commitment to developing and deploying advanced wireless technologies in rural areas, and our strong desire to see this needed financing tool used more broadly to bring advanced services to rural America.

As a supporter of the rural broadband loan program, NextWave applauds the Agency for opening a dialogue on the future of the program. We are also pleased that in administering the program, the Agency has provided funding to diverse technologies, including new wireless broadband technologies. We applaud much needed reforms in the proposed rule that are designed to reduce the cost of loan applications and begin to ease some of the credit support burdens contained in the current program rules. We urge the Agency to apply these reforms more broadly to applicants.

We are concerned, however, that the proposed rule changes related to eligibility and competitive markets will make the program less accessible to applicants seeking to bring needed services to rural America and run contrary to the letter and spirit of Title VI of the Rural Electrification Act. We urge the RUS to take our comments in this regard as a constructive effort to help the Agency achieve in broadband services what it has achieved in rural electrification and rural telephony.

NextWave’s fundamental concern is that, in combination, the proposed eligibility rules would effectively block a large number of communities from receiving RUS broadband loan financing

¹ NextWave Broadband Inc., IPWireless, Go Networks, and PacketVideo Corporation.

benefits to enhance their broadband connectivity. Our comments on the proposed rules focus on six critical areas:

- 1) All broadband is not created equal. The availability of the bare minimum 200 kbps service, regardless of the number of entities offering such service, should not stand in the way of RUS financing advanced multi-Mbps broadband service;
- 2) There is no independent, neutral means to determine the current availability of broadband service;
- 3) The number of competitors offering minimal broadband service is not dispositive of a community's need or desire for improved service. The quality, capability and affordability of existing services are more relevant factors than a mechanical test of the number of competitors;
- 4) It is often necessary to combine less rural areas with more rural areas to achieve loan feasibility;
- 5) Affiliate transaction rules should be used to encourage investment; and
- 6) New rules should not be used to reject loan applications that have been filed under the existing rules.

In light of these issues, we respectfully offer an alternative approach to afford applicants and communities more certainty and to speed the deployment of advanced broadband services throughout the nation.

The NextWave Family of Companies

The NextWave family of companies is focused on developing, marketing and using fixed and mobile wireless technologies to help people stay connected to their loved ones, their jobs, and their world. More than 3G or 4G wireless, we are opening a fundamentally new chapter in wireless communications. We call our vision of connectivity anywhere, anytime, and on virtually any device Wireless 2.0™. Our goal is to make Wireless 2.0™ a global reality by delivering the technologies and innovations needed to make wireless broadband faster, more reliable, and more affordable. The NextWave family of companies - Packet Video, IPWireless, GO Networks and NextWave Broadband - are well on our way to making that vision a reality.

Today, many of the largest service providers and handset manufacturers in the world, including Nokia, Motorola, Samsung, and Verizon Wireless, depend on device-embedded software solutions from our PacketVideo subsidiary: software that transforms a mobile handset into a fully-featured multimedia appliance that can stream, download and play video and music, receive live TV broadcasts and engage in two-way video telephony.

Through our IPWireless subsidiary, we are a global provider of mobile broadband and mobile broadcast solutions based on Universal Mobile Telecommunications Systems ("UMTS") TD-CDMA technology. A leader in the development of 3GPP TDD UMTS standards, IPWireless provides network operators with the hardware, software, chipsets, and network management products they need to deliver reliable, affordable, fully-mobile wireless broadband services. Today, mobile broadband networks based on IPWireless' TD-CDMA technology are in commercial operation in over

a dozen countries around the globe, including the Czech Republic, New Zealand, Germany, South Africa, Sweden, and the United Kingdom. In addition, through Northrop Grumman, IPWireless is the supplier of the wireless broadband technology to the New York City public safety network, which is the largest and most significant public safety broadband network to date.

At our GO Networks subsidiary, we are working hard to provide wireless service providers around the world with the carrier-class, Wi-Fi and WiMAX network systems they need to deliver reliable and affordable mobile and fixed broadband service to consumers. Utilizing a proprietary beamforming, smart-antenna technology, and an innovative, self-organizing and multi-frequency mesh architecture, GO's carrier-class, "metro-area" Wi-Fi solution is designed to deliver optimal performance at the lowest possible cost. Our family of wireless solutions offers technology solutions which will bring affordable, robust and advanced broadband to rural America.

NextWave is uniquely focused on wireless innovation. Our NextWave Broadband subsidiary has assembled one of the most accomplished engineering teams in the industry to develop breakthrough air-interface technologies and an entire family of low-cost, high-performance WiMAX chipsets and advanced network components.

To pave the way for our customers, NextWave has acquired nationwide spectrum licenses in the United States and abroad. This is spectrum that can be used to deploy advanced broadband networks that utilize NextWave's revolutionary technologies which deliver the full promise of Wireless 2.0™.

All broadband is not created equal.

Companies like NextWave and others are working around the clock to achieve higher and more reliable bitrates to meet the growing demands of consumers. The RUS broadband loan program should be a catalyst for such innovation, recognizing that the race for broadband is never really over. As the Agency has found in state modernization planning and its traditional telephone program, distance and density are barriers to rural America keeping up with the nation and the world in the quest for higher bitrates. The answer is not to stop working in areas that have achieved entry-level status in the broadband economy, but instead to encourage and facilitate a further quest for excellence.

While the jump from single digit dial-up Internet access to 256 kbps DSL speeds is significant and worthy of pursuit, the proposed RUS rule concludes that once a community has bitrates near 200 kbps, such capacity is sufficient for contemporary Internet usage. This may be true for some low-speed applications, such as email or basic Web surfing, but would be inadequate for bandwidth-intensive applications such as video and voice-over-IP ("VoIP"). The Federal Communications Commission ("FCC")-derived broadband definition of 200 kbps makes sense as a floor for the RUS broadband loan program. Unfortunately, the proposed RUS rule will make that floor the ceiling for a number of communities that are otherwise statutorily eligible to benefit from the broadband loan

program.² While it is understandable from a banking perspective that the RUS would not lend to multiple broadband providers in communities that have broadband capable plant, the proposed rule would also apply to communities where there are no RUS telecommunications or broadband program participants, tethering those communities to yesterday's technology and services.

With each passing day, the demands for increased bitrates increase. For example, the Internet is rapidly becoming a means of video distribution. One report estimates that YouTube, a company that did not even exist when the Congress enacted the broadband loan program in 2002, now accounts for 20% of all HTTP traffic and nearly 10% of all Internet traffic.³ Blockbuster, Netflix and Walmart have all announced plans to distribute movies over the Internet. In such a video-intensive environment, 200 kbps Internet access will have the feel and utility that dial-up access did when the Congress enacted the broadband loan program. Similarly, other advanced Internet applications are becoming increasingly bandwidth-intensive, including telemedicine, distance learning, high-quality teleconferencing and multi-player gaming.

As the rest of the world and the nation are racing past 200 kbps broadband speeds,⁴ rural America should not be locked into what amounts to first-generation broadband for the sake of administrative efficiency. The proposed eligibility requirement tied to the number of existing providers is both without statutory basis and risks holding rural America back. As an eligibility requirement, the proposed rule will deprive statutorily eligible applicants from even making a case to the Agency that there is demand for the proposed broadband service. For example, under the proposed rule, a statutorily eligible broadband loan applicant proposing to provide a multi-megabit, triple-play broadband service to an interested rural community and surrounding area could be denied financing because a collection of existing service providers - none providing area-wide coverage - offers spotty 200 kbps service in the town center. While the Agency has and should have discretion to prioritize applications and consider the number of competitors in a community when determining loan feasibility, it should leave program eligibility to Congress.

If the Agency is to use a "number of competitors" test, absent a mandate from Congress, it should not be used as an eligibility criterion. Instead, it should at best be a rebuttable presumption for loan feasibility or priority. Furthermore, such a test should not be based on the minimum bitrates for program participation, but should instead focus on the bitrates proposed by the applicant. This approach will advance, rather than stall, broadband deployment in rural areas. All players, existing service providers and broadband loan applicants alike, would be encouraged to deploy the highest

² The FCC does not view its current definition as a "ceiling." The FCC collects data on five different "speed tiers" faster than 200 kbps in both directions. The FCC recent requested comment on refining the speed tier information it collects on its Local Telephone Competition and Broadband Reporting Form (FCC Form 477), including whether the definition of broadband should allow different upstream and downstream speeds, and whether minimum threshold for reporting any connections on FCC Form 477 should be increased. The FCC also requested comment on a system whereby speed tiers would automatically adjust upwards to reflect technological advances. See [Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol \(VoIP\) Subscribership, Notice of Proposed Rulemaking, FCC 07-17, 22 FCC Rcd 7760, 7770 and n.46 \(2007\)](#).

³ See, *HTTP Overtakes P2P Traffic*, DSL Reports June 19, 2007.

⁴ The FCC reported in a January 2007 that 63.1% of broadband subscribers receive more than 2.5 Mbps when measured in the faster of directions. See, Chart 9, *High-Speed Services for Internet Access: Status as of June 30, 2006*, January 2007.

bandwidth services possible. The availability of the bare minimum 200 kbps service, regardless of the number of entities offering such service, should not stand in the way of RUS funding advanced multi-Mbps services.

Interestingly enough, the proposed rules do recognize that an incumbent service provider should be eligible to receive financing to upgrade its own services. That same approach should be extended to all applicants. Any applicant proposing to significantly improve available service or add new services should be welcome in the RUS broadband loan program.

The explanatory text accompanying the proposed rules⁵ appropriately recognizes that “increases in demand for bandwidth” has been one of the challenges for the Agency in the broadband loan program. RUS should meet that challenge by doing what it has done so successfully in telephony and electricity, namely to strive for the best. The 21st Century RUS should not conclude that 200 kbps is “good enough” for rural America just as the 20th Century Rural Electrification Administration (REA) did not settle for the inferior party line telephone service or unreliable electric service.

There is no independent, neutral means to determine the current availability of broadband service.

The proposed rules would not only establish numerical eligibility test based on the number of competitors, but would also institute a 40% un-served test based on the number of subscribers in an applicant’s plan that have access to only one or no broadband service provider. The 40% test is problematic for all of the reasons stated above related to the “number of competitors” test, but is made especially difficult by the fact that there is no independent, neutral means to determine the current availability of service.

While some states, like Kentucky, have launched broadband mapping projects, there is no consistent, reliable, neutral, nationwide resource that an applicant could consult to determine the likely eligibility of a specific territory. The Congress and the FCC are grappling with this very issue right now. It is unlikely that the RUS has the staff time or numbers to conduct its own survey. Nor can it rely on the proclaimed or advertised capabilities and availability of existing service providers, which are notoriously unreliable.

The intersection of the four-competitor eligibility rule with the 40% metric could mean that a market with a hodge-podge of unreliable and lower bandwidth providers would block any new entrant from even seeking financing to provide the very service a community needs for economic development. As a one-competitor test, the 40% metric is in many ways more restrictive than the four-competitor test. Moreover, it is even more unpredictable since determining its effect is a near impossibility based on available information.

The Agency should not impose the 40% metric or the numerical competitive metric (discussed above) at least until or unless independent, fair and reliable sources of data exist to enable applicants and the Agency an opportunity to neutrally determine levels of existing service.

⁵ Federal Register, page 26744, Vol. 72, No 91 May 11, 2007.

The number of competitors offering minimal broadband service is not dispositive of a community's need or desire for improved service.

The quality, capability and affordability of existing service providers are highly relevant factors in determining a whether a particular community needs or desires improved broadband service. The mechanical tests of “numbers of competitors” and percentage of un-served customers do not take these factors into account. In the proposed rules, the RUS makes clear that it will evaluate the affordability of an applicant's offering, yet the tests that could be used to bar a statutorily eligible applicant from financing do not take into account the cost of service offered by the incumbent.

The RUS describes the issue well in the introductory comments to the proposed rules. The Agency should expand, not contract, RUS broadband loan availability to demonstrate its commitment to “ensuring that rural America will have access to affordable, reliable, broadband services and to provide a healthy, safe and prosperous place to live and work.”⁶ NextWave recommends that if the Agency uses benchmark metrics to measure the existing competitive environment, it should not use them as eligibility requirements that would block statutorily eligible applicants. It should, however, consider the affordability, reliability and capability of existing providers' service and measure those factors against the services, prices, and technology proposed by the new entrant.

On a related matter, as a wireless technology and service provider, NextWave encourages the Agency to be extremely vigilant in adhering to its Congressional mandate for technological neutrality. We have pointed out above how the proposed rules provide exemptions for incumbent service providers that permit predominantly wireline DSL and cable providers to enhance their broadband service in spite of the proposed rules. The same principle of enhancing existing service should be available to all applicants. The Agency should also revise terms like “households that are proposed to be *passed*”⁷ and “*all* households in a proposed service territory”⁸ (emphasis added) to ensure that they are not interpreted to bar wireless technologies that are effectively and efficiently bringing much needed broadband service to rural America.

The combination of communities is often necessary to achieve loan feasibility.

We understand that the Agency has been criticized for making loans to communities that are more suburban in character, yet are eligible under the Title VI of the RE Act. Congress gave the RUS a tool to manage such cases through its priority process.

Congress fully considered program eligibility in 2002 when it first limited the broadband loan program to communities of 20,000 or less outside a metropolitan statistical area (“MSA”). When it later became clear that particularly in Western States, MSAs included communities that were truly rural in character, Congress dropped the MSA limitation. In doing so, Congress recognized what the RUS acknowledges as the “need for applicants to leverage revenues from lower-cost users (typically those

⁶ Federal Register at 26743.

⁷ Federal Register at 26756.

⁸ Federal Register at 26756.

in more densely populated areas within a city or town) in order to provide service to rural households in higher cost areas...”⁹

Adopting an urban exclusion from RUS funding priority would be defensible under the statute, particularly if it gave the Administrator the ability to waive the exclusion on a case-by-case basis where the particular community is statutorily eligible and in need of broadband service or is integral to a plan to extend service to an un-served or under-served area. However, the proposed urban eligibility criteria does not address the fundamental issue in the RUS broadband loan program, which is that the financial criteria, including the credit support requirements that are partially eased by the proposed regulation, nearly compel an applicant to focus on more densely populated areas. The urbanized area limitation could further exacerbate that problem by taking away one of the more useful tools in making rural service financially viable.

Affiliate transactions should be carefully scrutinized, but not prohibited.

The broadband marketplace is rapidly changing. Modern telecommunications companies provide both services and equipment. A service provider’s proprietary technology solutions often give that provider a competitive advantage in the marketplace, as well as the ability to provide superior service.

In addition, technology vendors can be a source of investment in service providers. The RUS broadband loan program should be fully accessible to innovative companies that can leverage RUS loan commitments. Certainly, transactions with affiliated companies should be scrutinized, but not *per se* prohibited. The RUS and its field staff have extensive experience in the telecommunications market and extensive data through its borrower profiles and list of materials process to assess the capabilities and pricing characteristics of telecommunications equipment and services.

NextWave urges the Agency to incorporate into its rules a test for affiliate transactions. This test should be based on the price and performance of the product or service involved. If a borrower can demonstrate that the technology it seeks to use performs well and is priced reasonably, as measured by similar offerings in the marketplace, the service provider should be permitted to procure equipment and services from an affiliated entity.

Pending applications should not be rejected for lack of compliance with the proposed new rules.

While the Agency reports increasing loan application processing speeds, the current waiting time between loan submission and approval is measured in months, not days. It is not unusual for a year or more to elapse between the date of submission and the date of the first draw from an approved loan. Given the tremendous expense and time involved in the preparation of a broadband loan application as well as the long processing time, it would be fundamentally unfair to judge pending applications on the basis of the eligibility criteria of the proposed rules. While the proposed rule does not suggest retroactive application to existing borrowers, it should make clear that pending

⁹ Federal Register at 26749.

applications would be judged by rules that were in effect at the time the original loan application was submitted to the Agency. The Agency should also make clear that the new rules do not apply to loans that have been approved, but have not yet closed.

NextWave proposes an alternative approach.

NextWave recognizes that the RUS is grappling with a significant challenge. While the RUS broadband loan program introduced new market realities to an agency steeped in the traditions of classic utility finance, the broadband market is not that different from the new realities of the entire telecommunications market. We respectfully suggest that the Agency abandon its efforts to create new eligibility requirements not supported by Title VI of the RE Act. Eligibility requirements in contrast to priority processing or rebuttable presumptions about feasibility lock out service providers genuinely interested in improving broadband service to their communities.

The test the Agency should adopt is whether the loan applicant is proposing to provide a level of service that is quantifiably better or more affordable than what is currently offered. This is essentially the test proposed for existing service providers seeking to upgrade their current service. It should be the test applied to all applicants. An applicant proposing to mirror the existing services and capabilities of an existing service provider would not meet this test and would not likely be able to demonstrate an ability to win customers.

An urbanized area test on its own could be defensible, so long as the Agency does not impose cost allocation requirements on infrastructure used to serve statutorily eligible communities or adjacent urban areas and the test provides the administrator the ability to approve exceptions to the rule when statutorily eligible areas within an urbanized area are rural in character, in need of improved broadband service, or integral to a plan to provide improved broadband service to areas that are outside the urbanized area.

As a matter of banking policy, it is understandable that the RUS would not generally lend to multiple providers within the same community. There may, however, be times when an existing borrower is not providing the level of service the community needs and approving a broadband loan within that under-served service territory would pose minimal risk to the loan security of the Agency.

The costs of preparing an RUS broadband loan application are significant. We applaud any effort which would reduce those costs. For example, the Agency should offer applicants an optional pre-application process to give a prospective RUS broadband loan applicant an opportunity to have communities they seek to serve certified by the Agency as eligible and available for RUS broadband loan financing. The pre-application process could also include a preliminary review of an applicant's credit worthiness. If a credible applicant and the RUS agree on a list of communities eligible for RUS broadband loan funds, the applicant and the Agency should work together in a constructive, cooperative manner to bring needed service to those communities. Such a process would also offer the RUS an opportunity to encourage applicants to push their coverage into un-served areas.

Limiting the availability of RUS broadband financing does not advance broadband deployment. It blocks communities from directly benefiting from RUS broadband loan financing and indirectly

benefiting from the availability of financing when existing service providers improve their service to ward off a prospective new entrant.

Conclusion

NextWave strongly supports the broadband loan program. It is the federal government's main incentive to spur broadband deployment in rural areas. We applaud all efforts to make the application process more accessible and less expensive.

However, NextWave opposes the Agency's efforts to rewrite Congressionally-established eligibility requirements. While each proposed new eligibility requirement attempts to correct a discrete problem in the current program, each does so in a way that is contrary to Title VI of the RE Act and is significantly overbroad. Taken together, the four-competitors, the 40% un-served, and the urbanized-area tests converge to block large portions of rural America from the direct and indirect benefits of the RUS broadband loan program.

A simpler, alternative test exists. It is a test partially embraced by a section of the proposed rules. The appropriate test for funding a broadband applicant should be whether the proposed service offers a quantifiable improvement over the existing level of service in the community.

NextWave appreciates the opportunity to participate in the Agency's rulemaking proceeding and provide our perspectives on this important matter.

Respectfully submitted,

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