NTCA
The Voice of Rural Telecommunications

July 10, 2007

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

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

Dear Ms. Brooks,

The National Telecommunications Cooperative Association (NTCA)[1] presents these comments on the USDA's Rural Utility Service (RUS or Agency) proposed rules in the above docket regarding Rural Broadband Access Loans and Loan Guarantees, contained in 7 CFR Part 1738 (Proposed Rules).[2] We appreciate the Agency's efforts in drafting proposed regulations designed to accelerate the deployment of broadband service to rural areas through the $1.2 billion Broadband Loan Program (Program).[3]

While the RUS Broadband Loan Program has provided a meritorious service to the rural communities, the Agency has identified several key areas in which the Agency believes improvements to the Program are needed: competition, definition of "eligible rural community," credit/equity support, refinancing, market surveys, deployment schedule, and transparency.

The Agency should consider NTCA's suggested improvements regarding these key areas and new proposed operational timelines: 1) Revise the competition threshold to no more than three, not four, Eligible Broadband Service Providers (EBSPs) and define an EBSP as one that controls at least 15%, not 10%, of the market households; 2) The new definition of an "eligible rural community" as one that contains fewer than 20,000 inhabitants located outside any "Urbanized Areas" as defined by the U.S. Census Bureau is appropriate; 3) The Agency should retain its current policy of requiring 20% credit

[1] Established in 1954 by eight rural telephone companies, today NTCA represents 575 rural rate-of-return regulated incumbent local exchange carriers (ILECs). All of its members are full service local exchange carriers, and many members provide broadband services to their communities via DSL, cable, wireless, and satellite. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). NTCA members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

[2] *Rural Utilities Service Notice of Proposed Rules*, 7 CFR Part 1738, Rural Broadband Access Loans and Loan Guarantees, OMB Control Number: 0572-0130, 72 Fed. Reg., No. 91 (pub. May 11, 2007), pp. 26742 – 26759) (Proposed Rules).

[3] Proposed Rules, p. 26744. The Agency approved 68 Program loans as of March 15, 2007 totaling $1.2 billion to private companies, (90%), cooperatives (7%), municipalities (3%) and tribal authorities (1 loan). *Ibid.*

NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
4121 Wilson Boulevard • Tenth Floor • Arlington, Virginia 22203
Phone/703-351-2000 • Fax/703-351-2001 • www.ntca.org

support, not 10%; 4) The new rules allowing RUS loan recipients to refinance non-Utilities Program debt, up to 40% of the loan, will benefit loan applicants and their customers; 5) The Agency should not exempt certain loan applicants from performing market surveys as proposed; 6) A five-year build-out period is more reasonable than the Agency's proposed three-year period; and 7) The Agency should revise the notice procedure and impose a certified letter requirement on the applicant or, at a minimum, lengthen the proposed 30 working day notice period for Incumbents to 60 or 90 working days. Furthermore, the Agency can improve its operational timelines by implementing a 180-day loan decision deadline and eliminating duplicative review and submissions by wholly-owned subsidiaries.

I. NTCA Members Rely on RUS Loans to Deploy Broadband Service In Rural Areas.

Many NTCA member companies have used the traditional RUS Loan Program, some for as long as 50 years, to bring technology services and economic stability to their areas. Some NTCA members have applied loans from the RUS Broadband Loan Program to build fiber to the home systems for telephone and high-speed Internet services in their communities. These members are using those valuable funds to bring broadband and other services to remote areas as the Agency intends. In the words of one NTCA member, "As a result of the service provided through the RUS Broadband Program, the economy has stabilized in many of these [rural] communities."

Every year, NTCA surveys its members on their activities in providing broadband services and Internet availability to their members/customers. NTCA's 2006 Survey Report, available on NTCA's website,[4] offers some insight into broadband deployment in rural America. The survey results also reflect the dedication and success of small rural providers working hard to bring advanced services to their customers, despite the often significant obstacles they must overcome.

Survey respondents indicated that they are facing major economic challenges in deploying broadband services. Eighty-five percent of survey respondents identified deployment cost of fiber as a significant barrier to widespread deployment. Survey respondents also noted the need for additional incentives to defray the costs of broadband deployment. Special incentive programs targeted to extend affordable and reliable broadband service to rural areas are needed for deployment to be accomplished on a reasonable and timely basis. Absent added incentives, the most geographically and economically challenging areas will not receive broadband service.

---

[4] NTCA's 2006 Broadband/Internet Availability Survey Report is available at NTCA's website at: http://www.ntca.org/content_documents/ATTACHMENT%20A_2006%20NTCA%20Broadband-Internet%20Survey%20Report.docnal.pdf (NTCA 2006 Broadband Survey Report).

II. The Proposed RUS Regulations Can Be Improved To Accelerate Broadband Deployment in Rural Areas Without Jeopardizing the RUS Broadband Loan Program.

NTCA offers its insight into the ramifications of the Proposed Rules on NTCA member companies and the broadband services they provide to their customers. While the RUS Broadband Loan Program has provided a meritorious service to rural communities, the Agency has identified several key areas in which the Agency believes improvements to the Program are needed: competition, definition of "eligible rural community," credit/equity support, refinancing, market surveys, deployment schedule, and transparency. The Agency should consider NTCA's suggested improvements regarding these key areas and regarding new proposed operational timelines.

A. Competition.

Currently, funding through the Broadband Loan Program is allowed where service already exists without regard to the number of providers or penetration rates. The current policy is to not consider an application if an existing Program borrower is already providing broadband service in the proposed area. The Agency perceives the current policy as unfair because the Agency does not loan against a current borrower yet loans against an established provider that is not a borrower.

Under the Proposed Rules, the Program allows loans to competitors but prohibit new loans if markets are saturated with established providers. The Agency would not loan to an applicant if there are four or more established providers in the market proposed to be served by an application.[5] The new rules establish a definition of "Existing Broadband Service Provider" as one that is serving at least 10% of the households in a given market.[6]

By setting a market threshold for "Existing Broadband Service Provider" and by limiting loans from being made in markets where there are four or more such providers, the Agency is moving in the right direction to ensure its financing resources are not utilized in a frivolous manner. Nevertheless, NTCA is concerned that the numbers the Agency uses are not conclusive enough to truly achieve the result the Agency seeks. Likewise, the figures the Agency ultimately uses in this regard are not soundly based in statistically strong enough data. As one NTCA member relates, "The chances of cost recovery and making a profit margin with 4 providers in a small rural market are not very good (considering investments of wireline, be it cable modems or DSL)."

With this in mind, NTCA encourages the Agency to lower the Existing Broadband Service Providers threshold to three or more for purposes of precluding Program loan making in such markets. The objective of the RUS Broadband Program is to ensure that underserved and/or unserved areas receive funds to help bring broadband service to such areas. The debate centers around the fact that in many

---

[5] Proposed Rules, 7 CFR § 1738.2, p. 26751.
[6] *Ibid.*

NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
4121 Wilson Boulevard • Tenth Floor • Arlington, Virginia 22203
Phone/703-351-2000 • Fax/703-351-2001 • www.ntca.org

cases, existing providers may often be serving the more densely populated segments of a market while not having the resources to serve the higher cost outlying and less densely populated areas of that same market. Will there be winners and losers if the number is lowered? In some markets the obvious answer is yes, but if we do not establish and operate this Program in the most judicious and financially responsible fashion possible, then it may become a victim of our own inability to view this matter seriously enough.

Clearly, the only way for an RUS Broadband loan to feasibly finance broadband deployment to those outlying areas is to allow the loan to incorporate the more densely populated areas of the market in question, yet in doing so do we place existing providers at risk. Again, there is no easy answer as to what number is right, or the best. Yet, in light of the long history our members have in serving extremely rural markets, our experience suggests that allowing loans to be made when three existing providers are already operating in a market may simply be too high. The vast majority of the nation's rural markets are not capable of sustaining even three providers, let alone another one financed by a federal loan program.

The Agency should also adjust the market control threshold upward from 10% to 15%. The markets that would typically be the focus of Program applications are generally going to be extremely small in terms of overall population and therefore potential and actual customers. Indeed, many markets may have only a few hundred people residing within them. The Agency's suggested 10% market penetration figure might realistically be talking about fewer than 25 people in some instances. Do such numbers reflect a realistic level from which to base decisions of whether or not applications should be funded? It is a difficult question, no doubt. Nevertheless, NTCA believes that in light of its Broadband Survey results that a more reasonable compromise may be to use a figure of 15%.[7] The Agency should revise the definition of an Existing Broadband Service Provider to be one that is currently serving at least 15% of the population of the subject market. As a point of reference, the House Agriculture Committee is preparing to mark-up Farm Bill legislation that currently contains provisions setting a 15% service threshold to denote Existing Broadband Service Providers.

We believe this approach will best serve the public interest and advance the Agency's and the President's goal of rural nationwide broadband deployment. The Agency must carefully review applications filed by new entrants where existing broadband access providers are attempting to deploy and serve their networks. While competition can bring lower prices and better services, the first priority of the Program is to provide residential service where service does not exist or is otherwise not readily available to consumers.

[7] NTCA 2006 Broadband Survey Report.

B. Rural Definition.

The current definition of an "Eligible Rural Community" considers whether a community is rural by mandating that the population of the community is less than 20,000 inhabitants, regardless of whether the community is inside or outside a metropolitan area. The Proposed Rules would require the communities of less than 20,000 inhabitants to also be located outside the boundaries of the U.S. Census definition of Urbanized Areas.[8]

The Proposed Rules do not specifically set forth the Census Bureau's definition of "Urbanized Area." According to the Census Bureau's web site glossary, the Census Bureau defines "Urbanized Area" as follows:

> **Urbanized Area (UA):** An urbanized area (UA) consists of densely settled territory that contains 50,000 or more people. The U.S. Census Bureau delineates UAs to provide a better separation of urban and rural territory, population, and housing in the vicinity of large places. At least 35,000 people in a UA must live in an area that is not part of a military reservation. For Census 2000, the UA criteria specify that the delineations be performed using a zero-based approach. Because of the more stringent density requirements and the less restrictive extended place criteria, some territory that was classified as urbanized for the 1990 census has been reclassified as rural (Area that was part of a 1990 UA has not been automatically grandfathered into the 2000 UA). In addition, some areas that were identified as UAs for the 1990 census have been reclassified as urban clusters.[9]

NTCA supports the proposed new definition of an "eligible rural community" as one that contains fewer than 20,000 inhabitants and also located outside the boundaries of any "Urbanized Areas" as defined by the U.S. Census Bureau. This revised definition more accurately reflects what is appropriately categorized as "rural" for this loan program.

C. Credit and Equity Support.

The current requirement for credit support is 20% of the requested loan amount contribution and in some cases, a demonstration that cash must be available in an amount equal to the first full year's operations. The Agency proposes requiring a minimum equity investment equal to 10% of the requested loan.[10] This is the eligibility standard; additional investments and financial criteria may be required to support the lending decision.[11]

---

[8] Proposed Rules, 7 CFR § 1738.2, p. 26751.
[9] http://www.census.gov/geo/www/tiger/glossry2.pdf (accessed 7-8-07).
[10] Proposed Rules, 7 CFR § 1738.31, p. 26754.
[11] *Ibid.*

The Agency should not adopt this rule revision and should retain the current policy requiring 20% credit support. Broadband providers who cannot meet the 20% threshold will not have sufficient financial stability to maintain service to their broadband customers and, consequently, should not be entitled to RUS funding.

D. Refinancing.

The existing rules allow Program applicants to refinance debt previously issued by the utilities programs. Current law is silent on whether applicants can use Program funds to pay off debts owed to other lenders and the current regulation allows for only utilities program debt to be refinanced. The Agency proposes to allow, within certain parameters, refinancing of non-Utilities Program debt as part of the application, limited to 40% of the loan amount.[12] Applicants proposing to refinance existing debt must certify that the resultant savings will promote the deployment of advanced data services.[13]

NTCA supports this approach as NTCA members who receive RUS loans would be able to refinance existing RUS loans as well as loans from CoBank, the Rural Telephone Finance Cooperative (RTFC), and other rural lenders. This rule change will promote competition among rural lenders to offer rural broadband providers (and derivatively their customers) better loan rates, terms and conditions.

E. Market Surveys.

Currently, Program loan applicants must conduct a market survey in every community covered by the loan application, even though the survey process may be onerous or unnecessary depending on the size of the application, the demographics of the proposed marketplace, and the financial strength of the applicant. The Agency proposed to eliminate the requirement for a market survey for applicants who: 1) propose to provide service in an unserved community; and 2) project a positive cash flow during the fine year financial forecast period for their business plan based on a market penetration rate of no more than 15 percent.[14]

This provision is deficient in two aspects: 1) defining an "unserved" community, and 2) verifying the forecast. First, the Proposed Rules carve out an exemption from the market survey for applications to provide service to "unserved communities." The concept of "unserved" is difficult to understand, however, since there are virtually no areas of the United States that do not have facilities available – whether by satellite, DSL, cable modem., licensed or unlicensed wireless spectrum – to provide broadband service. Many NTCA members provide broadband services through partnerships with the NRTC and WildBlue satellite.[15] Satellite has its limitations, mainly speed and price, which may make

[12] Proposed Rules, 7 CFR § 1738.22, p. 26753.
[13] *Ibid.*
[14] Proposed Rules, 7 CFR § 1738.34, p. 26755.
[15] NTCA 2006 Broadband Survey Report, p. 6.

the service unaffordable to some. Satellite service, still, offers an avenue for broadband access where other technologies fail. Some NTCA members use unlicensed wireless spectrum to provide broadband access.[16] This technology, too, has some limitations such as reliability. Do these limitations inherently make an area covered by satellite or unlicensed wireless spectrum as "unserved?" Does the Agency intend to flatly classify areas served by satellite and unlicensed wireless spectrum as "unserved?" The Agency has not clarified that aspect in its Proposed Rules.

Second, this approach also presents a verification problem: How can the Agency determine the reliability and trustworthiness of the applicant's five-year forecast without having a market survey for comparison? To provide reliable, dependable broadband service requires a very solid business plan, one that includes an accurate assessment of the potential market. Borrowers should have to do their homework and survey the potential take rate; otherwise, the Agency increases the risk of loan default due to unrealistic and unverified business expectations. The painstaking process of an RUS loan is intended to protect the American taxpayer. The Agency should not eliminate the market survey requirement.

F. Deployment Schedule.

There are now no regulatory deadlines for completion of a project from the time the RUS loan is approved. Generally, a borrower is allowed a five-year build-out period during which the communities that the borrower is proposing to deploy service cannot be funded by the Agency through another applicant. Under the Proposed Rules, borrowers will generally have three years to deploy service, after which the project will be reviewed and communities not receiving service may become eligible for funding through another applicant.[17]

The Agency takes a step in the right direction by placing an out limit on build-outs using Program funds. The three-year build-out time frame, though, may be too short for many Program applicants given telecommunications planning horizons, changes in technology and regulatory environments. A five-year build-out is more appropriate and will ensure that communities not served by an applicant will be open for new Program applications. Furthermore, the RUS uses a five-year projection time period as its "forecast period."[18] Five years, not three, should be the build-out time framework.

G. Transparency.

Presently, an RUS applicant must notify the public and existing broadband service providers of its loan application by placing a legal notice in a local newspaper located within some community in the proposed service area. The Agency's RUS field representative is then supposed to verify the level of

[16] *Ibid.*
[17] Proposed Rules, 7 CFR § 1738.38, p. 26756.
[18] Proposed Rules, 7 CFR § 1738.2(a), p. 26752

broadband deployment in the area that is to be served. The Agency then receives comments from existing providers and others on the propriety of the new loan application. The Agency has received complaints that the notice procedure is inadequate.

The Agency proposes changes to the notice procedure. Under the Proposed Rules, an applicant must provide a legal notice ("Notice") to the Agency for publication on the Agency's web page which will be posted after the application has been received in the Agency's national office for a period of 30 business days.[19] The Notice must state the total proposed service area, include a service area map and note whether the applicant intends to provide voice and video in addition to data.

The new Notice rules also affect every "Incumbent Service Provider ("Incumbent")," which includes every existing entity that offers data, voice, video and/or graphic services in the applicant's service area.[20] An Incumbent will have to submit to the Agency, within the 30-day posting period, a statement that includes: 1) the number of the Incumbent's customers in the applicant's proposed market who are capable of receiving broadband services; 2) the number of Incumbent's customers who subscribe to such services, the data transmission rates, and the cost of each level of service; 3) the number of Incumbent's customers who receive other services in the proposed service area and the rates the Incumbent is charging for such services; and 4) a map of the Incumbent's service territory.[21] The Agency asserts that all of the Incumbent's information will be exempt from disclosure under the Freedom of Information Act (FOIA).[22]

NTCA has suggested to the USDA and to Congress that the existing notice process could be improved by requiring applicants to send notices by certified letter to all service providers in the affected area.[23] This is a simple procedure that would create a record of actual and constructive notice, which is superior to the often-inadequate legal notices that are placed in statewide papers, rather than local papers.

If the Agency is unwilling to impose a certified letter requirement, the Agency should, at a minimum, lengthen the 30 working day period to 60 or 90 working days to give Incumbents more time to see and respond to new applications. Incumbents under the Proposed Rules will have increased responsibilities if the Incumbents wish to be considered "Existing Broadband Service Provider" which permits them to participate in RUS loan programs. The Proposed Rules will create new burdens for existing broadband access providers yet provide no additional funding for those increased regulatory burdens. Those burdens affect all existing data, voice, video and/or graphic providers, not just those who are receiving Program funds or operating under Program regulations. The Agency's Proposed Rules do not address

---

[19] Proposed Rules, 7 CFR § 1738.33(a), p. 26755.
[20] Proposed Rules, 7 CFR § 1738.2(a), p. 26752.
[21] Proposed Rules, 7 CFR § 1738.33(a), p. 26755.
[22] *Ibid.*
[23] *See, e.g.*, Testimony of Denny Law, Golden West Telecommunications, House Subcommittee on Specialty Crops, Rural Development and Foreign Agriculture, p. 5 (May 1, 2007), available at: http://agriculture.house.gov/testimony/110/h70501b/Law.pdf.

the financial costs of this burden on Incumbents. Existing providers will have more work, must monitor the Agency website on a daily basis, and must respond to the postings with competitively sensitive information. The new 30-day Agency web site Notice requirement is an improvement over the current process but the Agency should lengthen the notice period to 60 or 90 working days.

Furthermore, the Proposed Rules assume that competitively sensitive data provided in response to new postings will be withheld from FOIA review. The Agency may discover that it cannot, in fact, guarantee confidentiality under state or federal law.[24] The Federal Communications Commission is now litigating that issue in federal court.[25] Until that litigation (and any subsequent appeal and/or remand) is concluded, the Agency cannot guarantee that Incumbents' data, voice, video and graphic customer data are protected from FOIA disclosure.

H. Operational Timelines

In addition to the foregoing rule change suggestions, the Agency should consider two steps to improve the loan consideration process, designed to expedite the operation timeline. First, the Agency should adopt rules that will accelerate the loan application process to 180 days from receipt of application. Applicants are eager to know whether their applications have been approved and when they can begin using the funds to reach the Agency's goals of rural broadband deployment. Another commenter in this proceeding has requested the Agency to implement a 180-day loan processing timeline.[26] Mandating a 180-day loan application process timeline will reduce the uncertainty of funding and speed up the actual deployment.

A second operational timeline suggestion is to eliminate duplicative submission and review requirements for wholly-owned subsidiaries of parent companies. Much of the information provided by wholly-owned subsidiaries in the loan process must be replicated by the parent company. This unnecessary, duplicative effort is wasteful and inefficient. The Agency should adopt rules that eliminate the double review for wholly-owned subsidiaries of parent companies.

[24] For example, the Massachusetts Department of Telecommunications and Cable (MA DTC) recently denied Verizon's request to conceal the statewide and municipality-specific numbers of its FiOS subscribers contained in its Form 500 Annual Report of Complaint Data. The MA DTC held that Verizon did not meet its burden of proof under state law that the information is a trade secret or is competitively sensitive in part because the information was already available on the municipal level. Massachusetts Department of Telecommunications and Cable, *Ruling on Motions for Confidential Treatment Filed By Verizon New England, Inc.* (filed June 7, 2007). This ruling is available at: http://www.mass.gov/Eoca/docs/dte/catv/orders/6707rulmct.pdf.

[25] *Center for Public Integrity v. Federal Communications Commission,* U.S. Dist. Ct. (D. C.) Civ. Act. No. 06-1644 (RMC) (pending).

[26] *See* Rural Telephone Service Co. comment, filed July 3, 2007, p. 3.

I. Additional Observations -- Transmission Rate.

The present rules require loan applicants to agree to transmit data upstream and downstream at a minimum rate of 200 kilobits per second (Kbps) in both directions. The Agency may be considering to increase that data transmission rate for applications financed through this program, such as up to a minimum rate of 1 megabit per second (Mbps) upstream and downstream to each customer.[27]

The Federal Communications Commission (FCC) is considering industry and public recommendations on the definition of "broadband" in terms of transmission speed, different from the current 200 Kbps upstream and downstream, in its *Broadband Deployment Notice of Inquiry*, GN Docket No. 07-45.[28] Before the Agency considers adopting a higher standard as an effort to push broadband providers to deploy faster advanced telecommunication services, the Agency should consider the comments NTCA has filed in that proceeding.[29] As shown in NTCA's 2006 Broadband/Internet Availability Survey Report, 88% of respondents are providing at least 1 Mbps subscription services to their rural customers.[30] This means 12% of the respondents may not yet be able to provide a 1 Mbps service offering.

Simply stated, NTCA believes that it is important for the Program funds to go to applications that best meet the needs of the communities they propose to serve and that means supporting the speeds that are appropriate to the specific community in question. The Agency should look to the FCC's Broadband Deployment NOI proceeding for guidance on any future consideration of data transmission speed requirements.

III. Conclusion.

NTCA members recognize that the future and success of rural America is tied to adequate broadband service and the supporting telecommunications infrastructure. The RUS Broadband Loan Program has provided a meritorious service to the rural communities. The Agency has identified several key areas in which the Agency believes improvements to the Program are needed: competition, definition of "eligible rural community," credit/equity support, refinancing, market surveys, deployment schedule and

---

[27] The Agency retains the ability to define the speed for loan purposes. Proposed Rules, 7 CFR § 1738.2 (definition of "Broadband Service"), p. 26751. The Proposed Rules do not appear to contain specific recommendations on data transmission speed at this time.

[28] *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Notice of Inquiry, GN Docket No. 07-45, FCC 07-21 (rel. Apr. 16, 2007) (Broadband Deployment NOI).

[29] NTCA's initial and reply comments to the FCC's Broadband Deployment NOI are available on NTCA's website at: http://www.ntca.org/content_documents/FCC%2007-21,Initial%20Comments.pdf, and at: http://www.ntca.org/content_documents/FCC%2007-21%20NTCA%20Broadband%20Reply%20Comments.pdf.

[30] NTCA 2006 Broadband Survey Report, p. 7.

transparency. The Agency should consider NTCA's suggested improvements regarding these key areas and new proposed operational timelines.

If you have any questions, please do not hesitate to contact the undersigned at (703) 351-2146 or (703) 351-2039.

Sincerely,

/s/ Karlen Reed
Karlen Reed
Regulatory Counsel, Legal and Industry Div.

/s/ Tom Wacker
Tom Wacker
Director, Government Affairs Div.