

Before The
UNITED STATES DEPARTMENT OF AGRICULTURE
RURAL UTILITIES SERVICE

RURAL UTILITIES SERVICE)	
7 CFR Part 1738)	
)	Docket No. RUS-06-Agency-0052
RURAL BROADBAND ACCESS)	
LOANS AND LOAN GUARANTEES)	

COMMENTS
FILED ON BEHALF OF
OPEN RANGE COMMUNICATIONS, INC.

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TABLE OF CONTENTS

INTRODUCTION 1

GENERAL 2

 § 1738.2 Definitions.....2

SUBPART B – Loan Purposes and Basic Policies:..... 4

 § 1738.33 Legal Notice - Availability of Broadband Service4

 § 1738.61 Priorities.....5

 § 1738.21 Service Requirements for Proposed Projects.....7

 § 1738.31 Credit Support Requirement8

SUBPART D – Loan Application Requirements8

 § 1738.4 Market Survey.....8

 § 1738.35 Competitive Analysis.....9

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OPEN RANGE COMMUNICATIONS, INC.

Open Range Communications, Inc. (“Open Range”) by its attorney hereby submits comments on the *Notice of Proposed Rulemaking* issued by the Department of Agriculture Rural Utilities Service (“RUS”) on May 11, 2007. (*See Rural Broadband Access Loans and Loan Guarantees, Docket No. RUS-06-Agency-0052, 72 Fed. Reg. 26742 (May 11, 2007)*). In the Notice, RUS proposes a number of modifications to its procedures regarding rural broadband access loans and loan guarantees. Below Open Range sets forth its comments regarding the proposed changes.

INTRODUCTION:

Open Range Communications, Inc. was formed in 2004 with the specific mission of bringing broadband wireless service to rural communities throughout the United States. Open Range was formed by an experienced group of telecommunications executives and is supported by strong business partners in the telecommunications industry. Open Range has prepared and

submitted to the RUS an application which is currently pending for a rural broadband loan to support the construction of a proposed network which will serve 546 unserved and underserved rural markets across 17 states. The Open Range project will be the largest such rural broadband deployment to date and will make service available to more than 6 million people residing in rural America. Open Range believes that its experience in planning its proposed network, resolving myriad issues regarding the deployment of facilities, the selection of technology, and the delivery of service, together with its experience with the broadband loan process, enable it to provide valuable insight regarding the likely effects of certain of the proposed changes set forth in the RUS notice.

Open Range is a strong supporter of the RUS broadband loan program. Open Range believes that the funding available to the RUS broadband loan program is a key driver which makes possible the delivery of broadband wireless access in rural America. Open Range believes that without the RUS program and without large scale deployments of the kind planned by Open Range which take full account of economies of scale, it will be difficult if not impossible to deliver broadband service throughout rural America.

Open Range believes the fundamental principle which should guide RUS in fashioning its proposed rules should be to provide maximum support for the deployment of rural broadband. That is the principle which Open Range has applied in developing its comments below and against which Open Range believes RUS should measure each aspect of the proposed rules. The Open Range comments are organized in the manner set forth in the RUS May 11, 2007 Notice.

GENERAL: § 1738.2 Definitions

Eligible Rural Community

RUS proposes to change the definition of Eligible Rural Community. Under the existing rules an eligible rural community is one having no more than 20,000 inhabitants. The new definition proposed in the Notice is substantially more restrictive. RUS would retain the 20,000 population limitation but add to it a restriction that the area to be served not be located within the boundaries of an Urban Area. Urban Area is also defined in the proposed rules and includes the territory within an Urbanized Area or Urban Cluster. The proposed change would significantly curtail the availability of broadband loans in many small towns throughout the U.S.

The terms Urbanized Area and Urban Cluster are defined by the U.S. Census Bureau. Urbanized Areas consist of those having populations in excess of 50,000. On the other hand, Urban Clusters can include areas as small as 2,500 in population.¹ Attached to these comments is the U.S. Census Bureau's current list of Urban Clusters. As can be seen, the list includes many small towns in rural America having populations of less than 5,000. Denial of eligibility to these small rural towns would have two unfortunate effects. First, the broadband loan program would not be available to support the deployment of broadband service within these small towns themselves. Second, and just as importantly, these small towns could not be used to anchor systems serving the surrounding rural area. Thus, the restriction in the proposed rules providing that an Eligible Rural Community cannot include an area defined by the Census Bureau as an Urban Cluster would have the effect of curtailing the availability of funding to support the mission that the broadband loan program was designed to carry out. While Open Range understands and supports a policy that rural broadband loan funding should not be available for

¹ The current population limitation for 4% loans set forth in Section 1738.30(b)(2)(i)(A) is 2,500 inhabitants. The proposed rules exclude urban clusters which have a minimum population of 2,500 as well as a minimum population density. This suggests that application of the Urban
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larger towns and cities, the addition of the proposed definition of Urban Area which includes both Urbanized Areas and Urban Clusters could substantially undermine the RUS mission.²

Finally, Open Range supports the limitation regarding areas already served by four or more existing broadband service providers so long as RUS retains its proposed definition of an Existing Broadband Service Provider which is limited to facilities-based broadband providers.

SUBPART B – Loan Purposes and Basic Policies:

§ 1738.33 Legal Notice – Availability of Broadband Service

RUS has proposed changes to its legal notice requirement. The new notice rule would solicit specific information from incumbent providers regarding the scope of existing services. As RUS indicates, this information would be used to determine whether the incumbent provider should be classified as an Existing Broadband Service Provider. If so classified, such provider would be counted in determining the number of existing providers for the purposes of eligibility.³

Proposed section 1738.33(c) provides that proprietary and confidential information submitted by an incumbent provider in response to the legal notice would not be released under the Freedom of Information Act. This provision should be modified. While it is appropriate to

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Cluster limitation is too restrictive and would exclude many communities that should be eligible for funding.

² If RUS desires to add a restriction regarding certain types of communities, it should consider adopting a restriction regarding Urbanized Areas (50,000 population) not Urban Clusters (2,500 population). This would also align the definition with that appearing in the current House version of the Farm Bill (Section 620(a)(2)).

³ Open Range urges RUS to make available on its website any information that RUS maintains regarding the identity and service area of broadband providers in each community. This would assist applicants in fashioning proposals that meet the requirements of the rules.

protect proprietary and confidential information from disclosure generally, such information should be available for disclosure under an appropriate confidentiality agreement limiting disclosure and prohibiting dissemination of any such information. The RUS could employ the same means to protect confidential information used by the FCC to protect confidential information submitted by merger applicants. Procedures such as these have been used in a variety of contexts involving the handling of confidential information and could be used here as well. Absent at least limited disclosure and review, RUS would have no means of confirming that the information submitted by an incumbent is correct and yet that information could be used to deny a loan application for a particular community. Given the possibility that an eligibility determination could rest on such information, considerations of fundamental fairness and due process argue for at least limited disclosure, under an appropriate protective order if necessary, of any information submitted by third parties that could result in denial of a loan.

§ 1738.61 Priorities

RUS has proposed a new prioritization scheme (proposed section 1738.61) for loans made under the program. In essence, the new section provides that priority shall be given: first, to applications for service areas that include only households that have no broadband access; second, where at least 40% of households have no broadband access; and third, to other applicants. In order to qualify for first level priority, an application can include no markets that have broadband service. This could encourage applicants to segment their proposals and to submit applications in subgroups in accordance with the priority scheme. Thus, an applicant which intended to build a mix of communities having varying levels of service would be encouraged to break its application into parts to qualify at least some of its markets for higher priority. The problem with this approach is that if RUS analyzes the financial viability of a

proposal based on the markets included in a particular application, the priority scheme could foster the submission of applications that are subscale and not financially viable.

Open Range has devoted approximately three years to studying and modeling the rural wireless broadband market. Based on this analysis, Open Range believes that a viable network proposal must include a mix of communities, some of which will have service and some of which will not. Open Range also believes that delivering an attractive service mix at a reasonable price to consumers requires that a network operate at significant scale. The new priority scheme however, would encourage applicants to break their proposals apart into subgroups in order to qualify parts of the proposal for a higher level of priority. This will tend to produce applications which, although qualifying for a high priority, are less likely to be financially viable and less likely to achieve the scale required to reduce costs to the consumer. RUS should reconsider the way in which its priority scheme would apply and consider retaining a priority structure like that in the current rules which affords priority to unserved markets if there are insufficient funds for all of the applications that have been submitted. While a priority scheme is entirely appropriate if funds are short, it is not clear that it is in the interest of the program to encourage applicants to submit proposals which may not be sustainable in practice or which may not achieve the operational scale necessary to ensure that consumers receive the services they demand at attractive prices.⁴

⁴ Open Range does not fully understand how the new priority scheme would work in practice. As noted, the existing priority scheme comes into play if funds are limited and treats applications in groups segmented on a quarterly basis. Details like these are not included in the new priority scheme.

§ 1738.21 Service Requirements for Proposed Projects

In addition to the requirement that an applicant propose to serve an Eligible Rural Community, proposed section 1738.21 provides that the project in an area “not currently served by the applicant” must contain at least 40% of households with either no access to broadband service or access to only one existing provider.⁵ This limitation is in addition to the proposed limitation excluding urban clusters (minimum population 2,500) and affording priority to applications which include only markets with no broadband service or secondarily with markets having at least 40% of households with no service.

Open Range is concerned that these rule changes will result in a situation where it will be difficult to fashion a realistic proposal that will be financially viable, provide modern broadband service at reasonable prices and meet the new requirements. By excluding Urban Clusters the new rules would make it impossible to anchor service to a sparsely populated rural area by serving a small town in that area. The proposed “40%-no service” limitation works in a similar fashion. Indeed it might be difficult to design a service area meeting the 40% and Urban Cluster limitations and still have a network design and financial model that RUS would approve for a loan. Open Range urges the RUS to first analyze the application of these limitations, in combination and separately, using actual service areas and tests of financial viability, to determine their effect in practice before including them in the rules.

⁵ Obtaining the market penetration information necessary to design a 40%-no service operating territory could be quite difficult. Open Range has studied and collected data on a large number of rural markets. Although it is often possible to determine that service provider claims to have a presence in a particular market, it is difficult if not impossible to determine which households have service available to them. Under the proposed rules this information would be essential in designing an acceptable service territory.

In addition, the example provided in section 1738.21(a)(2) makes clear that the reference to areas currently served by the applicant means areas served by an Incumbent Service Provider as defined in section 1738.2 of the proposed regulations. It is not clear why the rules should provide a preference for incumbent service providers of this kind. The definition of incumbent service provider appears to encompass not only existing broadband providers but also existing telephone or cable television companies. It is not clear why a loan request by one of these companies for a broadband facility in an Eligible Rural Community where less than 40% of the households have no access or a single access to broadband would be acceptable where a proposal by another company not presently serving the area would not be acceptable. When the broadband loan program began, there was an initial preference given to applications by incumbent providers.⁶ The preference expired in 2004. Some incumbents took advantage of the priority and some did not. There is no reason to reinstitute preferential treatment at this stage of the broadband loan program. Incumbents who wish to take advantage of the broadband loan program have had several years to do so and may continue to do so in the future. At this time, the program should treat in a neutral manner all applicants seeking to provide broadband service whether incumbent or not.

§ 1738.31 Credit Support Requirement

Proposed section 1738.31 establishes new credit support requirements for broadband loans. Open Range supports the reduction in the equity requirement from 20% to 10% for startup companies and new entrants into an area. However the proposed language requiring applicants to have completed their credit support requirements when they file could eliminate otherwise viable rural service proposals. Investors generally commit to provide funding

⁶ See 7 C.F.R. § 1738.19(g).

contingent upon RUS approval of a loan. If RUS is concerned that it not expend resources processing loan requests that will not ultimately be funded one way to deal with this contingency is to require applicants to submit a filing fee along with a loan request which would offset the cost of processing the loan request. The FCC imposes similar filing fees to offset its costs and RUS could consider doing so as well. The fee would be calculated to offset some or all of the costs incurred by RUS in processing the loan request.

SUBPART D – Loan Application Requirements:

§ 1738.34 Market Survey

Proposed section 1738.34(b) eliminates the market survey requirement where an applicant proposes less than 15% household penetration. Open Range supports this proposed change and concurs with the RUS finding that the market survey can serve as a barrier in the application process.

§ 1738.35 Competitive Analysis

Proposed section 1738.35 provides that applicants must submit a competitive analysis which includes all service providers within the proposed service territory.⁷ As stated, the requirement would include not only facilities-based providers but also resellers of existing facilities-based providers. Open Range urges RUS to exclude from its competitive analysis entities which merely resell the broadband services of existing providers. Open Range believes that RUS has correctly excluded resellers in its definition of Existing Service Provider used in defining Eligible Rural Community and should do so here as well. As a practical matter,

⁷ Open Range believes that the RUS should continue to disregard satellite-delivered broadband services both in counting existing service providers and in its competitive analysis as well. Aside from considerations of cost and complexity of installation satellite services do not appear to
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reselling entities do not add to the availability of broadband service in a rural community. Instead, they merely redistribute the retail provision of the existing services available from the facilities-based providers in the market. Open Range believes that RUS has correctly determined that reselling entities should not be counted in determining whether a community is eligible for a broadband loan. Similarly, because resellers are just as likely to purchase underlying service from a new provider as they are from an existing provider, they do not affect competition in the same way as an existing facilities-based provider. Indeed, their marketing activities likely increase the overall demand and revenues for all facilities-based providers. This is particularly true in the case of the services that Open Range will offer which consist of wireless broadband and mobile communications. It is highly likely that resellers will purchase the underlying services of both Open Range and any incumbent wireline provider in order to be able to offer the widest possible mix of services to their customers. As such, these reselling entities would be customers rather than competitors of both Open Range and any incumbent provider.

CONCLUSION:

Open Range supports RUS' effort to reexamine and improve the workings of its rural broadband loan program. Open Range believes that many of the rule changes RUS has proposed will clarify and codify the procedures and processes used by RUS and will improve the ability of loan applicants to navigate the broadband loan process. In certain instances however, Open Range believes the proposed changes could needlessly restrict the availability of funding and potentially frustrate the further deployment of rural broadband services. In these instances, Open

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deliver service speeds commensurate with current definitions of broadband data speed. As

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Range urges the RUS not to adopt the proposed changes without first determining how they would affect the availability of funding for proposals that are likely to aid in the widespread deployment of rural broadband at reasonable prices. As noted previously, Open Range believes that this is the standard against which all the proposed rule changes should be measured.

Respectfully submitted

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terrestrial speeds become higher this difference if likely to increase.