

United States Coast Guard

Parent: Department of the Treasury

Components

Bureau of Alcohol, Tobacco and Firearms
 Bureau of Engraving and Printing
 Bureau of the Mint
 Bureau of the Public Debt
 Comptroller of the Currency
 Federal Law Enforcement Training Center
 Financial Crimes Enforcement Network
 (FinCEN) (effective January 30, 2003)
 Financial Management Service
 Internal Revenue Service
 Office of Thrift Supervision
 United States Customs Service
 United States Secret Service

3. Effective April 30, 2003, appendix B to part 2641 is further amended by removing the word and colon "Components:" and adding in place thereof the word and colon "Component:" in the listing for the Department of State and by removing the "International Joint Commission, United States and Canada (American Section)" from that listing.

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DEPARTMENT OF AGRICULTURE

Rural Utilities Service

7 CFR Part 1738

RIN 0572-AB81

Rural Broadband Access Loans and Loan Guarantees

AGENCY: Rural Utilities Service, USDA.
ACTION: Final rule.

SUMMARY: The Rural Utilities Service (RUS) is amending its regulations in order to establish the Rural Broadband Access Loan and Loan Guarantee Program as authorized by the Farm Security and Rural Investment Act of 2002 (Pub. L. 101-171) (2002 Act). Section 6103 of the Farm Security and Rural Investment Act of 2002 amended the Rural Electrification Act of 1936, as amended (RE Act), to add Title VI, Rural Broadband Access, to provide loans and loan guarantees to fund the cost of construction, improvement, or acquisition of facilities and equipment for the provision of broadband service in eligible rural communities. This final rule prescribes the types of loans available, facilities financed, and eligible applicants, as well as minimum credit support requirements to be considered for a loan. In addition, the rule prescribes the process through which RUS will consider applicants

under the priority consideration and the state allocations required in Title VI.

EFFECTIVE DATE: This rule is effective January 30, 2003.

FOR FURTHER INFORMATION CONTACT: Roberta D. Purcell, Assistant Administrator, Telecommunications Program, Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., STOP 1590, Room 4056, Washington, DC 20250-1590. Telephone number (202) 720-9554, Facsimile (202) 720-0810.

SUPPLEMENTARY INFORMATION:

Notice and Comment

Section 6103(b) of the 2002 Act requires that the regulations necessary to implement the Rural Broadband Access Loan and Loan Guarantee Program are to be promulgated without regard to the notice and comment provisions of 5 U.S.C. 553 or the Statement of Policy of the Secretary of Agriculture, effective July 24, 1971 (36 FR 13804), relating to notices of proposed rulemaking and public participation in rulemaking. Therefore, these regulations are issued as a final rule.

Executive Order 12866

This rule has been determined to be significant for purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget (OMB). In accordance with Executive Order 12866, an Economic Impact Analysis was completed, outlining the costs and benefits of implementing this program in rural America. The complete analysis is available from RUS upon request.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. RUS has determined that this rule meets the applicable standards provided in section 3 of that Executive Order. In addition, all State and local laws and regulations that are in conflict with this rule will be preempted. No retroactive effect will be given to the rule and, in accordance with section 212(e) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. 6912(e)), administrative appeal procedures must be exhausted before an action against the Department or its agencies may be initiated.

Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is not applicable to this rule because the agency is not required by 5 U.S.C. 553 or any other law to publish a notice of proposed

rulemaking for the subject matter of this rule. The RUS broadband program provides loans to borrowers at interest rates and terms that are more favorable than those generally available from the private sector. RUS borrowers, as a result of obtaining federal financing, receive economic benefits that exceed any direct cost associated with complying with RUS regulations and requirements.

Information Collection and Recordkeeping Requirements

Section 1601(c) of the 2002 Act provides that the promulgation of regulations necessary to implement the Rural Broadband Access Loan and Loan Guarantee Program shall be made without regard to chapter 5 of title 44 of the United States Code (the Paperwork Reduction Act).

Catalog of Federal Domestic Assistance

The program described by this rule is listed in the Catalog of Federal Domestic Assistance Programs under No. 10.851, Rural Telephone Loans and Loan Guarantees; No. 10.852, Rural Telephone Bank Loans; and No. 10.857, Rural Broadband Access Loans and Loan Guarantees. This catalog is available on a subscription basis from the Superintendent of Documents, the United States Government Printing Office, Washington, DC 20402. Telephone: (202) 512-1800.

Executive Order 12372

This rule is excluded from the scope of Executive Order 12372, Intergovernmental Consultation, which may require consultation with State and local officials. See the final rule related notice entitled "Department Programs and Activities Excluded from Executive Order 12372," (50 FR 47034).

Unfunded Mandates

This rule contains no Federal mandates (under the regulatory provision of Title II of the Unfunded Mandate Reform Act of 1995) for State, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the Unfunded Mandate Reform Act of 1995.

National Environmental Policy Act Certification

RUS has determined that this rule will not significantly affect the quality of the human environment as defined by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Therefore, this action does not require an environmental impact statement or assessment.

Background

Section 6103 of the 2002 Act amended the RE Act, to add Title VI, Rural Broadband Access, to provide loans and loan guarantees to fund the costs of construction, improvement, or acquisition of facilities and equipment for the provision of broadband service in eligible rural communities. Title VI defines eligible communities and entities, and sets forth the types of loans, as well as a state allocation system and a priority system for consideration of applicants.

Section 6103(b) of the 2002 Act provides that the regulations for this program are exempt from the notice and comment provisions of section 553 of title 5, United States Code (Administrative Procedures Act). RUS held a public meeting on June 27, 2002, in order to obtain background information for consideration in the implementation and administration of the Rural Broadband Access program. There were 22 presenters including lenders, telecommunications and broadband providers, trade associations, and capital market specialists. The presenter's written comments are available on the RUS Web site at http://www.usda.gov/rus/telecom/publicmeeting/public_meeting.htm.

RUS considered the oral and written comments of the presenters as well as the Conference Report accompanying the 2002 Act (Report 107-424) to formulate the regulations implementing the Rural Broadband Access Loan and Loan Guarantee Program.

Types of loans. The Rural Broadband Access Loan and Loan Guarantee Program will offer three types of loans: (1) A direct cost-of-money loan, bearing interest at the cost of borrowing to the Department of the Treasury for obligations of comparable maturity; (2) a direct 4 percent loan; and (3) a private lender guaranteed loan.

Eligible entities can apply for a direct cost-of-money loan or a private lender guaranteed loan to provide service in any eligible rural community. Four-percent direct loans will be available only to provide service in the most rural, economically-challenged communities which currently do not have broadband service to residents.

Four-percent direct loans will be available to eligible entities proposing to provide service in communities with no residential broadband service, population of 2,500 or less, and certain density and income requirements. The density requirement is a maximum number of persons per square mile of the applicant's defined service area. The income requirement is the average per

capita income in the county containing the applicant's service area as a percent of the national average per capita income. This requirement will be set at a maximum number. The income and density requirements are subject to review and adjustment on an annual basis and will be published in the **Federal Register** at the beginning of each fiscal year.

All the requirements for a 4-percent loan are in place to encourage build out of broadband facilities to the very poor, rural parts of the country. RUS feels that offering a fixed low interest rate program for these areas helps offset the high cost of serving remote areas which require more telecommunications plant per subscriber than the more densely populated communities.

Credit support requirement. At the public hearing on June 27, RUS heard comments from lenders and equity capital specialists on financing broadband infrastructure projects. In all cases, the lender or investor would require the borrower to contribute support to the project, from 35 to 100 percent of the cost of the project. This reflects the risk that lenders and investors perceive to exist in these projects. The contributions can be in the form of assets, cash, or guarantees from parent companies.

RUS believes that prudent lending practice, especially in the current telecommunications environment, dictates a credit support requirement as well. RUS also considered what form of support would be appropriate.

RUS set the requirement at a lower percent than other telecommunications lenders, 20 percent of the requested loan amount. This lower requirement is enhanced by the requirement that certain applicants have, at the time of application, sufficient cash on hand to support operations for one year. This amount can be part of the minimum 20 percent requirement, or if the cash required for one year of operating expenses is in excess of 20 percent of the loan, that cash requirement will be the minimum requirement. RUS set this requirement for start-up broadband operations to assure that they have cash on hand to cover operations until revenues generate sufficient cash flows to pay expenses as they become due.

RUS recognizes that the expenses of an ongoing telecommunications company can be covered through a regular stream of revenues, and therefore the need to have a large amount of cash on hand is unnecessary and imprudent. This requirement may deter operating telecommunications companies with a viable business plan from applying for funds to upgrade

facilities for broadband, perhaps denying a rural community of broadband service. Therefore, RUS will waive the minimum cash requirement for an ongoing company that can show positive cash flow for the two calendar years immediately preceding the date of the application.

Priority Consideration. Title VI directs RUS to give priority to eligible rural communities in which broadband service is not available. In addition, following Congressional guidance in the Conference Report accompanying the 2002 Act (H.R. Rpt. 107-424, 107th Cong. 2nd Sess., 579), RUS will evaluate for expedited approval, any completed application which meets the priority criteria and to evaluate the priority classification of applications on hand at least once every three months.

In addition, pursuant to Title VI, RUS will set up a State reserve in which, for the first 6 months of each fiscal year, the available funding for the fiscal year is allocated among the States, territories, and insular possessions based on the number of communities with populations of 2,500 or less in each State, territory, and insular possession in relation to the total number of such communities in the United States, its territories, and insular possessions.

At the same time, RUS did not want completed, feasible applications which did not meet the priority consideration to go unfunded until the end of the fiscal year. Consequently, RUS came up with a priority system which allows for the funding of completed, feasible applications in a timely manner so long as funding is available in the applicant's state reserve or, after April 1 of the fiscal year, the national reserve.

RUS will expedite for consideration for funding, applications proposing to provide service where none is physically available on a first-in, first-out basis. RUS will also give a lesser priority to those areas currently receiving service but (1) at rates that are not comparable to those in neighboring urban and suburban areas or (2) of quality that is considered unsatisfactory due to, among other criteria, data rate restrictions, system latency, or unreliable connections.

One-time priority for pilot program applicants. Language in the Conference Report accompanying the 2002 Act (H.R. Rpt. 107-424, 107th Cong. 2nd Sess., 579), specifically states, "The Managers expect the RUS to evaluate the priority status of all pending broadband applications as soon as practicable after the date of enactment. Any completed application which meets the priority criteria should be evaluated for expedited approval."

The pending, unfunded applications received under the broadband pilot program were returned to the applicants as required in the **Federal Register** at 67 FR 3140. Therefore, RUS has given these applicants a 30-day window to reapply under the requirements of this section. Applications which are submitted and determined to be complete within 30 days of publication of this section will be given priority for funding over new applicants under this program. Only completed applications which are technically and economically feasible will be considered for funding.

Availability of broadband service. As state above, Title VI directs RUS to give priority to eligible rural communities in which broadband service is not available. RUS took into consideration its long history in the telecommunications program in setting forth the criteria for determining the availability of broadband service and decided to consider not only whether broadband was physically available but also the quality of any existing broadband service in a community in granting priority status for funding.

RUS will first consider applications proposing to provide service where none is physically available, the "unserved" communities.

Second, RUS will consider applications proposing to provide service where rates are not comparable to similar service in urban and suburban areas, or quality of service is not satisfactory, the "underserved" communities.

In determining whether broadband service is available, RUS requires the applicant to publish a legal notice stating its intent to provide service in a community and requesting any incumbent provider to submit certain information to RUS including service territory, cost of service, rates of data transmission. RUS understands that this may be Confidential Business Information and will protect the confidentiality of the information.

Acquisitions. Title VI permits the use of loan funds for the acquisition of facilities and equipment for the provision of broadband facilities. However, RUS believes the primary intent of the legislation is to provide funding for broadband deployment in rural communities where residential service is not available. RUS will fund the acquisition of eligible facilities and equipment only if the applicant demonstrates it is necessary and incidental to furnishing or improving rural broadband service and the acquisition is less than 50 percent of the loan amount requested.

Refinancing. Title VI permits RUS to refinance existing RUS telecommunications debt if the use of the proceeds will further the construction, improvement, or acquisition of facilities and equipment for broadband service. RUS will limit the funds lent for refinancing to 40 percent of the total loan amount.

Competition with Existing RUS Telecommunications Borrowers. RUS believes that loan security for an existing telecommunications borrower may be at risk should RUS fund a competing service which could also offer traditional telephone service in addition to broadband service. However, residents in RUS telecommunications borrower service areas should not be denied the opportunity to subscribe to broadband service if the incumbent is not willing to provide the service. RUS will give existing telecommunication borrowers a two-year window in which RUS would not consider applications proposing to offer broadband service in an existing RUS telecommunications borrower's service area if the existing borrower, not later than 90 days after RUS receipt of an application proposing to provide broadband service in the borrower's local exchange service territory, submits to RUS a letter of intent to provide or begin to construct residential broadband service in its local exchange service territory within two years.

The incumbent RUS telecommunications borrower must provide, prior to October 1, 2004, support of its intent through submitting either a loan application to construct broadband facilities to RUS or another lender or proof that construction of broadband facilities has begun. Should the existing telecommunications borrower construct or begin to construct broadband facilities during the two-year window, RUS will not consider any applications proposing to provide competitive broadband service in that incumbent borrower's territory. RUS will monitor the incumbent's compliance with the letter of intent through onsite inspections or any other means necessary. If the borrower is not making satisfactory progress in providing broadband service in its local exchange service territory, RUS will consider applications proposing to provide broadband service in their territory.

This same principle will hold for borrowers under the Rural Broadband Access Loan and Loan Guarantee Program. In order to protect loan security, RUS will not fund applications proposing to construct broadband facilities in communities served by

borrowers using funds under this part regardless of the definition used for broadband service at the time of loan approval.

Rate-of-data transmission criteria for defining broadband service. Title VI states that the Secretary shall review and recommend modifications of rate-of-data transmission criteria for purposes of the identification of broadband service technologies. Given the rate of change in technology RUS feels that the rate-of-data transmission criteria may need to be changed within the 6-year time frame of the broadband loan program. Therefore, RUS will publish the criteria in the **Federal Register** at the beginning of each fiscal year. The newly published rate will be the minimum for all new applicants in that fiscal year. Unfunded, complete applications from the previous fiscal year will not be required to meet the new rate-of-data transmission criteria. Those applications will be evaluated for approval on the basis of the criteria in place as of the date of completion.

Conference language also suggests that RUS continue the use of the FCC definition of broadband service, as was used in the pilot program, in order to " * * * continue the current high standard used by RUS in determining what broadband service is." In the broadband pilot program, RUS used the FCC standard for "advanced telecommunications capability" as the rate-of-data transmission criteria for broadband. As of the date of publication of this regulation, the FCC uses the term "advanced telecommunications capability" to describe services and facilities with an upstream (customer-to-provider) and downstream (provider-to-customer) transmission speed exceeding 200 kilobits per second. RUS will continue to use this current standard for the rate-of-data transmission criteria unless the FCC changes the rate used in "advanced telecommunications capability". If FCC changes the rate, RUS will revisit its definition of broadband. RUS recognizes the value of coordinating with other agencies in determining rate-of-data transmission criteria for the purpose of determining broadband, and will continue to do so.

Notice of application deadline. At the beginning of each fiscal year, RUS will publish in the **Federal Register** a Notice of Application Deadline. The notice will cover those items in the regulation which are subject to annual review and change, including loan levels in each type of loan, rate-of-data transmission criteria, density and income requirements for 4-percent direct loans, and the dollar amounts available in each State under the allocation.

List of Subjects in 7 CFR Part 1738

Broadband, Loan programs-communications, Rural areas, Telephone, Telecommunications.

For reasons set out in the preamble, RUS amends chapter XVII of title 7 of the Code of Federal Regulations by adding a new part 1738 to read as follows:

PART 1738—RURAL BROADBAND ACCESS LOANS AND LOAN GUARANTEES**Subpart A—General**

Sec.

1738.1 General statement.

1738.2 Definitions.

1738.3—1738.9 [Reserved]

Subpart B—Loan Purposes and Basic Policies

1738.10 General.

1738.11 Availability of broadband service.

1738.12 Location of facilities.

1738.13 Allocation of funds.

1738.14 One-time priority for unfunded applications from the broadband pilot program

1738.15 Priorities.

1738.16 Eligible entities.

1738.17 Civil rights.

1738.18 Minimum and maximum loan amount.

1738.19 Facilities financed.

1738.20 Equity requirement.

1738.21 Interim financing.

1738.22 Loan security.

1738.23—1738.29 [Reserved].

Subpart C—Types of Loans

1738.30 Rural broadband access loans and loan guarantees.

1738.31 Full faith and credit.

1738.32—1738.39 [Reserved]

Subpart D—Terms of Loans

1738.40 General.

1738.41 Payments on loans.

1738.42—1738.49 [Reserved]

Authority: Pub. L. 107–171, 7 U.S.C. 901 *et seq.*

Subpart A—General**§ 1738.1 General statement.**

(a) This part sets forth the general policies, types of loans and loan guarantees, and program requirements under the Rural Broadband Access Loan and Loan Guarantee Program to provide funds for the costs of the construction, improvement, and acquisition of facilities and equipment for broadband service in eligible rural communities.

(b) Additional information regarding the Rural Broadband Access Loan and Loan Guarantee Program can be found in RUS Bulletin 1738–1, “Rural Broadband Access Loan and Loan Guarantee Application Guide” and RUS Bulletin 1738–2, “Rural Broadband

Access Loan and Loan Guarantee Advance and Construction Procedures Guide”.

(c) When reference is made in this part to existing RUS regulations, an applicant or borrower under this part will follow the requirements applicable to an RUS telecommunications borrower.

§ 1738.2 Definitions.

As used in this part:

Acquisition means the purchase of operating broadband facilities or another broadband system whether by acquiring broadband facilities or equipment, or majority stock interest of one or more organizations.

Administrator means the Administrator of the Rural Utilities Service, or his or her designee.

Affiliate means an organization that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the applicant.

Applicant means an eligible entity requesting approval of a loan or loan guarantee under this part.

Borrower means any organization that has an outstanding loan made or guaranteed by RUS.

Broadband pilot program means that program implemented through Notices of Funds Availability, published in the **Federal Register** at 65 FR 75920 and at 67 FR 3140.

Broadband service means any technology identified by the Administrator as having the capacity to transmit data to enable a subscriber to the service to originate and receive high-quality voice, data, graphics, and video. To qualify as broadband, the project must offer data transmission services, and may provide voice, graphics, video, and other services. At the beginning of each fiscal year, RUS will publish a notice in the **Federal Register** defining the minimum rate-of-data transmission criteria to qualify as broadband service during that fiscal year’s funding period.

Composite economic life means the weighted (by dollar amount of each class of facility in the loan) average economic life of all classes of facilities in the loan.

Economic life means the estimated useful service life of an asset as determined by RUS.

Eligible rural community means any incorporated or unincorporated place in the United States, its territories and insular possessions (including any area within the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau) that:

(1) Has no more than 20,000 inhabitants based on the most recent

available population statistics of the Bureau of the Census and

(2) Is not located in an area designated as a standard metropolitan statistical area. For purposes of this part, “place” may include any area located outside the boundaries of any incorporated or unincorporated city, village or borough having a population exceeding 20,000 that is not within an area designated as a standard metropolitan statistical area.

Feasibility study means the pro forma financial analysis prepared by the applicant, and acceptable to RUS, to determine the economic feasibility of a loan.

Fiscal year means the fiscal year of the federal government.

Forecast period means the time period beginning on the date (base date) of the applicant’s balance sheet used in preparing the feasibility study and ending on a date equal to the base date plus the number of years estimated in the feasibility study for completion of the construction covered by the loan. Feasibility projections are usually for 5 years.

Initial loan means the first loan made under section 601 of the RE Act to each eligible entity.

Interim construction means the construction, improvement, or acquisition of facilities and equipment prior to loan approval and release of funds.

Interim financing means funding for a project that RUS has acknowledged could be included in a loan prior to approving the loan.

Loan means any loan made or guaranteed under this part by RUS, unless otherwise noted.

Loan contract means the loan agreement between RUS and the borrower, including all amendments thereto.

Loan documents means the loan contract, note, and security instrument between the borrower and RUS and any associated document pertaining to a loan.

Loan funds means funds provided pursuant to a loan made or guaranteed under this part by RUS.

Mortgage means the security document between the borrower, as debtor, and RUS, as creditor, including any amendments and supplements thereto.

Private loan guarantee means a loan made by a non-Federal lender and guaranteed by RUS.

RE Act means the Rural Electrification Act of 1936, as amended (7 U.S.C. 901 *et seq.*).

Release of funds means a determination by RUS that an applicant has complied with all of the conditions

prerequisite to the advance of funds as set forth in the loan contract.

RUS means the Rural Utilities Service, an agency of the United States Department of Agriculture, and successor to the Rural Electrification Administration.

RUS telecommunications borrower means any organization that has an outstanding telecommunications loan made or guaranteed by RUS under Titles II, III, or IV of the RE Act.

Service area means the geographical area within which the applicant proposes to make broadband service available with a loan provided under this part.

Telecommunications means the transmission and reception of voice, data, sounds, signals, pictures, writings, or signs of all kinds, by wire, fiber, radio, light, or other visual or electromagnetic means.

TIER means Times Interest Earned Ratio. TIER is the ratio of an applicant's net income (after taxes) plus interest expense, all divided by interest expense. For the purpose of this calculation, all amounts will be annual figures and interest expense will include only interest on debt with a maturity greater than one year.

§§ 1738.3–1738.9 [Reserved]

Subpart B—Loan Purposes and Basic Policies

§ 1738.10 General.

(a) The purpose of the Rural Broadband Access Loan and Loan Guarantee Program is to provide loans to provide funds, on a technology neutral basis, for the costs of construction, improvement, and acquisition of facilities and equipment for broadband service in eligible rural communities.

(b) The proceeds of any loan made under this part may be used to refinance an outstanding obligation on another telecommunications loan made under the RE Act if the use of the proceeds will further the construction, improvement, or acquisition of facilities in eligible rural communities.

(1) Funds used for refinancing may not constitute more than 40 percent of the loan. The remainder of the proceeds shall only be used for the construction or improvement of facilities and equipment for broadband services.

(2) In calculating the expected composite economic life under § 1738.41 of this part, the economic life of any loan refinanced under this section will be based on the remaining economic life of the assets underlying that loan.

(c) RUS will not assess fees or charges for any loan made under this part.

(d) Loans will only be made under this part if the applicant's financial operations, taking into account the impact of the facilities financed with the proceeds of the loan and the associated debt, are economically feasible, as determined by RUS.

§ 1738.11 Availability of broadband service.

(a) As provided in § 1738.15 of this part, priority will be given to loans to finance service to eligible rural communities in which broadband service is not available to residential customers in the applicant's proposed service area.

(b) RUS shall consider the following criteria in determining whether broadband service is not available to residential customers:

(1) Broadband service is not being provided to residential customers in the applicant's proposed service area and no entity is committed to provide such service before the service would reasonably be expected to be available pursuant to the loan application;

(2) Broadband service is not provided at rates comparable to those of similar services in neighboring urban and suburban areas, as determined by RUS; and

(3) The quality of existing service, including, but not limited to, the availability of specified data rates, system latency, and data rate restrictions, is not satisfactory as determined by RUS.

(c) All applicants, as part of submitting a completed application, shall:

(1) Certify to RUS the extent to which paragraphs (b)(1) through (b)(3) of this section, apply to residential customers in the proposed service area, and

(2) Publish legal notice stating the applicant's intent to offer broadband service in a particular community.

(i) The notice must set forth the applicant's proposed service area, and request any incumbent broadband service provider to submit to RUS within 30 days:

(A) The number of residential customers receiving broadband service in the applicant's proposed service area, the rates of data transmission, and the cost of each level of service, or proof of commitment to provide service in the proposed service area, and

(B) A map of its service territory.

(ii) The notice must satisfy all other requirements to constitute legal notice within the areas proposed to be served.

(iii) The notice must be published in state and local newspapers covering the

applicant's proposed service area if such publication is not included in the legal notice requirement.

§ 1738.12 Location of facilities.

RUS will make broadband loans for facilities which RUS determines are necessary to serve subscribers located in eligible rural communities. RUS may determine that it is necessary for facilities financed with loan funds to be located outside of eligible rural communities.

§ 1738.13 Allocation of funds.

(a) On October 1, of each fiscal year, or as soon as possible after funds become available, RUS will:

(1) Establish a national reserve for broadband loans, and

(2) Allocate amounts in the reserve to each State, territory, and insular possession, based on the ratio of the number of communities with a population of 2,500 inhabitants or less in the state, territory, and insular possession to the number of communities with a population of 2,500 inhabitants or less in all states, territories, and insular possessions. Population will be based upon the Bureau of the Census' latest decennial census.

(b) To be considered eligible for funding from the State reserve during the fiscal year, an application, determined by RUS to be complete, must be postmarked no later than January 31 of the fiscal year.

(c) On April 1 of each fiscal year, RUS will return all unobligated amounts in each state's reserve to the national reserve and will make the national reserve available to eligible entities in any state.

(d) To be considered eligible for funding from the national reserve during the current fiscal year, a completed application, satisfactory to RUS, must be postmarked no later than July 31 of the fiscal year.

(e) Completed applications that are economically and technically feasible, as determined by RUS, will be considered for funding in accordance with the priority requirements set forth in § 1738.15 of this part.

§ 1738.14 One-time priority for unfunded applications from the broadband pilot program.

(a) Each application that was submitted and remains unfunded from the broadband pilot program will be given a one-time priority for funding for a loan under this part.

(b) Each applicant will be given 30 days from the date of publication of this part in the **Federal Register** to resubmit

a completed application in accordance with the provisions of this part.

(c) Completed applications submitted within the 30-day time-frame will be considered for financing:

(1) First, where broadband service is not available to residential customers, as set forth in § 1738.11 of this part.

(i) Completed applications will be funded on a first-in, first-out basis, as long as funds remain available in the applicable state's reserve.

(ii) When the state reserve is not adequate to fund the next completed application on a first-in, first-out basis, RUS will consider subsequent completed applications for that state for funding on a first-in, first-out basis. All unfunded, completed applications will be carried forward for consideration for funding from the national reserve.

(2) Second, where broadband service is available to residential customers:

(i) On January 1, 2003, after all new applications submitted under this part proposing to provide service where none is available have been considered under § 1738.15(b) of this part, all completed applications will be considered for funding on a first-in, first-out basis, as long as funds remain available in the applicable state's reserve.

(ii) When the state reserve is not adequate to fund the next completed application on a first-in, first-out basis, RUS will consider subsequent completed applications for that state for funding on a first-in, first-out basis. All unfunded, completed applications will be carried forward for consideration for funding from the national reserve.

§ 1738.15 Priorities.

Subject to the one-time priority set forth in § 1738.14 of this part, in making loans under this part, priority will be given to eligible entities submitting completed applications for the construction, improvement, or acquisition of facilities and equipment for broadband service in eligible rural communities as follows:

(a) As of October 1 of the fiscal year, completed applications remaining unfunded from the previous fiscal year where broadband service is not available to residential customers, as set forth in § 1738.11(b)(1) of this part, will be considered for funding on a first-in, first-out basis, as long as funds remain available in the applicable state's reserve. When the state reserve is not adequate to fund the next completed application on a first-in, first-out basis, RUS will consider subsequent completed applications for that state for funding on a first-in, first-out basis. All unfunded, completed applications will

be carried forward for consideration for funding from the national reserve.

(b) New completed applications proposing to provide service where none is available to residential customers, as set forth in § 1738.11 of this part, will be considered for funding, from the state reserve prior to April 1 and the national reserve after April 1, on a first-in, first-out basis, as long as funds remain available. As applications are processed using the first-in, first-out process, RUS may expedite for consideration for funding applications proposing to provide service where none is available, as set forth in § 1738.11(b)(1). When funds are not adequate to fund the next completed application on a first-in, first-out basis, RUS will consider subsequent completed applications for funding on a first-in, first-out basis.

(c) On January 1, March 30, April 1, July 1 and September 30 of the fiscal year, all unfunded, completed applications on hand will be prioritized and considered for funding, from the state reserve prior to April 1 and the national reserve after April 1, as follows:

(1) First, where broadband service is not available to residential customers, as set forth in § 1738.11(b)(1) of this part, on a first-in, first-out basis, as long as funds remain available.

(2) Second, where broadband service is not available to residential customers, as set forth in § 1738.11(b)(2) and (3) of this part, on a first-in, first-out basis, as long as funds remain available.

(3) Third, where broadband service is available to residential customers, on a first-in, first-out basis, so long as funds remain available.

§ 1738.16 Eligible entities.

(a) RUS makes broadband loans to legally organized entities providing, or proposing to provide, broadband services in eligible rural communities.

(1) Types of eligible entities include cooperative, nonprofit, limited dividend or mutual associations, limited liability companies, commercial organizations and Indian tribes and tribal organizations as defined in 25 U.S.C. 450b (b) and (c). Individuals or partnerships of individuals are not eligible entities.

(2) An entity is not eligible if it serves more than 2 percent of the telephone subscriber lines installed in the United States.

(3) To be eligible, an entity must have sufficient authority to enter into a contract with RUS and to carry out the purposes of the proposed loan.

(b) A State or local government, including any agency, subdivision, or instrumentality thereof (including

consortia thereof) shall be eligible for a broadband loan only if, not later than April 30, 2003, no other eligible entity is already offering or has committed to offer broadband services to the eligible rural community. RUS will determine whether the commitment is sufficient for purposes of this paragraph.

§ 1738.17 Civil rights.

Applicants are required to comply with certain regulations on nondiscrimination and equal employment opportunity. See RUS Bulletin 1790-1, "Nondiscrimination Among Beneficiaries of RUS Programs" and RUS Bulletin 20-15:320-15, "Equal Employment Opportunity in Construction Financed with RUS Loans"; 7 CFR parts 15 and 15b and 45 CFR part 90.

§ 1738.18 Minimum and maximum loan amount.

Recognizing plant costs, the applicant's cost of system design, and RUS' administrative costs, RUS will not consider applications for loans or loan guarantees of less than \$100,000. Maximum loan amounts apply only to an applicant for a direct 4-percent broadband loan, as provided for in § 1738.30(b)(2) of this part.

§ 1738.19 Facilities financed.

(a) RUS makes broadband loans to finance the construction, improvement, and acquisition of facilities and equipment to provide broadband service in eligible rural communities.

(b) RUS makes broadband loans to finance broadband facilities leased under the terms of a capital lease as defined in generally accepted accounting principles. RUS will not make a broadband loan to finance facilities leased under the terms of an operating lease as defined in generally accepted accounting principles.

(c) RUS makes broadband loans to finance an acquisition by an eligible entity only when the acquisition is necessary and incidental to furnishing or improving rural broadband service.

(d) RUS will not approve the use of broadband loans to acquire any stock or any facilities or equipment of an affiliate of the applicant.

(e) RUS will not make a broadband loan to finance the following items:

(1) Customer terminal equipment (including modems) not owned by the applicant during its economic life and any associated inside wiring;

(2) Vehicles not used primarily in construction; and

(3) Operating expenses.

(f) RUS will not make a broadband loan to finance systems or facilities that

have not been designed and constructed to RUS' satisfaction. See RUS' Bulletins 1738-1 and 1738-2.

(g) Prior to October 1, 2004, RUS will not make a broadband loan under this part to provide broadband service in an area receiving local exchange telephone service from an RUS telecommunications borrower to any entity other than the incumbent RUS telecommunications borrower if, not later than 90 days after RUS receives an application proposing to provide broadband service in the borrower's local exchange service territory, the incumbent RUS telecommunications borrower submits to RUS a letter of intent to provide or begin to construct residential broadband service in its local exchange service territory prior to October 1, 2004. The incumbent RUS telecommunications borrower must provide, prior to October 1, 2004, support of their intent to provide broadband service through submitting either a loan application to construct broadband facilities or proof that construction of broadband facilities has begun. Thereafter, unless the RUS telecommunications borrower has constructed or begun to construct broadband facilities in its service area, RUS will consider an application for a loan under this part to provide the broadband service in an area served by an RUS telecommunications borrower according to the criteria for determining broadband availability in § 1738.11(b) of this part.

(h) RUS will not approve loans to more than one applicant to provide broadband service within the same eligible rural community, nor to an applicant proposing to provide service in a community served by a borrower using funds under this part regardless of the definition of broadband service at the time of loan approval.

(i) If an unadvanced loan, or a portion thereof, is rescinded, a new loan shall not be made to the same applicant for the same purposes as in the rescinded loan.

§ 1738.20 Credit support requirement.

(a) To be eligible for a loan, RUS will require an applicant to provide credit support in an amount equal to 20 percent of the requested loan amount.

(b) The applicant must have, as part of the minimum 20 percent requirement, cash or, in the case of State and local governments, cash equivalents in an amount equal to operating expenses for the first full year of providing service, as determined by a feasibility study satisfactory to RUS. This cash requirement will be waived for applicants operating as

telecommunications companies which have positive cash flow for the two calendar years immediately preceding the date of application.

(c) The remainder of the minimum requirement can be met by undepreciated assets which would normally be financed as part of a loan under this part, additional cash or cash equivalents, licenses, or an unconditional letter of credit, or the equivalent, satisfactory to RUS.

(d) For purposes of this section, assets and licenses will be valued based on the lower of cost or market value, net of liens or other obligations of payments for those assets and licenses.

§ 1738.21 Interim financing.

(a) Upon notification by RUS that an applicant's application is considered complete, the applicant may enter into an interim financing agreement with a lender other than RUS or use its own internally generated funds for interim construction.

(b) For an applicant to preserve the option of obtaining loan funds for reimbursement of interim financing, the following procedures must be followed:

(1) Interim construction shall be conducted in accordance with RUS Bulletin 1738-2 and 7 CFR part 1788, except that the applicant shall not begin interim construction until all necessary licenses, permits, and other governmental approvals have been obtained;

(2) Equal employment opportunity requirements apply to interim construction. See RUS Bulletin 20-15: 320-15; and

(3) Interim construction shall be covered by an Environmental Report prepared in accordance with 7 CFR part 1794 and approved by RUS.

(c) RUS approval of interim financing is not a commitment that RUS will make loan funds available.

§ 1738.22 Loan security.

(a) RUS makes loans only if, in the judgment of the Administrator, the security therefore is reasonably adequate and the loan will be repaid within the time agreed.

(b) RUS generally requires that an applicant provide RUS with a first lien, in form and substance satisfactory to RUS, on all of the applicant's property and such additional security as RUS may require. If necessary, RUS will share in the first lien with another lender provided the RUS loan is adequately secured and will be repaid within the time agreed.

(c) Unless otherwise approved by RUS, the applicant shall purchase and own the collateral for the loan free from

liens or security interests, other than those securing the RUS loan.

(d) In the case of loans that include the financing of broadband facilities that do not constitute self-contained operating systems or units, the applicant shall, in addition to the mortgage lien on all of the applicant's facilities financed by RUS, furnish adequate assurance, in the form of contractual or other arrangements, satisfactory to RUS, that continuous and efficient broadband service will be rendered.

(e) Beginning with the first calendar year following the end of the forecast period, RUS will require the recipient of a broadband loan to maintain, at a minimum, a TIER at least equal to the projected TIER determined by the feasibility study prepared in connection with the loan, but at least 1.25 and not greater than 2.0.

(f) Additional financial, investment, operational, and managerial controls appear in the loan documents required by RUS.

§§ 1738.23-1738.29 [Reserved]

Subpart C—Types of Loans

§ 1738.30 Rural broadband access loans and loan guarantees.

(a) Direct cost-of-money broadband loans shall bear interest at a rate (the "Cost of Money Interest Rate") equal to the cost of borrowing to the Department of Treasury for obligations of comparable maturity. The Cost of Money Interest Rate will be provided by RUS when the funds are advanced to the borrower.

(b) Direct 4 percent broadband loan.

(1) To be eligible for a direct loan bearing an interest rate of 4 percent, the applicant must be proposing to serve:

(i) A community that:

(A) Has a population of less than 2,500 inhabitants;

(B) Is not currently receiving broadband service as set forth in § 1738.11(b)(1) of this part, and

(C) Is located in a county with per capita personal income that is less than or equal to that percent of the national average per capita personal income which RUS will publish in the **Federal Register** at the beginning of each fiscal year. County per capita personal income as a percent of the national average per capita personal income is published by the Bureau of Economic Analysis, U.S. Department of Commerce, at <http://www.bea.doc.gov/bea/regional/reis/>. RUS will use the most recent statistics published on October 1 of the fiscal year in which the application is deemed complete by RUS; and

(ii) A service area with a certain maximum population density,

(ii) A service area with a certain maximum population density,

calculated as the total number of persons in the service area divided by the square miles of the service area. The maximum population density requirement will be published by RUS in the **Federal Register** at the beginning of each fiscal year.

(2) The total amount of financing made available by RUS, in each fiscal year, for direct loans bearing an interest rate of 4 percent and the maximum of any one loan will be published by RUS in the **Federal Register** at the beginning of each fiscal year.

(3) When an approved application exceeds the maximum amount of 4 percent financing that may be made available to the borrower, a direct loan made at 4 percent may be made simultaneously with a "Cost-of-Money Interest Rate" loan.

(4) A 4 percent direct loan may be made simultaneously with a Cost-of-Money Interest Rate loan or a private loan guarantee.

(c) Private loan guarantees. A private loan guarantee shall bear interest at a rate set by the lender consistent with the current applicable market rate for a loan of comparable maturity.

(1) A private loan guarantee is available to any legally organized lending agency which includes commercial banks, trust companies, mortgage banking firms, insurance companies, and any other institutional investor authorized by law to loan money, hereafter referred to as "lender". At the time of application, applicants must provide RUS the name of the lender who will be providing the funding and a commitment from that lender to provide the funds.

(i) The lender shall be subject to credit examination and supervision by a Federal or state agency unless RUS determines that alternative examination and supervisory mechanisms are adequate.

(ii) The lender shall demonstrate to RUS the capability to adequately service guaranteed loans. The lender shall also be in good standing with its licensing authority and meet the loan making, loan servicing, and other requirements of the jurisdiction in which the lender makes loans guaranteed under this part.

(2) The lender selected by the borrower shall provide evidence satisfactory to RUS of its qualification under this part, along with the name of the authority that supervises such lender.

(3) The lender may establish charges and fees for the loan provided they are not greater than those normally charged other applicants for the same type of loan in the ordinary course of business. RUS will not guarantee any portion of

the loan used to pay lender charges and fees.

(4) Loans are guaranteed for no more than 80 percent of the amount of principal except for those purposes in § 1738.30(c)(3) of this part for which RUS will not provide a guarantee. RUS' guarantee is limited to the loan repayment obligation of the borrower and does not extend to guaranteeing that a lender will remit to a holder loan payments made by the borrower.

(5) The interest rate must be fixed and must be the same for the Guaranteed Loan Amount or the respective Guaranteed Loan Portion Amount or the respective Guaranteed-Amount Equivalent, as the case may be, and Unguaranteed Loan Amount or the respective Unguaranteed Loan Portion Amount or the respective Unguaranteed-Amount Equivalent, as the case may be.

(6) The entire loan will be secured by the same security with equal lien priority for the Guaranteed Loan Amount or the respective Guaranteed Loan Portion Amount or the respective Guaranteed-Amount Equivalent, as the case may be, and Unguaranteed Loan Amount or the respective Unguaranteed Loan Portion Amount or the respective Unguaranteed-Amount Equivalent, as the case may be. The Unguaranteed Loan Amount or the respective Unguaranteed Loan Portion Amount or the respective Unguaranteed-Amount Equivalent, as the case may be, will neither be paid first nor given any preference or priority over the Guaranteed Loan Amount or the respective Guaranteed Loan Portion Amount or the respective Guaranteed-Amount Equivalent, as the case may be.

(7) All loan documents, including, but not limited to, a loan guarantee agreement between RUS and the lender, the loan note guarantee, the guaranteed loan note, and the mortgage will be prepared by RUS. Contact RUS for copies of forms of the loan documents. The guaranteed loan agreement between the borrower and the lender shall be subject to RUS approval.

(8) Once a private loan guarantee is approved, the lender will be required to fully service the loan including:

(i) Determining that all prerequisites to each advance of loan funds by the lender under the terms of the contract of guarantee, all financing documents, and all related security documents have been fulfilled. The lender must obtain RUS approval to advance funds prior to each advance of funds.

(ii) Billing and collecting loan payments from the borrower.

(iii) Notifying the Administrator promptly of any default in the payment

of principal and interest on the loan and submit a report, as soon thereafter as possible, setting forth its views as to the reasons for the default, how long it expects the borrower will be in default, and what corrective actions the borrower states it is taking to achieve a current debt service position.

(iv) Notifying the Administrator of any known violations or defaults by the borrower under the lending agreement, contract of guarantee, or related security instruments, or conditions of which the lender is aware which might lead to nonpayment, violation, or other default.

(9) Upon notice to the lender, RUS may assume loan servicing responsibilities for the loan or the Guaranteed Loan Amount or the respective Guaranteed Loan Portion Amount or the respective Guaranteed-Amount Equivalent, as the case may be, or require the lender to assign such responsibilities to a different entity, if the lender fails to perform its loan servicing responsibilities under the loan guarantee agreement, or if the lender becomes insolvent, makes an admission in writing of its inability to pay its debts generally as they become due, or becomes the subject of proceedings commenced under the Bankruptcy Reform Act of 1978 (11 U.S.C. 101 *et seq.*) or any similar applicable Federal or state law, or is no longer in good standing with its licensing authority, or ceases to meet the eligibility requirements of this section. Such negligent servicing is defined as the failure to perform those services which a reasonable prudent lender would perform in servicing its own portfolio of loans that are not guaranteed, and includes not only a failure to act but also not acting in a timely manner.

(10)(i) The Guarantee shall cease to be effective with respect to any Guaranteed Loan Amount or any Guaranteed Loan Portion Amount or any Guaranteed-Amount Equivalent to the extent that:

(A) The Guaranteed Loan Amount or the respective Guaranteed Loan Portion Amount or the respective Guaranteed-Amount Equivalent, as the case may be, is separated at any time from the Unguaranteed Loan Amount or the respective Unguaranteed Loan Portion Amount or the respective Unguaranteed-Amount Equivalent, as the case may be, in any way, directly or through the issuance of any Guaranteed-Amount Equity Derivative or any Guaranteed-Amount Debt Derivative; or

(B) Any holder of the Guaranteed Loan Note or any Guaranteed Loan Portion Note or any Derivative, as the case may be, having a claim to payments on the Guaranteed Loan receives more than its pro-rata percentage of any

payment due to such holder from payments made under the Guarantee at any time during the term of the Guaranteed Loan.

(ii) The assignment by the lender requires prior written approval from RUS.

(iii) The assignment shall entitle the holder to all of the lender's rights. However, the lender shall remain responsible for servicing the entire loan.

(iv) The borrower, its principal officers, members of the borrower's board of directors and members of the immediate families of said officials shall not be a holder of the borrower's loan.

(11) RUS will not guarantee any loan under this subpart that provides for:

(i) A balloon payment of principal or interest at the final maturity date of the loan; or

(ii) The payment of interest on interest.

(12) For purposes of this subsection:

(i) Derivative means any right, interest, instrument or security issued or traded on the credit of the Guaranteed Loan or any Guaranteed Loan Portion, including but not limited to:

(A) Any participation share of, or undivided ownership or other equity interest in, the Guaranteed Loan or any Guaranteed Loan Portion;

(B) Any note, bond or other debt instrument or obligation which is collateralized or otherwise secured by a pledge of, or security interest in, the Guaranteed Loan or any Guaranteed Loan Portion; or

(C) Any such interest in such an interest or any such instrument secured by such an instrument.

(ii) Guaranteed-Amount Debt Derivative means any note, bond or other debt instrument or obligation which is collateralized or otherwise secured by a pledge of, or security interest in, the Guaranteed Loan Note or any Guaranteed Loan Portion Note or any Derivative, as the case may be, which has an exclusive or preferred claim to the Guaranteed Loan Amount or the respective Guaranteed Loan Portion Amount or the respective Guaranteed-Amount Equivalent, as the case may be.

(iii) Guaranteed-Amount Equity Derivative means any participation share of, or undivided ownership or other equity interest in, the Guaranteed Loan or any Guaranteed Loan Portion or any Derivative, as the case may be, which has an exclusive or preferred claim to the Guaranteed Loan Amount or the respective Guaranteed Loan Portion Amount or the respective Guaranteed-Amount Equivalent, as the case may be.

(iv) Guaranteed-Amount Equivalent means:

(A) With respect to any Derivative which is equal in principal amount to the Guaranteed Loan or any Guaranteed Loan Portion, that amount of payment on account of such Derivative which is equal to the Guaranteed Loan Amount or the respective Guaranteed Loan Portion Amount, as the case may be; or

(B) With respect to any Derivatives which in the aggregate are equal in principal amount to the Guaranteed Loan or any Guaranteed Loan Portion, that amount of payment on account of such derivatives which is equal to the Guaranteed Loan Amount or the respective Guaranteed Loan Portion Amount, as the case may be.

(v) Guaranteed Loan Amount means that amount of payment on account of the Guaranteed Loan which is guaranteed under the terms of the Guarantee.

(vi) Guaranteed Loan Portion Amount means that amount of payment on account of any Guaranteed Loan Portion which is guaranteed under the terms of the Guarantee.

(vii) Guaranteed Loan Note means, collectively, the note or notes executed and delivered by the Borrower to evidence the Guaranteed Loan.

(viii) Guaranteed Loan Portion means any portion of the Guaranteed Loan.

(ix) Guaranteed Loan Portion Note means any note executed and delivered by the Borrower to evidence a Guaranteed Loan Portion.

(x) Unguaranteed-amount equivalent means all amounts of payment on account of any Derivative other than the respective Guaranteed-Amount Equivalent.

(xi) Unguaranteed loan amount means all amounts of payment on account of the Guaranteed Loan other than the Guaranteed Amount.

(xii) Unguaranteed loan portion Amount means all amounts of payment on account of any Guaranteed Loan Portion other than the respective Guaranteed Loan Portion Amount.

§ 1738.31 Full faith and credit.

Loan guarantees made under this part are supported by the full faith and credit of the United States.

§§ 1738.32—1738.39 [Reserved]

Subpart D—Terms of Loans

§ 1738.40 General.

Terms and conditions of loans are set forth in a mortgage, note, and loan contract. Provisions of the mortgage and loan contract are implemented by provisions in RUS bulletins and regulations. Standard forms of the

mortgage, note, and loan contract can be obtained from RUS. However, RUS reserves the right to establish terms and conditions, including security requirements, on a case-by-case basis.

§ 1738.41 Payments on loans.

(a) Broadband loans must be repaid with interest within a period that, rounded to the nearest whole year, equals the expected composite economic life of the facilities to be financed, as calculated by RUS.

(1) The expected composite economic life shall be based upon the depreciation rates for the facilities financed by the loan.

(2) The depreciation rates used shall be the rates currently in place, as long as RUS finds them to be reasonable for the telecommunications industry.

(b) Applicants may request a repayment period that is shorter than the expected composite economic life of the facilities financed. A shorter period may be approved as long as the Administrator determines that the loan remains feasible.

(c) Interest is payable on funds advanced each month as it accrues beginning with the first billing after the advance, as defined in the note. Principal payments on each note are scheduled to begin one year after the date of the first advance. After this deferral period, interest and principal payments on all funds advanced during this one-year period shall be made in equal monthly installments. Principal payments on funds advanced 1 year or more after the date of the first advance will begin with the first billing after the advance. The interest and principal payments on each of these advances shall be made in equal monthly installments.

§§ 1738.42—1738.49 [Reserved]

Dated: January 27, 2003.

Hilda Gay Legg,

Administrator, Rural Utilities Service.

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