

FHH TELECOM LAW

Current Issues in Telecommunications Law and Regulation

The Broadband Stimulus Issue



When the federal government offers to give away or lend over \$7 billion, even the most jaded industry observers sit up and take notice. With the issuance of a Notice of Funds Availability (NOFA) a couple of weeks ago, NTIA and the Rural Utilities Service (RUS) kicked off the scramble for these dollars, with the first application deadline coming up on August 14.

Given the rare opportunity to get funding for broadband projects that would otherwise never get off the ground, we here at Fletcher, Heald & Hildreth have put together a special stimulus group to coordinate information gathering, answer questions by prospective applicants, and assist in application preparation.

The FHH Broadband Stimulus Group is comprised of 11 FHH attorneys familiar with the NOFA process and the broadband technology issues which must be addressed in that process. The group includes: Donald Evans; Joseph Di Scipio; Tom J. Dougherty; Paul Feldman; Jeffrey Gee; Scott Johnson; Mitchell Lazarus; Francisco Montero; Lee Petro; Raymond Quianzon; and Kathleen Victory.

This issue of FHH Telecom Law focuses on various aspects of the process of applying for, receiving, and keeping



money under the regulations: an overview by Don Evans, a look at which geographic areas qualify for funding by Tom Dougherty, a summary of the application scoring process by Jeff Gee, a look ahead by Joe DiScipio at the reporting and other obligations which will apply to winners, and an analysis by Mitchell Lazarus of the "net neutrality" principles that must govern the provision of broadband by award recipients. Finally, Tom Dougherty sounds a warning note for local jurisdictions and those who would partner with them based on an arcane nineteenth century rule of law.

We urge all of our readers who may be interested in seeking funding under the NTIA and RUS programs to evaluate your prospects quickly since we expect the money to go fast.

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Broadband Stimulus 101

Feds Throw Open First Stimulus Money Window

August 14 deadline for the first \$4 billion looms

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On July 1, the Rural Utilities Service (RUS) and the National Telecommunications and Information Administration (NTIA) released the long and eagerly awaited rules governing the distribution of billions of dollars in stimulus funds to expand broadband service in the United States. The 121-page tome: lays out in detail how much money is to be distributed in the first funding round; adopts critical definitions of “rural,” “unserved” and “underserved” areas; specifies how the applications will be “scored” to determine who gets the money; and prescribes the elements that must be included in each application on pain of dismissal.

Deadline. The most daunting feature of the rules is the **August 14** deadline for filing. That leaves less than a month to pull together a fairly complicated package of information and projections, perhaps involving the receipt and expenditure of millions of dollars. But remember, the underlying purpose of this program is to stimulate the economy, so in this case haste makes not waste, but good public policy. Your whole package must be electronically filed by 5:00 p.m. (EDT) on August 14. (For handicapped people or smaller award requests, paper copies must be hand-delivered by 5:00 p.m. (EDT) on August 14 or postmarked by August 14.) Anguished cries from prospective applicants about the enormous quantum of required information and the short time fuse have already been raised on Capitol Hill, generating some hope that the deadline may be pushed back a bit, but no one should delay preparation of his application in that expectation.

To be sure, the August deadline applies only to the first round of funding – there will be at least one additional opportunity to file later in 2009 or 2010 (RUS is now waffling on whether there will be three funding tranches or only two), but as we will explain, there may be some advantage to filing in the first round.

Know Your Acronyms. The Feds have adopted cute acronyms for the two funding vehicles.

“**BIP**” – Broadband Initiatives Program – is the name for the RUS program intended primarily to bring broadband to rural areas.

“**BTOP**” – Broadband Technology Opportunities Program – is the NTIA program which is open to both rural and urban areas. BIP and BTOP sound like lovable clowns in a small European circus, but they are no laughing matter here.

Funds Available. The official moniker for the document released by RUS and NTIA is a “Notice of Funds Availability” or “NOFA.” That’s because the announcement says that \$2.4 billion is being made available for rural areas by the RUS and \$1.6 billion is being made available from NTIA sources. This \$4 billion represents a hefty chunk of the \$7.2 billion that has been allocated for this program overall. So even though there is at least one more funding tranche still to come, the Feds have front-loaded the awards to try to get the money out there sooner rather than later. Particularly in the case of *rural* applicants, there is some premium on filing early since RUS is proposing to shovel out 96% of its money in this first round.

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Broadband Stimulus 101

Who Gets What Where, and How?

“Proposed funded service areas”: what they are, what differences they make

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The Notice of Funds Availability (NOFA) – about which much has already been written – puts an end to months of speculation about how, exactly, the government plans to allocate the billions of dollars earmarked for broadband development. Now we know . . . or at least we have a better idea.

The Feds are doling out the stimulus cash based both on demographic considerations and on the level of broadband service already available in the areas proposed to be served. And to complicate matters, the funds are being distributed through two separate but partially overlapping programs – the Broadband Initiatives Program (BIP), and the Broadband Technology Opportunities Program (BTOP). The fun comes in trying to figure out who gets what under which program.

Some helpful definitions – The decisional criteria for both BIP and BTOP include, in particular, two crucial factors: whether the area to be served by the applicant is “rural”; and whether that area is “unserved” or “underserved.” A quick summary of those terms for BIP/BTOP purposes:

“*Area*” – For both programs, applicants must specify the “area” to which the funds would be applied. The precise “proposed funded service area” (PFSA) covered by any proposal is self-determined by the applicant. Each PFSA can be composed of as many contiguous census blocks as the applicant proposes to serve, with census blocks being the smallest demographic metric used by the Census Bureau. Service to entire census blocks is required (absent a waiver from the administering agency).

“*Rural*” – Another consideration common to both programs is the “rural” character of the PFSA. An area is “rural” if it is outside of any city, town or incorporated area that has a population that is greater than 20,000 inhabitants and if it is also outside of an urbanized area adjacent to a city with a population greater than 50,000 inhabitants. Whether an area is “rural” is

determined by information derived from the last decennial census, which was the 2000 census.

“*Unserved*” v. “*Underserved*” – According to both RUS and NTIA, an area is “unserved” if terrestrial broadband (minimum advertised speeds of “at least” 768 kbps down and 200 kbps up, fixed or mobile) is not available to 90% or more of the households in the area.

An area is “underserved” if it features any of the following three characteristics: (1) no more than 50% of the households have access to facilities-based, terrestrial (fixed or mobile) broadband service (minimum advertised speeds of at least 768 kbps down and 200 kbps up); (2) no fixed or mobile broadband service provider advertises downlink speeds of three megabits per second (Mbps) or more for the area; or (3) 40% or fewer of the households in the area subscribe to broadband service.

Note that the availability of broadband service from satellite – as opposed to terrestrial – carriers is **not** a factor in determining whether an area is unserved or underserved.

Now that we have some sense of what these terms mean, let’s look at how they play out in the application process.

BIP – Strictly “rural”

The BIP money is intended for use in rural unserved or underserved areas. BIP funds are available for “last mile” and “middle mile” broadband infrastructure projects in PFSA’s that are: (a) at least 75% rural **and** (b) without access to broadband services or underserved with broadband services. ***If you propose service to an area that is at least 75% “rural,” you MUST apply through the BIP.***

The precise “proposed funded service area” covered by any proposal is self-determined by the applicant.

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Broadband Stimulus 101

Do You Get the Points?

Elaborate scoring systems to be applied by RUS, NTIA

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The American Recovery and Reinvestment Act of 2009 (the "Recovery Act") appropriated \$7.2 billion to fund broadband related projects. As with all stimulus spending measures, the need to get money injected into the system quickly is balanced against the need to ensure that funds are spent in ways that most efficiently and effectively promote the purposes of the funding as set out by Congress. Thus, rather than simply dumping 72 million \$100 bills out of the back of a cargo plane, the Federal agencies in charge of these funds have attempted to set up objective criteria against which applicants for funding may be judged. Applicants seeking broadband funding must understand these criteria and the scoring methods the government will use to determine which projects are worthy of funding.

BIP is intended to facilitate broadband deployment in rural areas. BTOP has a broader mission: (1) deploying broadband infrastructure in unserved and underserved areas in the United States; (2) enhancing broadband capacity at public computer centers; and (3) promoting sustainable broadband adoption projects. While BIP funding is reserved for projects serving rural areas, BTOP-funded projects are anticipated to serve a variety of geographic areas. All of the criteria used to evaluate funding applications are based on these purposes and the priorities of each program.

BIP Evaluation Criteria

BIP funding requires that 75% of the area to be served be in a rural area that "lacks sufficient access to high speed broadband service to facilitate rural economic development." RUS will give priority to projects that: (1) give end users a choice of providers; (2) serve the highest proportion of rural residents that lack access to broadband service; (3) are projects of current or former RUS borrowers (also known as Title II borrowers); and (4) are fully funded and ready to start once Recovery Act funding is received.

The application process uses a scoring system that awards points based on how well the proposed project

meets BIP's purposes and priorities. After establishing whether a particular applicant is eligible for BIP funding (ineligible or incomplete applications will be rejected), all applications will be ranked based on their total score. Each application is independently scored against the criteria. That is, applications are not scored relative to other applications. Only the highest scoring applications, however, will be allowed to proceed to the next level of evaluation. Lower scoring applications will be rejected.

Applicants seeking broadband funding must understand the criteria and the scoring methods the government will use.

The scoring criteria are grouped into four categories: (1) Project Purpose; (2) Project Benefits; (3) Project Viability; and (4) Project Budget and Sustainability. For BIP applications, each of these categories is given an equal number of points (25) and the number of points within each category is based on fairly specific criteria.

Project Purpose (25 points total):

- ☑ *Proportion of rural residents served in unserved areas* (1-5 points) – One point for every 10,000 unserved households.
- ☑ *Rural area targeting* (1-5 points) – One point for every 5% increase in the rural service area over the minimum 75 percent requirement.
- ☑ *Remote area targeting* (1-5) points – One point for every 50 miles a service area is located from a non-rural area.
- ☑ *Recovery Act/ other governmental collaboration* (1-5 points) – One point for each Recovery Act or other governmental program that is partnered with the proposed project.
- ☑ *RUS Title II Borrower* (5 points) – All or nothing five points if the application is a past or present RUS Title II borrower.

Project Benefits (25 points total):

- ☑ *Performance of the offered services* (10 points) – Ten points are awarded if the project will deliver

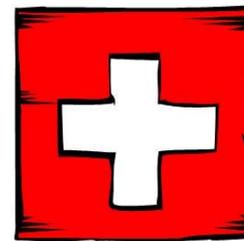
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Broadband Stimulus 101

Stimulus Applicants Can't be Neutral on "Net Neutrality"

Funding tied to expanded principles of "neutrality"

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The concept of "network neutrality", still in a long gestation, is gradually finding its way into the law – most recently, as a condition of participating in the broadband stimulus program.

Though lacking a widely-accepted definition, the term "network neutrality" generally refers to the concept that Internet users should have unfettered access to content and services – in other words, that service providers should not be allowed either to impede or to favor access to particular sites. Most proponents agree on two exceptions: for legitimate law enforcement (to block, say, child pornography), and for "reasonable network management." The latter, in practice, usually amounts to finding ways of throttling back the small percentage of people who take up a large percentage of the available bandwidth.

Service providers, by and large, dislike the whole idea. Some want the option of charging sites extra money for delivering their content faster to consumers, or of offering consumers content that is not available through competitors. None wants the government probing into its network management practices. If the country decides it wants network neutrality as a matter of policy, regulation will be necessary.

The FCC made a start in 2005, when it adopted four "principles" of neutrality. These declare that consumers are entitled to:

access the lawful Internet content of their choice;
 run applications and use services of their choice;
 connect their choice of devices; and
 have competition among providers.

As usual, the principles are subject to the needs of law enforcement and reasonable network management. The list is fine, as far as it goes. Some observers would like to have seen an additional principle barring discrimination among content providers. The biggest omission, however, is not in the list itself, but rather in the FCC's having skipped the step of adopting the list as enforceable rules.

The legal effect of the principles, if any, is the topic of a

lawsuit now pending in the U.S. Court of Appeals. A year ago the FCC determined that Comcast, which provides both cable service and Internet service, had selectively interfered with an Internet application called BitTorrent which, among other uses, helps subscribers to download movies. Comcast claimed this was reasonable network management. Skeptics noted that BitTorrent offered a free alternative to Comcast's on-demand cable TV offering. Citing its four principles, the FCC ordered Comcast to stop targeting particular applications. Comcast said it had already stopped, but went to court anyway, to assert that the principles, not being actual rules, were legally inadequate to support an order. The court has not yet issued a decision in the case.

In the meantime, two government agencies not usually associated with private-sector telecommunications regulation have written a form of network neutrality into law, for all practical purposes.

The BIP and BTOP stimulus programs propose to hand out \$7.2 billion with an important catch. Applicants taking funds under either BTOP or BIP *must* commit to a specific form of network neutrality. It has five requirements:

- Adhere to the FCC's four principles.
- Do not favor particular content or applications over others (the "fifth principle" missing from the FCC's original formulation).
- Publicly explain any network management policies (to head off Comcast-type problems).
- Connect to the public Internet (disqualifying projects that consist entirely of closed private networks).
- Offer interconnection on reasonable rates and terms (a throwback to the FCC's "Computer II/III" rules to open the market for Internet access to competition).

On point (4), the funding agencies are quick to clarify that awardees may use private networks rather than the public Internet for "managed services" such as telemedi-

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Broadband Stimulus 101

The Job Isn't Over 'Til the Paperwork's Done

Post-award chores abound for successful stimulus applicants

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If you are lucky and perseverant enough to be awarded broadband stimulus funds, your travails are not yet over. In fact, they may just be beginning. Awardees under both BIP and BTOP must comply with a number of post-award requirements. We're providing a thumb-nail introduction to those requirements below. As you review the various post-award obligations, keep in mind the stern admonition, at least for BIP winners, that in the event of failure to comply with the terms of an award, "RUS may exercise rights and remedies." That vague but menacing threat is intended to ensure that winners carefully comply with the various post-award requirements.

BIP Requirements – Let's first take a look at highlights of the post-award requirements for BIP winners. If you are a BIP winner, you will have to comply with all "reasonable" RUS requests to support ongoing monitoring efforts. That means, for example, that at all times during business hours RUS and its minions may (with appropriate notice) inspect the broadband system and any other property encumbered by the mortgage or security agreement and review and make copies of all of your stuff (both written and electronic). The mortgage and security agreements secure the government's investment in your assets, just as a bank would collateralize a commercial loan by taking a lien on your property.

To regularize accounting, BIP winners must adopt a GAAP system of accounts that is acceptable to and approved by the RUS (we'll leave out the jokes about what the government knows about accounting). Awardees must submit annually an audited financial statement prepared by a CPA approved by the RUS and a report on compliance and a management letter. In addition to the BIP-specific and general Recovery Act requirements (covered below), BIP winners must submit within 30 calendar days at the end of each quarter, balance sheets, income statements, statements of cash flow, rate package summaries, and the number of customers taking broadband service on

a per community basis, utilizing RUS's Broadband Collection and Analysis System (BCAS). There are numerous other BIP-specific quarterly and annual reporting requirements, but suffice it to say that the government intends to monitor its investment very closely. These requirements persist for three years from the date of the award.

BTOP Requirements – As a general rule, the sale or lease of any of the award-funded broadband facilities is prohibited. There are, of course exceptions (which require notice to the requisite agencies). Sales or leases will be approved if: (1) adequate consideration is given, and (2) the buyer or lessee agrees to fulfill the terms and conditions of the project; and (3) either (a) the sale or lease was included in the initial application and was included in the proposal for funds or (b) the requisite agencies waive the provision for any sale or lease occurring after the tenth year from the date of issuance of the grant/loan. None of this, however, is intended to limit awardees from leasing facilities to another service provider for the provision of broadband service. As a practical matter, we cannot envision that RUS would want – or have any reason – to prevent alienation of these properties so long as the purposes of the stimulus money continue to be served by the buyer.

As with BIP winners, the NTIA has the right to inspect the broadband system and any other property funded by the system and make copies of everything. An audit may be conducted at any time.

Finally, all BTOP Broadband Infrastructure awardees that offer Internet access service to the public for a fee must participate in the State Broadband Data and Development Grant Program. This program gathers data on: (1) the availability of broadband service within the service area (with different reporting requirements for the wireline and wireless based systems); (2) the residential average revenue per user; (3)

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There are numerous BIP-specific reporting requirements. Suffice it to say that the government intends to monitor its investment very closely.

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Beware of Dillon's Rule**Pesky precedent may complicate formation of public/private partnerships**

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As interest in snagging a piece of the broadband stimulus builds to fever pitch, it may be a good idea to sound a cautionary note with respect to one obscure, but potentially important, quirk in U.S. law that could mess up a lot of plans. I'm talking about Dillon's Rule. Never heard of it? Not surprising. Despite its importance, it's easy to overlook, unless you happen to have an interest in the jurisprudence of state and local governments. But overlook it at your peril. Dillon's Rule could effectively bar, or at least seriously complicate, efforts by private entities to successfully dip into the deep pool of stimulus funds through the device of public/private partnerships (a device recommended by a number of supposed gurus).

The fascination for public/private partnerships as a means of reaching Stimulus El Dorado derives from Section 6001(e)(1) of the Act. That section provides NTIA stimulus fund eligibility not only to States, but also to their political subdivisions, the District of Columbia, United States territories and possessions, Indian tribes, native Hawaiian organizations, and non-profit groups. So the line for stimulus cash forms here if you're anybody but a commercial entity.

As an inside track to accessing the funds, some savants have suggested that commercial interests partner up with State or local governments to receive the NTIA funds. This is because public/private partnerships get a preference in the scoring process. In that case, you might imagine that a local government entity – county, city, town, etc. – would make an ideal partner.

This is where Dillon's Rule rears its ugly head. Dillon's Rule is a court-created doctrine (circa 1886, but still alive and kicking today) which provides that a political subdivision of a State has only those powers expressly conferred on it by charter or law. If a court finds that an act of a local government is beyond the local government's powers, the local government does not have authority to engage in the act. And without that author-

ity, even the most willing county, or town, or city, would be powerless to enter into a public/private partnership.

How many States have conferred upon their constituent counties, towns, parishes or cities the power to provide broadband services to their residents – either specifically or by categorical grant of power to provide communications services to residents and businesses? I admit that I have not conducted a survey, but anyone thinking about doing a deal with one or another particular local government would be well-advised to research that point thoroughly before jumping in.

Without careful research there is no safe and simple way of knowing whether a local government can partner up with you, even if they want to.

Dillon's Rule or some variant of it is in effect in most States, although it is not necessarily included in State statutes or constitutions. In many instances Dillon's Rule is a non-statutory doctrine enforced by the courts of a State. In still other cases, Dillon's Rule is codified. In many States, the State legislature has enacted "home rule" provisions for its counties

and/or municipalities which allow the county and/or municipality to engage in some activities that are not traditional local governmental activities. These activities may or may not include operating or owning a broadband service business. In some other States where Dillon is construed very narrowly, counties or cities have no power independent from the State. In other words, without careful research there is no safe and simple way of knowing whether any particular local government is going to be legally competent to partner up with you, even if they really want to.

But wait, you say – the Stimulus Package is a Federal law. How can individual States somehow override Uncle Sam? Simple. Dillon's Rule involves the power of each State to regulate its own affairs. It has twice survived attacks on its constitutionality before the United States Supreme Court. As a matter of conventional federalism, the Feds are not in a position to waive it or

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Small mistake, big fine

FCC to Inter Tech: REALLY, Keep the Paperwork Straight!

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We reported in February a proposed FCC fine of \$7,000 against a company called Inter Tech which had failed to properly verify an FM broadcast transmitter. This is a rare offense, in part because verification is so easy: just test the product for compliance with the FCC's technical rules, and keep certain records. In the same order, the FCC proposed to add on another \$11,000 for Inter Tech's saying it had discontinued a particular model when, in fact, the model was still on sale. We observed that Inter Tech was lucky, as the FCC could have imposed the same \$7,000 fine separately for each of 15 different models.

We spoke too soon. The FCC is back.

Two of the new offenses also concern Inter Tech's FM transmitters, each made up of an exciter and an amplifier supplied by different companies. (The exciter is the part that produces an FM signal at relatively low power, which the amplifier then amplifies.) Inter Tech had verification paperwork relating only to the exciters. The amplifiers had been separately approved, under the more demanding procedure of certification. But that was not enough. Combining the two components makes a new product that requires a new verification, a step that Inter Tech had omitted.

Another two violations appear to stem from the same certified amplifiers. Inter Tech had apparently combined these with the exciters and marketed the resulting package under its own trade name. Re-branding a certified device is perfectly acceptable, under the rules, but only with the approval of the certification grantee. In practice, this is very common. There are dozens of brands of Wi-Fi equipment, for example, but far fewer manufacturers who supply the FCC-certified transmitters inside. The same core circuitry thus turns up in many different makes and models. In this case, however, Inter Tech was unable to show authorization from the company that made the amplifiers.

Turning these facts into a rule violation took a few steps. First, the FCC deemed Inter Tech's re-branding to be a "modification" of the equipment. Under the rules,

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Santa comes early for some applicants

Late-Filed EBS/BRS Renewal Applications Get Reprieve

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After sitting on a host of late-filed Educational Broadband Service (EBS) and Broadband Radio Service (BRS) renewal applications for more than two years, the FCC finally decided last month to accept the filings and process the applications. There were more than 116 EBS licensees who for various reasons had neglected to file their last renewal application by the prescribed deadline. In many cases, there had been some confusion about whether a renewal application was fileable when the underlying station had not yet been constructed. This occurred because, in the transition from oversight of such applications by the Mass Media Bureau to oversight by the Wireless Bureau, there was a change of policy on this issue which was never publicly announced. The Commission decided that it was unfair to administer the administrative death penalty to licensees who had failed to apprehend the new, but unannounced, policy and act accordingly.

On the other hand, there were also quite a few applicants who had simply neglected to file the renewal on time due to carelessness, oversight, changes in personnel, or because their lessee had failed to take care of it. The Commission declared, in effect, that these educators were grown-ups and "the dog ate my report" type excuses were unacceptable. Nevertheless, since it was permitting mere permittees to file late-filed renewals, it decided it would be inequitable not to extend similar relief to licensees who had actually built their systems. The FCC therefore magnanimously waived the filing deadline for everybody. A huge sigh of relief was audible over much of the country, particularly from the administrators who had failed to file the renewals on time. At the same time, the FCC dismissed Sprint-Nextel's objections to this action on the grounds that Sprint would not be harmed by acceptance of the late filings and therefore had no legal standing to complain.

The dilatory filers did not get off unscathed, however. The Commission decided that they would not be allowed to "split the football" with nearby incumbents who had timely filed their renewal applications. Splitting the football occurs when the protected service areas of two co-channel licensees overlap. The FCC ruled several years

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October BRS Auction Gets More or Less Interesting

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Last issue we reported that the FCC had announced the auction this fall of slivers and pieces of various Broadband Radio Service BTAs that had for one reason or another fallen back into the public domain. At the time, we groused that the FCC had set the minimum prices way too high for small pieces of spectrum that were not only outside of population centers but highly encumbered by other licensees. In response to two commenters who complained about this flaw in the auction proposal, the FCC decided to re-calculate the minimums to reflect the high level of incumbency in many of the markets. The result is that many of the larger markets will be far more affordable to interested parties; the upside to the Federal treasury is that many of these same markets will now be bid on rather than going unpurchased and lying fallow for an indefinite number of additional years.

Another positive development was that the FCC at long last resolved the status of later-filed renewals

which had languished for many years in administrative limbo. (See story on page 8.) This ruling allows prospective bidders to know for sure who the other licensees in the market are and which spectrum is actually vacant.



On the other hand, the FCC clarified that winners of the BRS licenses in the auction will be bound by the same 2011 “substantial service” deadline that applies to all other BRS licensees. That means that winners may have only a year or so to build out their systems.

Although the Commission left open the possibility that winners could request an extension of time, such a request would be at their peril. So the Commission has again cast a pall on the value of these licenses.

What would happen if they held an auction and nobody came? Short form applications for this auction are due no later than August 18, 2009. We'll find out then.



(*Inter Tech* - Continued from page 8)

said the FCC, that made Inter Tech the “responsible party” answerable for compliance. And that in turn, according to the argument, obligated Inter Tech to re-certify the amplifiers for sale under its own trade name.

That first step – calling the re-branding a modification – strikes us as a stretch. The rule that shifts responsibility for compliance, following a modification, appears to contemplate *technical* modifications, particularly those that might adversely affect the device’s continued compliance. Certainly that was the clear intent of the FCC order that adopted the rule. As far as we can tell, the FCC has never before treated re-branding as a modification for these purposes.

Besides, having found that the whole transmitter fell

short under the equipment authorization rules, it seems excessive to also cite Inter Tech separately for one component of the same transmitter.

Inter Tech did not help its case by claiming the transmitter was exempt from FCC regulation on the ground that it was sold only for export. The legal premise is right: products manufactured for export do not need FCC compliance or approval. But Inter Tech's sole basis for invoking this exception was the words “Export Only” in its marketing materials – diluted, unfortunately, by an offer to ship anywhere within the United States.

The FCC is looking more aggressive all the time in its enforcement efforts. Sadly, it is getting plenty of help from careless manufacturers. Total proposed fines in this round are \$22,000.



(Stimulus Overview - Continued from page 2)

Within the overall funding amounts, there are some key subsets. Of the \$2.4 billion in BIP money, half is reserved for last mile projects (*i.e.*, projects designed to get broadband service to the end user). Of that half, \$400 million is reserved for grants for remote area projects – projects that address the most sparsely populated and needy parts of the country. The other \$800 million is reserved for loans or loan/grants for non-remote but nevertheless rural areas. Another \$800 million is set aside for loans and loan/grants for “middle mile” projects – what most people would call back haul. By our math, that leaves \$400 million in BIP money available for unrestricted purposes.

BTOP is offering \$1.6 billion, divided as follows: no more than \$1.2 billion for broadband infrastructure projects, \$50 million to establish public computer centers so people will have public access to broadband, \$150 million for “sustainable broadband adoption” projects (nobody, including NTIA, seems to be quite sure what this particular money is supposed to be for), and \$200 million as a “national reserve” – a sort of broadband rainy day fund.

It must be remembered that all of this money does not have to be doled out in the first round. If there are insufficient worthy applications, the funds can simply be held over to the next round. However, *all* the money has to be out the door by September 30, 2010.

Where is the Money Going? There is both a geographic and a service-based component to determining which regions of the country qualify for project funds. As mentioned above, the BIP money is primarily intended for rural applications, so 75% of the areas to be served with this money must go to serve rural areas. Moreover, if you qualify as a rural area, you *must* apply through the BIP program first, even though your application can also be considered for BTOP money if it's not found worthy of BIP. One of the initially perceived advantages of filing for BIP was that you would not be saddled with the requirement applicable to BTOP money to pay 20% of the project cost out of non-federal funds – *i.e.*, you can get a grant for the *whole* amount. However, RUS poured cold water on those dreams by declaring that pure grants would be available only for those “remote” areas described above – the areas that nobody wants to serve now. BTOP funds can go to both urban and rural areas.

Both programs, however, emphasize the importance of

providing service to unserved and underserved areas. It's not that difficult to determine if an area is completely unserved – a simple drive test or a look at a cable TV or telco service map would answer that, but how do you determine when an area is “underserved”? This is one of the most criticized elements of the rules as announced because it is so difficult to determine with any accuracy who is receiving service in an area already served by at least one broadband provider. Those companies aren't saying how many subscribers they have, and they are obviously not going to be eager to help a government-subsidized competitor come into the market. Those companies will also have the right to challenge your claims about service or the lack thereof, so this key component of an applicant's eligibility package is highly vulnerable. (See Tom Dougherty's article on page 3.)

Application Process. RUS and NTIA have published an electronic version of the application form on their website. (You can check it out at http://broadbandusa.sc.egov.usda.gov/download_app.htm.) The 72-page form is an intimidating one, calling for a large amount of data from the applicant. Required components include a detailed description of the project including:

- ☐ a granular description of the area to be served with maps, geography, numbers of households and businesses passed, job impact, etc);
- ☐ a description of the proposed service offerings and proposed pricing plans;
- ☐ the advertised rates of existing providers;
- ☐ a network diagram certified by a network engineer;
- ☐ a project timeline;
- ☐ management résumés;
- ☐ legal opinions as to the applicants' qualifications;
- ☐ financial information about the applicant, both historical and projected;
- ☐ other information peculiar to BTOP.

A major purpose of these programs is to stimulate job creation, and the application process itself could be a job creation program for engineers, lawyers, accountants, geographers and others. Perhaps the Feds are relying on the onerousness of the process itself to deter less-than-committed applicants, but the process may also deter otherwise deserving applicants who are simply unable to amass this mountain of data in the 30 days

(Continued on page 11)



(Net Neutrality - Continued from page 5)

cine, public safety, and distance learning, where necessary for quality of service. The document is not entirely clear, but we think point (4) means that an awardee proposing to use funds for a private network must also offer a public Internet connection. We also note that the four principles apply to all “Internet access or Internet Protocol-enabled (IP-enabled) services,” presumably including a private network that uses IP-based communications, as many do.

The agencies emphasize that awardees are free to manage their networks responsibly. They can use caching and bandwidth allocation (without discriminating among content or applications), and can take reasonable measures to combat spam, denial of service attacks, illegal content, and other harmful activities.

The network neutrality obligations are binding not only on awardees, but also on contractors and subcontractors who build or operate funded systems. And the obligations continue to apply for the life of the facilities, not just the particular networks that run on them. If company *A* builds network facilities with stimulus money, and at some later time transfers the facilities to company *B*, which wants to use them for some other purpose, all of the above conditions nevertheless carry over.

Any disputes over the requirements are referred to the FCC for action based on “any FCC rules implicated in

the dispute.” Today, of course, there are none. An aggrieved party’s next stop is the funding agency, which may “exercise all available remedies to cure the default.” Vague threats are always the worst.

If the FCC maintains its disinclination to adopt actual rules on network neutrality, we will have the awkward situation of systems being subject to different requirements, depending on whether they were built with stimulus money or otherwise. A content provider that suspects discrimination would have to inquire into the origins and funding of the facilities used by the network in question. This will become difficult as various companies buy and sell and interconnect both publicly and privately funded networks, and even parts of networks, in ever-more-complex configurations. Worse, content moving from the provider to the end user may traverse both stimulus-funded and other facilities. Pinpointing where the discrimination occurs, for purposes of bringing a complaint, may well be impossible.

Many observers – this author included – think that the best solution is for the FCC to step up and do its job of requiring all broadband service providers, however funded, to treat content suppliers and end users evenhandedly. A good start would be simply to adopt as rules the four principles, plus two more from the stimulus list: no content discrimination, and mandatory disclosure of network management policies. Those of us favoring this view are surprised there might be any serious question that this is the right thing to do.



(Stimulus Overview - Continued from page 10)
available.

Who Gets the Money? A scoring system has been established by each program to measure how well the applications serve the purposes of the program and how likely they are to succeed. (See Jeff Gee’s article on page 4.) This is an attempt to make the selection process objective, though we note that the BTOP has an astonishing level of personal involvement by high level political appointees at NTIA at the back end of the award process – a design feature that does nothing to assuage fears that the awards may be based on political connections rather than merit. Perhaps to counteract that apprehension, applicants and their representatives are barred from any contact with the funding agencies while their applications are being considered (other than responding to formal notices).

In general, the programs have been set up to prioritize applicants who contribute more rather than less of their own money, who request a larger component of their

award as loan rather than grant, and who provide the greatest service to areas that currently have the least broadband access. This will require a challenging trade-off by applicants between getting the funds in the first place, ensuring the sustainability of their project, and risking as little of their own money and as much of the government’s as possible.

Post-Grant Accountability. The rules prescribe detailed monitoring and reporting requirements for award recipients to ensure that they are spending the money quickly and as promised. Any failures to meet promised performance can result in “deobligation” of the committed funds and other severe penalties. There are also restrictions on what you can do with the revenues you receive for a few years, and you must get permission to sell the system you have created. (See Joe Di Scipio’s article on page 6.)

All of this proves once again the adage that there is no free lunch, but that should not deter folks with a good plan from ordering up the menu.



(Geographic Areas - Continued from page 3)

BTOP – Not necessarily rural, but definitely unserved/underserved

If your project does not qualify for BIP funds, it may still qualify for BTOP funding. BTOP funds are also available for “last mile” and “middle mile” projects. The major difference between BIP and BTOP is that BIP is focused exclusively on **rural** unserved or underserved areas, while BTOP is focused upon unserved or underserved areas *whether or not* they happen to be “rural”. Thus, presumably, a census block consisting of a population density like that of Soho in Manhattan would qualify as long as it can be demonstrated that the census block is either unserved or underserved.

The most difficult eligibility criterion applicants will face is determining broadband service availability. Unfortunately, neither RUS nor NTIA has offered any advice on exactly how that determination will be made. The NTIA and RUS define broadband speed in any area as the speed advertised by the service provider, with the focus on the “least” advertised speed. But in real life, a network operator will offer peak speeds and average speeds, and may advertise speed ranges.

Moreover, a network operator’s service literature or contracts may provide that speeds lower than advertised may be experienced. Do such fine-print provisions establish or affect the operator’s “advertised speed”? Because neither NTIA nor RUS has addressed this issue, it’s hard to say. However, we believe it wise to ignore such fine-print qualifications on speed limits in this context. Rather, applicants should look instead to the slowest speed which the operator actually advertises, since that is the minimum a prospective customer (*i.e.*, somebody who does not have immediate access to service literature or formal access agreements) can expect.

Further complicating the speed issue is the pesky quirk

Do fine-print provisions establish or affect the operator’s “advertised speed”? It’s hard to say.

that wireless carriers tend to advertise speeds on a nationwide, rather than local market-by-market, basis. AT&T Mobility’s advertisement of dongle speeds illustrates this dilemma. In a press release dated June 4, 2008, AT&T announced new dongle download speeds of between 700 kbps and 1.7 Mbps and upload speeds between 500 kbps and 1.2 Mbps that will be available in “nearly 350 major metropolitan areas.” So what is the advertised minimum data speed in my particular PFSA? What defines the limits of a “metropolitan area” as AT&T uses that term? How is wireless coverage defined? Neither NTIA nor RUS has addressed these issues. Based upon our belief that those who guess wrong on the outcome of these issues will not get the benefit of the doubt, we suggest that applicants err on the conservative side.

As noted, the agencies will fund two different types of broadband infrastructure projects: “last mile” projects, in which service to end users or end user devices is the predominant use of the infrastructure; and “middle mile” projects, in which the infrastructure is used to support the last mile portion with point-to-point backhaul, special access, or some other transport infrastructure. The discussion above focused upon the areas where “last mile” facilities would be built. “Middle mile” projects must connect at least two points. For “middle mile” facilities to qualify for BIP funds, the proposed funded service area must be at least 75% rural and at least one terminus of the project must be within an area that is “unserved” or “underserved.” For BTOP funds, a “middle mile” project is eligible if at least one connection terminates in an underserved area.

All of these factors make the careful selection and definition of an applicant’s proposed service area a critical part of the process. Failure to meet the “rural” and “unserved” or “underserved” tests can result in either outright disqualification or less favorable consideration for your application. Accordingly, extreme caution should be exercised in the initial design of the proposed project to avoid being shut out at the starting gate.



(Dillon’s Rule - Continued from page 7)

declare it inoperative.

If you are a municipality, a county, a parish or a town with your eye on broadband stimulus money, I suggest that you closely review your authority to seek

out and use this money. If you are a commercial organization that is considering partnering with a local government to qualify for, or assure better access to, NTIA grants, I suggest that you look carefully at the authority of the local government partner to seek out and use this money.



(Post-Award Paperwork - Continued from page 6)

the first point of aggregation for last mile connection points like remote terminals and cable headends; (4) middle connection points; and (5) a list of community anchor institutions to which service is provided.

General Reporting Requirements – Both BIP and

BTOP awards (loans, grants, loan/grant combinations) are subject to all statutes and regulations regarding reporting on Recovery Act funds. Note that if Recovery Act funds are combined with other funds, awardees must account for the RUS or NTIA funds separately. The awardee and any subcontractor must report to the relevant agency: (1) the total amount of Recovery Act funds received; (2) the amount of those funds that were used or obligated to projects; (3) a detailed list of those projects (with specific reporting requirements); and (4) detailed information on any subcontracts or subgrants awarded by the awardee which must include the elements required to comply with the Federal Funding Accountability and Transparency Act of 2006 (register with the CCR database at <http://www.ccr.gov/>). Recovery Act

It will come as no surprise that unknown additional reporting requirements will be specified at the time the award is issued.

reports are due ten days after the end of the quarter in which the award was issued and each quarter thereafter until a final report is made at the end of three years. Failure to timely report could result in suspension of further payments until the awardee complies with reporting requirements. At this point, it will come as no surprise that unknown additional reporting requirements will be specified at the time the award is issued.

In addition to the general reporting requirements, there are also specific BTOP Broadband Infrastructure Awardees and Public Computer Center Awardees which we do not include here, but are available for review in the Notice of Funds Availability.

The bottom line here is that, like most everything else in life, cashing in on the stimulus program is a process that isn't over until the paperwork is done – and in this case, the paperwork will keep coming and coming for years after the award. Successful applicants must be ready to maintain fastidious records and be prepared to open those records up to the government at any time.



(EBS/BRS Renewals - Continued from page 8)

ago that in those overlapping situations, the licensees would divide equally the overlap area, which appears as a football shaped figure in diagrams. Under the Commission's latest ruling, though, the late filers would not be entitled to their half of the football. Half a football is normally better than none, but here none of a football is better than none, because at least the licensees get the service areas that do not overlap with anyone else.

The FCC also permitted those applicants who had neither constructed their stations nor timely filed for extensions of time to construct to file late-filed requests

for extension time, which it agreed to grant when filed.

Finally, the FCC also tied up loose ends for a handful of BRS licensees whose late-filed renewals had been petitioned against by Sprint-Nextel. Here too, the FCC dismissed the Sprint petitions on procedural grounds, freeing the licensees to proceed with build-outs and transitions of their markets. The FCC obviously decided that, legal niceties aside, it was better for the development of the BRS/EBS service to have these renewals finalized and a build-out accomplished by 2011 rather than putting the spectrum up for auction and waiting indefinitely for service to be provided.

Links? We've got your links . . . right here!!

Broadband Stimulus Links

Looking for more information about the broadband stimulus programs?

For a complete copy of the RUS/NTIA Notice of Funds Availability (NOFA), go to:

http://www.ntia.doc.gov/frnotices/2009/FR_BBNOFA_090702.pdf

To review the application form to be used for NOFA funding, go to:

http://broadbandusa.sc.egov.usda.gov/download_app.htm

For a broadband stimulus "Information Library" compiled by NTIA, go to:

http://broadbandusa.sc.egov.usda.gov/info_lib.htm

For continuing coverage of developments in the broadband stimulus program, go to:

www.commlawblog.com





(Stimulus Scoring - Continued from page 4)

broadband speeds that meet or exceed the benchmarks set for the type of service provided (e.g., wireline “last mile” projects must deliver at least 20 Mbps service to households).

- ☑ *Affordability of services offered* (1-5 points) – Up to five points given if the proposed rates are considered affordable for the target audience.
- ☑ *Choice of provider* (5 points) – Applications that propose to allow more than one provider to serve end users will receive five points.
- ☑ *Critical community facilities* (5 points) – Applications that propose to offer discounted rate packages to all “critical community facilities” in the proposed funded service area will receive five points.

Project Viability (25 Points)

- ☑ *Applicant’s organizational capability* (1-12 points) – RUS will evaluate past performance and accomplishments of the project’s management team and award points accordingly.
- ☑ *Community support* (2 points) – Community support for the project must be evidenced by letters of support are received from all communities in the proposed funded service area. To receive the two points, the letters must be from a “designated community leader” in each community.
- ☑ *Ability to promptly start project* (10 points) – Applicants must demonstrate that all licenses and regulatory approvals have been obtained, all required contractors and vendors are ready to enter into contracts, all required equity contributions have been made, and that the project timeline is reasonable.
- ☑ *Disadvantaged small businesses* (1 point) – Applicants that meet the definition of a socially and economically disadvantaged small business concern under Section 8(a) of the Small Business Administration will receive one point.

Project Budget and Sustainability (25 Points)

- ☑ *Reasonableness of the budget* (1-5 points) – Points awarded based on the clarity and reasonableness of the proposed budget.
- ☑ *Leverage of outside resources* (1-10 points) – Points awarded on a sliding scale based on the ratio of outside funding to requested BIP funding with

greater outside funding earning a greater number of points.

- ☑ *Extent of grant funding* (1-10 points) – Points awarded on a sliding scale based on ratio of funds requested in the form of grants to funds requested in the form of loans with loan funding favored over grant funding (e.g., zero points if grant funds make up 100% of the request and ten points if loan funds make up 100% of the request).

BTOP Evaluation Criteria

As noted above, BTOP’s purposes are slightly different from BIP’s purposes. In addition, as previously stated, BTOP funding will be distributed among three different project categories: Broadband Infrastructure, Public Computer Centers, and Sustainable Broadband Adoption Projects. As these projects have different goals

and priorities, the evaluation criteria differ for each category of project. Thus, although BTOP applications are evaluated on the same broad criteria as BIP applications (Project Purpose; Project Benefits; Project Viability; and Project Budget and Sustainability), the specific factors and weight given to each factor vary from BIP evaluations. In addition, the information provided thus far suggests that BTOP scoring may be less rigidly

structured than the BIP scoring system, with reviewers of BTOP applications having more latitude to weigh and balance factors within each criterion. As with BIP application, the highest scoring applications will proceed to more detailed analysis. Lower scoring applications will be rejected. Thus, as with BIP applications, applicants must ensure their applications fully address each of the following criteria.

Project Purpose (30 points) Applications will be judged with respect to how well the proposed project matches BTOP’s statutory purposes. In doing so, reviewers will consider:

- ☑ The project’s “fit” with BTOP statutory purposes;
- ☑ The level of collaboration with other Recovery Act and other governmental programs;
- ☑ The project’s ability to enhance service for health care, education, and children;
- ☑ Whether the applicant meets the definition of a socially and economically disadvantaged small busi-

Although BTOP applications are evaluated on the same broad criteria as BIP applications, the specific factors and weight given to each factor vary from BIP evaluations.

(Continued on page 15)



(Stimulus Scoring - Continued from page 14)

ness concern under section 8(a) of the Small Business Administration.

Project Benefits (25 points) The factors considered in reviewing project benefits vary according to the type of project being reviewed.

For Broadband Infrastructure “Last Mile” projects, factors include cost-effectiveness, performance of the offered service, affordability of services offered, and the degree to which the project meets nondiscrimination, interconnection, and choice of provider standards.

For Broadband Infrastructure “Middle Mile” projects, factors include the impact the project will have on the proposed service area, the level of need in that area, network capacity, the affordability of the services offered, and the degree to which the project meets nondiscrimination, interconnection, and choice of provider standards.

For Public Computer Center projects, factors include the degree to which the center will be available to the public, the training and educational programs to be offered, and the availability and qualifications of the proposed consulting and teaching staff.

For Sustainable Broadband Adoption projects, factors include the number of new broadband users that may be generated by the program, the projected cost per new user, and demonstrated innovation in methods to encourage sustainable broadband adoption.

Project Viability (25 points)

Technical feasibility. For Broadband Infrastructure and Computer Center projects, applications will be evaluated on the comprehensiveness and appropriateness of the proposed technical solutions and system designs. For Sustainable Broadband Adoption projects, the operational details of the project will be assessed.

Organizational capability. Reviewers will assess the experience and expertise of the project’s management team and applicant’s past history with similar projects.

Community involvement. Reviewers will examine whether the project proposes meaningful “linkages” with community organizations in the project area, with special emphasis on community anchor institutions, public safety organizations and socially and economically disadvantaged small business concerns.

Ability to promptly start project. Reviewers will evaluate whether required licenses and regulatory approvals have been obtained, whether required contractors and vendors are ready to enter into contracts, and whether the project timeline is reasonable.

Project Budget and Sustainability (20 points)

Reasonableness of the project budget. Applicants must be able to demonstrate that their proposed budgets are reasonable based on, among other things, the budget’s clarity, level of detail and appropriateness to the proposed project.

Sustainability of the project. Projects must be able to demonstrate that their projects are sustainable past the initial funding period. For Broadband Infrastructure and Computer Center projects, reviewers will consider business plans, market projections and other relevant data. For Sustainable Broadband Adoption projects, reviewers will consider whether the increases in broadband adoption rates will be sustained beyond the conclusion of the project.

Leverage of outside resources. All projects must meet a matching funds requirement of 20% of total project costs. Applicants must demonstrate the ability to provide, from non-federal sources, funds required to meet or exceed that 20% matching funds requirement unless a waiver of that requirement has been requested.

As noted above, applicants must be mindful of the scoring systems that will be used to evaluate BIP and BTOP applications. The evaluation of applications does not end with the scoring systems, however. Indeed, the scoring system is just the first stage of the overall grant process. In step two of the process, applicants are required to submit additional documentation to support the claims made in their initial applications. Thus, applicants should not attempt to “game” the scoring system by making unsupportable claims as to their projects’ purpose, benefits, viability or sustainability. Rather, applicants should seek to ensure that they have ample evidence that their projects match the statutory purposes and priorities of the funding programs. Doing so will require a considerable amount of time and effort. As less than a month remains until the August 14 deadline for first round funding, organizations interested in applying for funding should begin those efforts immediately.

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First Class

COMING NEXT YEAR: The *FHH Telecom Law* Digital Transition

Following the FCC's example in herding the public into a digital universe, we at *FHH Telecom Law* are planning to do the same in 2010. In an effort to reduce our carbon footprint and bring the news to our readers as quickly as possible (and in color!), we are going to stop distributing *FTL* in a paper edition. Instead, we will distribute it electronically. No firm date has been set yet, but we expect we will stop the paper edition sometime in the first quarter, 2010.

We already have an e-mailing list of several hundred subscribers. If you are among them, you need do nothing – your continued receipt of *FTL* is taken care of.



If, on the other hand, you are one of our several hundred subscribers who receive their monthly *FTL* fix on paper via snail mail, and if you wish to continue to receive *FTL* (and who wouldn't?), you will need to send us the email address(es) through which we can alert you to each month's edition. Just specify your preferred email address(es) in an email to cole@fhblaw.com; it *will be helpful if the subject line reads "FTL email address change"*.

As the FCC did in the DTV Transition, we will provide further warnings as the Big Day approaches – but we encourage you to act sooner rather than later to avoid any possible delivery interruption.