

such securities. However, she may invest the proceeds in a diversified mutual fund. See the definition of *permitted property* at § 2634.1003.

(b) *Internal Revenue Service reporting requirements.* An eligible person who elects to defer the recognition of capital gains from the sale of property pursuant to a Certificate of Divestiture must follow Internal Revenue Service rules for reporting the sale of the property and the reinvestment transaction.

**§ 2634.1007 Cases in which Certificates of Divestiture will not be issued.**

The Director of the Office of Government Ethics, in his or her sole discretion, may deny a request for a Certificate of Divestiture in cases where an unfair or unintended benefit would result. Examples of such cases include:

(a) *Employee benefit plans.* The Director will not issue a Certificate of Divestiture if the property is held in a pension, profit-sharing, stock bonus, or other employee benefit plan and can otherwise be rolled over into an eligible tax-deferred retirement plan within the 60-day reinvestment period.

(b) *Complete divestiture.* The Director will not issue a Certificate of Divestiture unless the employee agrees to divest all of the property that presents a conflict of interest, as well as other similar or related property that presents a conflict of interest under a Federal conflict of interest statute, regulation, rule, or Executive order. However, any property that qualifies for a regulatory exemption at 5 CFR part 2640 need not be divested for a Certificate of Divestiture to be issued.

*Example 1 to paragraph (b):* A Department of Agriculture employee owns shares of stock in Better Workspace, Inc. valued at \$25,000. As part of his official duties, the employee is assigned to evaluate bids for a contract to renovate office space at his agency. The Department's designated agency ethics official discovers that Better Workspace is one of the companies that has submitted a bid and directs the employee to sell his stock in the company. Because Better Workspace is a publicly traded security, the employee could retain up to \$15,000 of the stock under the regulatory exemption for interests in securities at 5 CFR 2640.202(a). He would be able to request a Certificate of Divestiture for the \$10,000 of Better Workspace stock that is not covered by the exemption. Alternatively, he could request a Certificate of Divestiture for the entire \$25,000 worth of stock. If he chooses to sell his stock down to an amount permitted under the regulatory exemption, the Office of Government Ethics will not issue additional Certificates of Divestiture if the value of the stock goes above \$15,000 again.

(c) *Property acquired under improper circumstances.* The Director will not issue a Certificate of Divestiture:

(1) If the eligible person acquired the property at a time when its acquisition was prohibited by statute, regulation, rule, or Executive order; or

(2) If circumstances would otherwise create the appearance of a conflict with the conscientious performance of Government responsibilities.

**§ 2634.1008 Public access to a Certificate of Divestiture.**

A Certificate of Divestiture issued pursuant to the provisions of this subpart is available to the public in accordance with the rules of § 2634.603 of this part.

[FR Doc. 04-17200 Filed 7-27-04; 8:45 am]

BILLING CODE 6345-02-P

## DEPARTMENT OF AGRICULTURE

### Rural Utilities Service

#### 7 CFR Part 1739

RIN 0572-AB94

#### Broadband Grant Program

**AGENCY:** Rural Utilities Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Rural Utilities Service (RUS) is publishing regulations to administer the Community Connect Grant Program for the provision of broadband transmission service in rural America. This final rule is intended to establish eligibility and application requirements, the review and approval process, and grant administration procedures for the Community Connect Grant Program.

**EFFECTIVE DATE:** July 28, 2004.

**FOR FURTHER INFORMATION CONTACT:** Roberta D. Purcell, Assistant Administrator, Telecommunications Program, Rural Utilities Service, STOP 1590, 1400 Independence Avenue SW., Washington, DC 20250-1590, Telephone (202) 720-9554, Facsimile (202) 720-0810. Email address: [Bobbie.Purcell@usda.gov](mailto:Bobbie.Purcell@usda.gov).

#### SUPPLEMENTARY INFORMATION:

##### Executive Order 12866

This final rule has been determined to be not significant for purposes of Executive Order 12866, and therefore has not been reviewed by the Office of Management and Budget (OMB).

##### Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance (CFDA) Program number assigned to the Community Connect Grant Program is 10.863. The Catalog is available on a subscription basis from

the Superintendent of Documents, the United States Government Printing Office, Washington, DC 20402-9325, telephone number (202) 512-1800.

##### Executive Order 12372

This program is not subject to the requirements of Executive Order 12372, "Intergovernmental Review of Federal Programs," as implemented under USDA's regulations at 7 CFR part 3015.

##### Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. RUS has determined that this final rule meets the applicable standards provided in section 3 of the 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 this 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, if any, must be exhausted before an action against the Department or its agencies may be initiated.

##### Executive Order 13132, Federalism

The policies contained in this final rule do not have any substantial direct effect on states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Nor does this final rule impose substantial direct compliance costs on state and local governments. Therefore, consultation with states is not required.

##### Regulatory Flexibility Certification

Pursuant to 5 U.S.C. 553(a)(2), this final rule related to grants is exempt from the rulemaking requirements of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), including the requirement to provide prior notice and an opportunity for public comment. Because this final rule is not subject to a requirement to provide prior notice and an opportunity for public comment pursuant to 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable.

##### Unfunded Mandates

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

### Environmental Impact Statement

This final rule has been examined under RUS environmental regulations at 7 CFR part 1794. The RUS Administrator has determined that this action is not a major Federal action significantly affecting the environment. Therefore, in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an Environmental Impact Statement or Assessment is not required.

### Information Collection and Recordkeeping Requirements

This rule contains no new reporting or recordkeeping burdens under OMB control number 0572-0127 that would require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

### Background

On July 8, 2002, RUS published a Notice of Funds Availability (“NOFA”) in the **Federal Register** (67 FR 45079) announcing its Community Connect pilot grant program for the provision of broadband transmission service in extremely rural, lower-income American communities. Initially, twenty million dollars in grant authority was made available to promote “community-oriented connectivity,” which would stimulate economic development and enhance educational and health care opportunities in rural areas through theretofore unavailable broadband transmission service. *See* Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Act of 2002, Public Law 107-76, Title III, *Distance Learning and Telemedicine Program (2001)*. In addition, a community center that would provide such service free to area residents for two years was required.

In response to the July 8, 2002, NOFA, RUS received more than 300 applications totaling more than \$185 million in funding requests. As part of a national competition, RUS reviewed the applications for eligibility and scored the applications according to the rurality of the project, the economic need of the project service area, and the “community-oriented-connectivity” benefits to be derived from the proposed service. On May 16, 2003, Secretary of Agriculture, Ann Veneman, announced the 40 highest scoring grants totaling \$20,184,642. This announcement fully utilized RUS’ 2002 appropriation.

Due to the overwhelming response to that NOFA, RUS had eligible applications on hand totaling more than the \$10 million appropriation received for Fiscal Year 2003. *See* Consolidated

Appropriations Resolution of 2003, Public Law 108-7, 117 Stat. 11, Title III, *Distance Learning and Telemedicine Program (2003)*. To eliminate the need for fully eligible applicants to resubmit applications during Fiscal Year 2003, RUS utilized its 2003 appropriation by funding eligible projects submitted in accordance with the July 8, 2002, NOFA. The 2003 grant announcements were made September 24, 2003.

For Fiscal Year 2004, \$9 million in grants will be made available through a national competition to applicants providing broadband transmission service on a “community-oriented connectivity” basis. *See* Consolidated Appropriations Act of 2004, Public Law 108-199, 118 Stat. 3, Title III, *Distance Learning and Telemedicine Program (2004)*.

To encourage “community-oriented connectivity,” RUS will provide grants to eligible applicants who will deploy broadband transmission service in rural communities where such service does not currently exist; who will connect all critical community facilities such as local schools, education centers, libraries, hospitals, health care providers, law enforcement agencies, public safety organizations, fire, and rescue services, as well as residents and businesses; and who will operate a community center which provides free and open access to area residents. Grants will be made available, on a competitive basis, for the deployment of broadband transmission services to critical community facilities, rural residents, and rural businesses and for the construction, acquisition, expansion, and/or operation of a community center which would provide free access to broadband transmission services to community residents for at least two years. Funding is also available for end-user equipment, software, and installation costs. A state-of-the-art community center will not only provide improved access but will aid rural residents in developing on-line businesses and will allow them to reap the benefits of Internet-based advanced placement courses and continuing adult education. Applications are limited to one project, as defined in this regulation. Applicants wishing to serve multiple projects must submit an application for each project.

On May 14, 2004, RUS published a proposed rule in the **Federal Register** (69 FR 26777) and received the following comments addressed below. RUS now is issuing the following final regulation to administer the program for Fiscal Year 2004.

The effective date for this regulation is based on two factors. First, the

program will essentially operate as it has been since the pilot phase. No significant changes have been made with the implementation of this regulation. Second, in an effort to expedite the application process this year, RUS believes that an “immediate” effective date is necessary in order to proceed with opening the application window to enable application processing and approval of grants during this fiscal year.

### Comments

*Comment:* Funding should be limited to only non-profit entities. The commenter stated that funding for profit companies subsidizes businesses that do not need funding.

*Response:* RUS believes that limiting funding to only non-profit organizations would inhibit the facilitation of broadband services in many small, rural communities. Where a qualified, for profit organization already exists, it would be burdensome to require a new non-profit organization to be established in order to seek financial assistance. All applicants must compete for funding on a national basis; the scoring criteria is designed to measure the needs and characteristics of the community and residents being served (income levels, population, and need for services), regardless of the type of entity proposing to provide them. In many rural areas, the existing telecommunications company may be the only viable option for promoting service in the most rural and economically challenged areas. Excluding these companies would therefore prohibit the expansion of broadband service to many isolated, rural communities where the utilization of debt financing is economically prohibitive.

*Comment:* The definition of broadband service (200 Kb/s in both directions) should be raised to 10Mb/s.

*Response:* RUS uses the Federal Communications Commission’s current definition of high-speed advanced services, which is 200 Kb/s upstream and down stream. RUS annually reviews this definition to determine if changes are necessary. Nothing would prohibit an applicant from offering higher speeds.

*Comment:* Clarification was requested on the definition of “Service Area”; the commenter was unsure if two towns separated by only a few miles could be combined into one service area.

*Response:* RUS believes that the definition is clear. It states: Service Area means a *single* [emphasis added]

Community \* \* \*. The definition of Community states: Community means any incorporated or unincorporated town, village, or borough recognized in the U.S. Census in a Rural Area.

Therefore, only one Census recognized community (town, village, etc.) is eligible per application. Two or more Census recognized communities, regardless of their proximity to one another cannot be combined. However, unincorporated areas or locally recognized communities, NOT recognized in the Census, that are contiguous to the eligible Census community can be included.

*Comment:* Concern was expressed over the exclusion of funding for facilities that would duplicate existing services; the commenter stated this provision would protect incumbent telecommunications companies and prohibit another entity from providing service. The commenter believes that this is contrary to the intent of the program.

*Response:* The purpose of the program is clearly stated in § 1739.1: "RUS will give priority to rural areas that it believes have the greatest need for broadband transmission services." Those areas would be areas without broadband service. If an incumbent local exchange carrier (ILEC) is currently providing service that meets the definition of broadband, there is no need to finance a competing entity using grant funds; RUS has other loan programs that offer financing for competitive local exchange carrier (CLEC) purposes. Grant funding is a very scarce, limited Federal resource. Grant funds in this program are specifically targeted to areas where no broadband service exists. In a community where an ILEC is not providing broadband, grant funding is available; however, the grantee may not duplicate the ILEC's voice service.

*Comment:* When calculating the "rurality" of the project, differing demographics such as population dispersion and proximity to other towns should be considered.

*Response:* In order to fairly score an application, objective scoring criteria should be based on verifiable, widely available data. The legislation authorizing this program defines the eligible population area as being 20,000 or less. Therefore, we have to consider population data. There are other ways to approximate the rurality of an area, but they all have inequities and some are difficult to consistently and fairly measure. By allowing the applicant to define their own limits of the "service area," RUS believes it has provided flexibility to design broadband systems

that can serve the widest practical number of rural residents, yet still be a sustainable project.

*Comment:* Awards should be based on the needs of the communities.

*Response:* RUS agrees. Community need is one of the scoring criteria on which awards are made. In addition, the other two scoring criteria are a reflection of the community itself (size measured in "rurality" and economic need measured by the community's per capita personal income).

*Comment:* Too much emphasis is being placed on required documentation of local community support for the proposed broadband services (such as town meetings, market surveys, etc.).

*Response:* Local community support is a key component of this program. This is a unique approach designed to engage an entire community in its implementation and provide a holistic methodology for the deployment of broadband services. As such, applicants must provide documentation that ensures that the proposed services are desired and will be utilized in ways which best meet the community's needs. In addition, experience has proven that the higher the level of involvement from the local community, the more successful and sustainable the project tends to be. That is why it is important for applicants to adequately document their community's involvement in the project.

*Comment:* Grant size to any one applicant should be limited.

*Response:* Individual community infrastructure needs vary greatly from one community to the next. For that reason, RUS chose not to limit the size of the grant to any applicant, since the applicant is required to provide service to the entire community. In addition, RUS reserves the right to review and adjust all project costs and expenditures if necessary to ensure that funds are utilized prudently.

*Comment:* There was concern expressed over the requirement for an engineering design to be submitted with the application; the commenter believes that RUS is requiring a design to be prepared by an engineering firm or consultant and suggested that the engineering design for the project not be required with the application.

*Response:* An engineering design is a critical component of the application. It provides RUS with assurance that the applicant has the ability to construct the system as proposed and deliver the proposed services. The engineering design must be satisfactory to RUS but does not have to be prepared by an outside engineering firm; the design can be prepared internally.

*Comment:* Recommendation to adjust the maximum number of computers required for the community center to less than one percent of the population of the community; the commenter supported a minimum of ten computers per center.

*Response:* There is no "minimum percentage;" applicants are only required to have a minimum of ten Computer Access Points in the community center.

*Comment:* Applicants should be allowed to bundle local exchange telecommunications service with broadband service to help subsidize cost of broadband service.

*Response:* In order to most efficiently utilize scarce grant resources, the grant funds are specifically targeted to provide facilities for the delivery of broadband services where such services do not currently exist; they are not intended to be utilized to replace existing services, such as voice access. This non-duplication policy ensures that funding will be utilized in the most effective manner.

*Comment:* Recommendation that RUS require proof from the companies that claim to provide broadband service in a proposed area; the commenter is concerned about inaccurate claims on the availability of broadband service.

*Response:* In the grant program, the applicant must certify that broadband service does not currently exist in the proposed service area. This should eliminate inaccurate claims from existing service providers. In addition, before awarding funds, RUS will verify the certification of the applicant through site visits to ensure that broadband service does not exist.

*Comment:* Recommendation to increase the population eligibility level from 20,000 to 50,000 inhabitants.

*Response:* The program is statutorily required to limit funding to communities of 20,000 inhabitants or fewer by the appropriations bill which authorized the funding under the Distance Learning and Telemedicine program.

*Comment:* Consideration should be given for the state of Alaska's unique geographic and demographic circumstances, regarding populations and remoteness, with regard to the definition of community; the scoring criteria for need; the types of services covered; and provision of "free" service to critical community facilities.

*Response:* When implementing a nationally competitive grant program, standards must be set that attempt to treat every applicant as equally as possible. In establishing the scoring criteria and weights for each criterion,

RUS took into consideration measures that it believes offers an equal chance to each applicant without regard to specific geographic location. While two of the measures are objective (rurality and income levels), the third measure is subjective (benefit and need). This subjective measure allows for applicant's to explain the unique issues they are facing and points are awarded based on the application's ability to address those issues and produce benefits.

*Comment:* Recommendation to include, as eligible for financing, "extremely rural" service areas that are not recognized by the Census even if the applicant is not proposing to serve one census recognized community.

*Response:* In a competitive grant program, it is necessary to have consistent, well defined criteria that ensure that all applicants are treated equally. In doing so, RUS chose to define communities as those recognized by the Census. This enables RUS to verify the population and income levels for each applicant using a neutral, well defined source. This ensures competitive fairness among all applicants and eliminates inaccurate service territory information. RUS encourages the inclusion of non-Census recognized communities that are contiguous to the applicant's Census recognized service territory.

*Comment:* In lieu of providing a community center with free access to services for two years, allow for a free computer and broadband service to residents' homes for at least two years.

*Response:* This would undermine the community-oriented connectivity concept, which is key to the program's goal. The community center will facilitate broadband initiatives and provide the necessary training and computer skills to those residents that are seeking them. It will also provide a long-term, low cost means of access beyond two years to those residents that cannot afford service at home. In addition, free home access would strain an applicant's sustainability, since revenues from residential access would be used to support the system and its ability to provide free access to critical community facilities.

#### List of Subjects in 7 CFR 1739

Broadband; Grant programs—Communications; Rural Areas; Telecommunications; and Telephone.

■ For reasons set forth in the preamble, RUS amends Chapter XVII of title 7 of the Code of Federal Regulations by adding part 1739 as follows:

### PART 1739—BROADBAND GRANT PROGRAM

#### Subpart A—Community Connect Grant Program

Sec.

1739.1 Purpose.

1739.2 Funding availability and application dates and addresses.

1739.3 Definitions.

1739.4–1739.9 [Reserved]

1739.10 Eligible applicant.

1739.11 Eligible project.

1739.12 Eligible grant purposes.

1739.13 Ineligible grant purposes.

1739.14 Matching contributions.

1739.15 Completed application.

1739.16 Review of grant applications.

1739.17 Scoring of applications.

1739.18 Grant documents.

1739.19 Reporting and oversight requirements.

1739.20 Audit requirements.

1739.21 OMB control number.

#### Subpart B [Reserved]

**Authority:** Title III, Pub. L. 108–199, 118 Stat. 3.

#### Subpart A—Community Connect Grant Program

##### § 1739.1 Purpose.

(a) The provision of broadband transmission service is vital to the economic development, education, health, and safety of rural Americans. The purpose of the Community Connect Grant Program is to provide financial assistance in the form of grants to eligible applicants that will provide, on a "community-oriented connectivity" basis, broadband transmission service that fosters economic growth and delivers enhanced educational, health care, and public safety services. RUS will give priority to rural areas that it believes have the greatest need for broadband transmission services, based on the criteria contained in this subpart.

(b) Grant authority will be used for the deployment of broadband transmission service to extremely rural, lower-income communities on a "community-oriented connectivity" basis. The "community-oriented connectivity" concept will stimulate practical, everyday uses and applications of broadband by cultivating the deployment of new broadband transmission services that improve economic development and provide enhanced educational and health care opportunities in rural areas. Such an approach will also give rural communities the opportunity to benefit from the advanced technologies that are necessary to achieve these goals.

##### § 1739.2 Funding availability and application dates and addresses.

(a) RUS will publish, annually in the **Federal Register**, a Notice of Funds Availability (hereinafter "NOFA") that will set forth the total amount of funding available; the maximum and minimum funding for each grant; the application submission dates; and the appropriate addresses and agency contact information. The NOFA will also outline and explain the procedures for submission of applications, including electronic submissions. RUS may publish more than one NOFA should additional funding become available.

(b) Notwithstanding paragraph (a) of this section, RUS may, in response to a surplus of qualified eligible applications which could not be funded from the previous fiscal year, decline to publish a NOFA for the following fiscal year and fund said applications without further public notice.

##### § 1739.3 Definitions.

As used in this subpart:

*Bandwidth* means the capacity of the radio frequency band or physical facility needed to carry the Broadband Transmission Service.

*Basic Broadband Transmission Service* means the broadband transmission service level provided by the applicant at the lowest rate or service package level for residential or business customers, as appropriate, provided that such service meets the requirements of this part.

*Broadband Transmission Service* means providing an information-rate equivalent to at least 200 kilobits/second in the consumer's connection to the network, both from the provider to the consumer (downstream) and from the consumer to the provider (upstream).

*Community* means any incorporated or unincorporated town, village, or borough recognized in the U.S. Census in a Rural Area.

*Community Center* means a public building, or a section of a public building with at least ten (10) Computer Access Points, that is used for the purposes of providing free access to and/or instruction in the use of broadband Internet service, and is of the appropriate size to accommodate this purpose. The community center must be open and accessible to area residents before, during, and after normal working hours and on Saturday or Sunday. Examples of facilities that may be partially used for the described purposes include school, library, or city hall.

*Computer Access Point* means a new computer terminal with access to Basic Broadband Transmission Service.

*Critical Community Facilities* means every public school or education center, public library, public medical clinic, public hospital, community college, public university, or law enforcement, fire and ambulance stations in the proposed Service Area.

*Eligible Applicant* shall have the meaning as set forth in § 1739.10.

*Eligible Grant Purposes* shall have the meaning as set forth in § 1739.12.

*End-User Equipment* means computer hardware and software, audio or video equipment, computer network components, telecommunications terminal equipment, inside wiring, interactive video equipment, or other facilities required for the provision and use of Broadband Transmission Service.

*Matching Contribution* means the applicant's qualified contribution to the Project, as outlined in § 1739.14.

*Project* means the applicant's proposed Basic Broadband Transmission Service financed by the grant and Matching Contribution for the proposed Service Area.

*Rural Area* means any area of the United States not included within the boundaries of any incorporated or unincorporated city, village, or borough having a population in excess of 20,000 inhabitants.

*RUS* means the Rural Utilities Service, an agency of the United States Department of Agriculture, which is part of the Rural Development Utilities Program.

*Service Area* means a single Community, and may include the unincorporated areas or locally recognized communities, not recognized in the U.S. Census, located outside and contiguous to the Community's boundaries, in which the applicant proposes to provide Broadband Transmission Service.

*Spectrum* means a defined band of frequencies that will accommodate the Broadband Transmission Service.

*Telecommunications Terminal Equipment* means the assembly of telecommunications equipment at the end of a circuit or path of a signal, including but not limited to facilities that receive or transmit over-the-air broadcast, satellite, and microwave, normally located on the premises of the end user, that interfaces with telecommunications transmission facilities, and that is used to modify, convert, encode, or otherwise prepare signals to be transmitted via such telecommunications facilities, or that is used to modify, reconvert, or carry signals received from such facilities, the

purpose of which is to accomplish the goal for which the circuit or signal was established.

*USDA* means the United States Department of Agriculture.

#### **§§ 1739.4–1739.9 [Reserved]**

#### **§ 1739.10 Eligible applicant.**

To be eligible for a grant, the applicant must:

(a) Be legally organized as an incorporated organization, an Indian tribe or tribal organization, as defined in 25 U.S.C. 450b(b) and (c), a state or local unit of government, or other legal entity, including cooperatives or private corporations or limited liability companies organized on a for-profit or not-for-profit basis.

(b) Have the legal capacity and authority to own and operate the broadband facilities as proposed in its application, to enter into contracts and to otherwise comply with applicable federal statutes and regulations.

#### **§ 1739.11 Eligible project.**

To be eligible for a grant, the Project must:

(a) Serve a Rural Area where Broadband Transmission Service does not currently exist, to be verified by RUS prior to the award of the grant;

(b) Serve one Community recognized in the latest U.S. Census. Additional communities located in the contiguous areas outside the Community's boundaries that are not recognized (due to size) in the U.S. Census, can be included in the applicant's proposed Service Area, but must be supported by documentation, acceptable to RUS, as to their existence;

(c) Deploy Basic Broadband Transmission Service, free of all charges for at least 2 years, to all Critical Community Facilities located within the proposed Service Area;

(d) Offer Basic Broadband Transmission Service to residential and business customers within the proposed Service Area; and

(e) Provide a Community Center with at least ten (10) Computer Access Points within the proposed Service Area, and make Broadband Transmission Service available therein, free of all charges to users for at least 2 years.

#### **§ 1739.12 Eligible grant purposes.**

Grant funds may be used to finance:

(a) The construction, acquisition, or leasing of facilities, including spectrum, to deploy Broadband Transmission Service to all participating Critical Community Facilities and all required facilities needed to offer such service to residential and business customers

located within the proposed Service Area;

(b) The improvement, expansion, construction, or acquisition of a Community Center that furnishes free access to broadband Internet service, provided that the Community Center is open and accessible to area residents before, during, and after normal working hours and on Saturday or Sunday. Grant funds provided for such costs shall not exceed the greater of five percent (5%) of the grant amount requested or \$100,000;

(c) End-User Equipment needed to carry out the Project;

(d) Operating expenses incurred in providing Broadband Transmission Service to Critical Community Facilities for the first 2 years of operation and in providing training and instruction. Salary and administrative expenses will be subject to review, and may be limited by RUS for reasonableness in relation to the scope of the Project; and

(e) The purchase of land, buildings, or building construction needed to carry out the Project.

#### **§ 1739.13 Ineligible grant purposes.**

(a) Grant funds may not be used to finance the duplication of any existing Broadband Transmission Service provided by another entity.

(b) Facilities financed with grant funds cannot be utilized, in any way, to provide local exchange telecommunications service to any person or entity already receiving such service.

#### **§ 1739.14 Matching contributions.**

(a) The grant applicant must contribute a Matching Contribution which is at least fifteen percent (15%) of the grant amount requested and shall be in the form of:

(1) Cash for eligible grant purposes.

(2) In-kind contributions for purposes that could have been financed with grant funds under this part. In-kind contributions must be new or non-depreciated assets with established monetary values. Manufacturers' or service providers' discounts shall not be considered as a Matching Contribution.

(3) The rental value of space provided within an existing Community Center, provided that the space is provided free of charge to the applicant, for the first 2 years of operation.

(4) Salary expenses incurred for the individual(s) operating the Community Center, for the first 2 years of operation.

(5) Expenses incurred in operating the Community Center, for the first 2 years of operation.

(b) Costs incurred by the applicant, or by others on behalf of the applicant, for

facilities, installed equipment, or other services rendered prior to submission of a completed application shall not be considered as an Eligible Grant Purpose or Matching Contribution.

(c) Rental values of space provided must be substantiated by rental agreements documenting the cost of space of a similar size in a similar location.

(d) Rental values, salaries, and other expenses incurred in operating the Community Center will be subject to review by RUS for reasonableness in relation to the scope of the Project.

(e) Any financial assistance from federal sources shall not be considered as a Matching Contribution unless there is a federal statutory exception specifically authorizing the federal financial assistance to be considered as such.

#### **§ 1739.15 Completed application.**

A completed application must include the following documentation, studies, reports and information in form satisfactory to RUS. Applications should be prepared in conformance with the provisions of this part and applicable USDA regulations including 7 CFR parts 3015, 3016, and 3019. Applicants must use the RUS Application Guide for this program, found at <http://www.usda.gov/rus/telecom/> containing instructions and all necessary forms, as well as other important information, in preparing their application. Completed applications must include the following:

(a) *An Application for Federal Assistance.* A completed Standard Form 424.

(b) *An executive summary of the Project.* The applicant must provide RUS with a general project overview that addresses the following categories:

- (1) A description of why the Project is needed;
- (2) A description of the applicant;
- (3) An explanation of the total Project cost;
- (4) A general overview of the broadband telecommunications system to be developed, including the types of equipment, technologies, and facilities to be used;

(5) Documentation describing the procedures used to determine the unavailability of existing Broadband Transmission Service; and

(6) A description of the participating Critical Community Facilities.

(c) *Scoring criteria documentation.* Each grant applicant must address and provide documentation on how it meets each of the scoring criteria detailed in § 1739.17.

(d) *System design.* The applicant must submit a system design that contains the following, satisfactory to RUS:

(1) A narrative discussing the proposed Community Center, all costs of the Project, all existing and proposed facilities that are a part of the Project, the services to be provided by the Project, and the proposed Service Area;

(2) Engineering design studies providing an economical and practical engineering design of the Project, including a detailed description of the facilities to be funded, technical specifications, data rates, and costs; and

(3) A map of the proposed Service Area reflecting the proposed location of the Community Center and all participating Critical Community Facilities.

(e) *Scope of work.* The scope of work must include, at a minimum:

(1) The specific activities and services to be performed under the Project;

(2) Who will carry out the activities and services;

(3) The time-frames for accomplishing the Project objectives and activities; and

(4) A budget for all capital and administrative expenditures reflecting the line item costs for Eligible Grant Purposes, the Matching Contribution, and other sources of funds necessary to complete the Project.

(f) *Community-Oriented Connectivity Plan.* The applicant must provide a Community-Oriented Connectivity Plan consisting of the following:

(1) A listing of all participating Critical Community Facilities to be connected. For those Critical Community Facilities in the Service Area which will not be included in the Project, an explanation of why they are not being included should be provided. The applicant must also provide documentation that it has consulted with agents of all Critical Community Facilities in the Service Area, and must provide statements as to their willingness to participate, or not to participate, in the proposed Project;

(2) A description of the services available to local residents through the use of the Community Center;

(3) A listing of the proposed Telecommunications Terminal Equipment, telecommunications transmission facilities, data terminal equipment, interactive video equipment, computer hardware and software systems, and components that process data for transmission via telecommunications, computer network components, communication satellite ground station equipment, or any other elements of the Project designed to further the deployment and use of Broadband Transmission Service, that the applicant intends to build or fund using RUS grant funds and the Matching Contribution; and

(4) If other telecommunications carriers (including interexchange carriers, cable television operators, enhanced service providers, providers of satellite services and telecommunications equipment manufacturers and distributors) are participating in the delivery of services, a description of the consultations and the anticipated role of such providers in the proposed Project.

(g) *Financial information and sustainability.* The applicant must provide a narrative description demonstrating the sustainability of the Project during the first two years and after completion and the sufficiency of resources and expertise necessary to undertake and complete the Project. The following financial information is required:

(1) Certified financial statements, if available; otherwise, the most current income statement and balance sheet for existing operations; and

(2) *Pro forma* financial information for 5 years, evidencing the sustainability of the Project.

(h) *A statement of experience.* Information on the owners' and principal employees' relevant work experience that would ensure the success of the Project. The applicant must provide a written narrative describing its demonstrated capability and experience, if any, in operating a broadband telecommunications system.

(i) *Evidence of legal authority and existence.* The applicant must provide evidence of its legal existence and authority to enter into a grant agreement with RUS and to perform the activities proposed under the grant application.

(j) *Funding commitment from other sources.* If the Project requires additional funding from other sources in addition to the RUS grant, the applicant must provide evidence that funding agreements have been obtained to ensure completion of the Project.

(k) *Compliance with other federal statutes.* The applicant must provide evidence of compliance with other federal statutes and regulations, including, but not limited to the following:

(1) 7 CFR part 15, subpart A—Nondiscrimination in Federally Assisted Programs of the Department of Agriculture—Effectuation of Title VI of the Civil Rights Act of 1964.

(2) 7 CFR part 3015—Uniform Federal Assistance Regulations.

(3) 7 CFR part 3017—Governmentwide Debarment and Suspension (Non-procurement).

(4) 7 CFR part 3018—New Restrictions on Lobbying.

(5) 7 CFR part 3021—Governmentwide Requirements for Drug-Free Workplace (Financial Assistance).

(6) Certification regarding Architectural Barriers.

(7) Certification regarding Flood Hazard Precautions.

(8) An environmental report, in accordance with 7 CFR part 1794.

(9) Certification that grant funds will not be used to duplicate lines, facilities, or systems providing Broadband Transmission Service.

(10) Federal Obligation Certification on Delinquent Debt.

#### **§ 1739.16 Review of grant applications.**

(a) All applications for grants must be delivered to RUS at the address and by the date specified in the NOFA (*see* § 1739.2) to be eligible for funding. RUS will review each application for conformance with the provisions of this part. RUS may contact the applicant for additional information or clarification.

(b) Incomplete applications as of the deadline for submission will not be considered. If an application is determined to be incomplete, the applicant will be notified in writing and the application will be returned with no further action.

(c) Applications conforming with this part will then be evaluated competitively by a panel of RUS employees selected by the Administrator of RUS, and will be awarded points as described in the scoring criteria in § 1739.17. Applications will be ranked and grants awarded in rank order until all grant funds are expended.

(d) Regardless of the score an application receives, if RUS determines that the Project is technically or financially infeasible, RUS will notify the applicant, in writing, and the application will be returned with no further action.

#### **§ 1739.17 Scoring of applications.**

(a) All eligible applications will receive points for the following scoring criteria:

- (1) The rurality of the Project (up to 40 points);
- (2) The economic need of the Project's Service Area (up to 30 points); and
- (3) The "community-oriented connectivity" benefits derived from the proposed service (up to 30 points).

(b) Scoring criteria:

(1) *The rurality of the project*—up to 40 points.

(i) This criterion will be used to evaluate the rurality of the Community served by the Project, in accordance with the following method of scoring.

Rurality shall be determined by the 2000 population data contained in the U.S. Bureau of the Census at <http://factfinder.census.gov>. The following categories are used in the evaluation of rurality:

(A) Level 1 means any Community having a population of less than 500 inhabitants.

(B) Level 2 means any Community having a population of at least 500 and not in excess of 1,000 inhabitants.

(C) Level 3 means any Community having a population over 1,000 and not in excess of 2,000 inhabitants.

(D) Level 4 means any Community having a population over 2,000 and not in excess of 3,000 inhabitants.

(E) Level 5 means any Community having a population over 3,000 and not in excess of 4,000 inhabitants.

(F) Level 6 means any Community having a population over 4,000 and not in excess of 5,000 inhabitants.

(G) Level 7 means any Community having a population over 5,000 and not in excess of 10,000 inhabitants.

(H) Level 8 means any Community having a population over 10,000 and not in excess of 20,000 inhabitants.

(ii) Each application will receive points based on the location of the facilities financed using the definitions in paragraphs (b)(1)(i)(A) through (H) of this section.

(A) For a Service Area that includes a Level 1 Community, it will receive 40 points.

(B) For a Service Area that includes a Level 2 Community, it will receive 35 points.

(C) For a Service Area that includes a Level 3 Community, it will receive 30 points.

(D) For a Service Area that includes a Level 4 Community, it will receive 25 points.

(E) For a Service Area that includes a Level 5 Community, it will receive 20 points.

(F) For a Service Area that includes a Level 6 Community, it will receive 15 points.

(G) For a Service Area that includes a Level 7 Community, it will receive 10 points.

(H) For a Service Area that includes a Level 8 Community, it will receive 5 points.

(2) *The economic need of the Project Service Area*—up to 30 points.

(i) This criterion will be used to evaluate the economic need of the Service Area. Applicants must utilize the per capita personal income for the Community serviced, as determined by the U.S. Bureau of the Census at <http://factfinder.census.gov>. Applicants will be awarded points as outlined below for

service provided in the Community where the per capita personal income (PCI) is less than 70 percent of the national average per capita personal income (NAPCI):

(A) PCI is 75 percent or greater of NAPCI; 0 points;

(B) PCI is less than 75 percent and greater than or equal to 70 percent of NAPCI; 5 points;

(C) PCI is less than 70 percent and greater than or equal to 65 percent of NAPCI; 10 points;

(D) PCI is less than 65 percent and greater than or equal to 60 percent of NAPCI; 15 points;

(E) PCI is less than 60 percent and greater than or equal to 55 percent of NAPCI; 20 points;

(F) PCI is less than 55 percent and greater than or equal to 50 percent of NAPCI; 25 points;

(G) PCPI is less than 50 percent of NAPCI; 30 points;

(ii) [Reserved]

(3) *The "community-oriented connectivity" benefits derived from the proposed service*—up to 30 points.

(i) This criterion will be used to score applications based on the documentation in support of the need for services, benefits derived from the services proposed by the Project, and local community involvement in planning and implementation of the Project. Applicants may receive up to 30 points for documenting the need for services and benefits derived from service as explained in this section.

(ii) RUS will consider:

(A) The extent of the applicant's documentation explaining the economic, education, health care, and public safety issues facing the community and the applicant's proposed plan to address these challenges on a community-wide basis;

(B) The extent of the Project's planning, development, and support by local residents, institutions, and community facilities will be considered. This includes evidence of community-wide involvement, as exemplified in community meetings, public forums, and surveys. In addition, applicants should provide evidence of local residents' participation in the Project planning and development;

(C) The extent to which the Community Center will be used for instructional purposes including Internet usage, Web-based curricula, and Web page development; and

(D) Web-based community resources enabled or provided by the applicant, such as community bulletin boards, directories, and public web-hosting.



**§ 1739.18 Grant documents.**

The terms and conditions of grants shall be set forth in grant documents prepared by RUS. The documents shall require the applicant to own all equipment and facilities financed by the grant. Among other matters, RUS may prescribe conditions to the advance of funds that address concerns regarding the Project feasibility and sustainability. RUS may also prescribe terms and conditions applicable to the construction and operation of the Project and the delivery of Broadband Transmission Service to Rural Areas, as well as other terms and conditions applicable to the individual Project.

**§ 1739.19 Reporting and oversight requirements.**

(a) A project performance activity report will be required of all recipients on an annual basis until the Project is complete and the funds are expended by the applicant. Recipients are to submit an original and one copy of all project performance reports, including, but not limited to, the following:

(1) A comparison of actual accomplishments to the objectives established for that period;

(2) A description of any problems, delays, or adverse conditions which have occurred, or are anticipated, and which may affect the attainment of overall Project objectives, prevent the meeting of time schedules or objectives, or preclude the attainment of particular Project work elements during established time periods. This disclosure shall be accompanied by a statement of the action taken or planned to resolve the situation; and

(3) Objectives and timetable established for the next reporting period.

(b) A final project performance report must be provided by the recipient. It must provide an evaluation of the success of the Project in meeting the objectives of the program. The final report may serve as the last annual report.

(c) RUS will monitor recipients, as it determines necessary, to assure that Projects are completed in accordance with the approved scope of work and that the grant is expended for Eligible Grant Purposes.

(d) Recipients shall diligently monitor performance to ensure that time schedules are being met, projected work within designated time periods is being accomplished, and other performance objectives are being achieved.

**§ 1739.20 Audit requirements.**

A grant recipient shall provide RUS with an audit for each year, beginning

with the year in which a portion of the financial assistance is expended, in accordance with the following:

(a) If the recipient is a for-profit entity, an existing Telecommunications or Electric Borrower with RUS, or any other entity not covered by the following paragraph, the recipient shall provide an independent audit report in accordance with 7 CFR part 1773, "Policy on Audits of RUS Borrowers."

(b) If the recipient is a State or local government, or non-profit organization, the recipient shall provide an audit in accordance with 7 CFR part 3052, "Audits of States, Local Governments, and Non-Profit Organizations."

**§ 1739.21 OMB control number.**

The information collection requirements in this part are approved by the Office of Management and Budget (OMB) and assigned OMB control number 0572-0127.

**Subpart B—[Reserved]**

Dated: July 16, 2004.

**Hilda Gay Legg,**

*Administrator, Rural Utilities Service.*

[FR Doc. 04-17105 Filed 7-27-04; 8:45 am]

**BILLING CODE 3410-15-P**

**DEPARTMENT OF JUSTICE****8 CFR Parts 1001, 1003, 1103, 1239 and 1287**

**[EOIR No. 139I; AG Order No. 2728-2004]**

**RIN 1125-AA43**

**Executive Office for Immigration Review; Definitions; Fees; Powers and Authority of DHS Officers and Employees in Removal Proceedings**

**AGENCY:** Executive Office for Immigration Review, Department of Justice.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** This rule amends regulations relating to the Executive Office for Immigration Review to conform with certain regulatory changes made by the Department of Homeland Security (DHS) for consistency and clarity. This rule makes no substantive changes in the Department of Justice regulations, but makes appropriate revisions to the definitions and fee provisions and the regulations relating to issuance of notices to appear and subpoenas in the EOIR regulations, in order to avoid confusing and unnecessary duplication of provisions already set forth in the DHS regulations. Finally, this rule

makes a necessary technical change to an existing regulation.

**DATES:** *Effective date:* This interim rule is effective on July 28, 2004.

*Comment date:* Written comments must be submitted on or before August 27, 2004.

**ADDRESSES:** Please submit written comments to Kevin Chapman, Acting General Counsel, Executive Office for Immigration Review, Office of the General Counsel, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041. To ensure proper handling, please reference RIN No. 1125-AA43 on your correspondence. You may view an electronic version of this interim rule at [www.regulations.gov](http://www.regulations.gov). You may also comment via the Internet to EOIR at [eoir.regs@usdoj.gov](mailto:eoir.regs@usdoj.gov) or by using the [www.regulations.gov](http://www.regulations.gov) comment form for this regulation. When submitting comments electronically, you must include RIN No. 1125-AA43 in the subject box.

**FOR FURTHER INFORMATION CONTACT:**

Kevin Chapman, Acting General Counsel, Executive Office for Immigration Review, Office of the General Counsel, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041, telephone (703) 305-0470.

**SUPPLEMENTARY INFORMATION:****Background**

On November 25, 2002, the President signed into law the Homeland Security Act of 2002 (HSA) creating the new Department of Homeland Security (DHS) and transferring the functions of the former Immigration and Naturalization Service (INS) to the Department of Homeland Security. Public Law 107-296, tit. IV, subtit. D, E, F, 116 Stat. 2135, 2192 (Nov. 25, 2002). The Attorney General retained the functions of the Executive Office for Immigration Review (EOIR) in the Department of Justice. HSA section 1101, 116 Stat. at 2273.

In order to implement the transfer of functions under the HSA, the Attorney General reorganized title 8 of the Code of Federal Regulations and divided the regulations into chapters relating to the functions of the then-INS (chapter I) and the functions of EOIR (chapter V). 68 FR 9824 (Feb. 28, 2003); *see also* 68 FR 10349 (March 5, 2003). The Attorney General transferred appropriate parts, subparts and sections of the regulations, and duplicated other parts, subparts and sections, to ensure continuity in the regulations pertaining to EOIR, while making the appropriate division of authority under the HSA. The Secretary of Homeland Security has since issued two regulations amending 8 CFR