

- An entity to which a loan or grant is made shall not use the support to overbuild or duplicate expansion efforts made by an entity that has received a broadband loan from RUS; and
- The RUS shall adhere to the notice, report, and service area assessment requirements set forth in 7 U.S.C. §§ 950bb(d)(5), (8), and (10).²

In response to the NOI, which seeks input on implementing these criteria, ACA comments on the first two of the three issues raised in the NOI: (1) the question of how “sufficient access” to 10/1 Mbps broadband service by households is to be determined, and (2) the question of how to collect accurate data about whether broadband service is already available in an area.³

In Awarding Support for the Program, RUS Should Abide by Two Overriding Principles: Prevent Overbuilding of Existing Broadband Providers and Coordinate with Other Federal Agencies’ Broadband Support Programs

Before commenting on two of the issues raised in the NOI, ACA believes the RUS should recognize that, while the Program gives it a unique and tremendous opportunity to bring broadband service to unserved areas, the Program’s success relies on RUS abiding by two overriding principles – prevent overbuilding of existing broadband providers⁴ and coordinate with broadband support programs of other federal agencies. Let us elaborate on each principle.

² Consolidated Appropriations Act of 2018, § 779.

³ NOI at 35609.

⁴ The NOI appropriately uses the term “existing broadband provider” and not “incumbent service provider,” which is defined in § 950bb(b)(2). *See id.*; 7 U.S.C. § 950bb(b)(2). The term “incumbent service provider” has relevance for the broadband loan and loan guarantee program administered by RUS because it is a factor in the test in § 950bb(d)(2)(A) to determine whether a proposed service territory is eligible for support. *See* 7 U.S.C. § 950bb(d)(2)(A). However, that term is not relevant to the Program because the statute implementing the Program provides a new test to replace § 950bb(d)(2)(A): at least 90 percent of the households to be served by a project receiving a loan or grant shall be in a rural area without sufficient access to broadband. Consolidated Appropriations Act of 2018, § 779. That means that if at least 90 percent of households in the area do not have sufficient access to broadband from any combination of existing service providers, then the area may be eligible for support under the Program.

In enacting the Program, Congress was clear that any support should not be used to overbuild existing broadband service providers.⁵ Congress demonstrated this intent in two ways. First, the statute imposes a stringent test for determining whether an area is eligible for support. Under existing law, § 950bb(d)(2), an area is eligible for a RUS broadband loan or loan guarantee where not less than 15 percent of the households in the proposed service territory do not have access to broadband service at the requisite level of performance (25 Mbps/3 Mbps⁶) and broadband service is not provided in any part of the proposed service territory by 3 or more incumbent service providers, each of which must serve not less than 5 percent of the households in the proposed areas.⁷ However, for the Program, Congress limited the areas that are eligible for support, *i.e.*, areas where 90 percent of the households do not have sufficient access to broadband service (currently 10/1 Mbps service) from existing broadband providers.⁸ Second, the statute prohibits RUS from providing support in an area where a service provider has already received a broadband loan from RUS.⁹ In sum, these two provisions give RUS clear direction that Program support should not be used to overbuild existing broadband providers. By following the principle of not using the Program's support to overbuild existing broadband providers both in promulgating rules and administering the Program, RUS will not only ensure that private investment in broadband networks will not be undermined, but it will spend limited federal funding most efficiently – in those areas where it is most needed.

⁵ Consolidated Appropriations Act of 2018, § 779.

⁶ 7 U.S.C. § 950bb(e). See Department of Agriculture, Rural Utilities Service, Rural Broadband Access Loan and Loan Guarantee Program, Notice of Funds Availability, 82 Fed. Reg. 34473 (July 25, 2017) (redefining “Broadband Service” from 4 Mbps/1 Mbps to 25 Mbps/3 Mbps).

⁷ 7 U.S.C. § 950bb(d)(2).

⁸ Consolidated Appropriations Act of 2018, § 779.

⁹ *Id.*

As for coordinating with other federal agencies' broadband support programs, ACA recognizes that RUS understands the importance and value of accounting for other federal broadband support programs and coordinating with the Federal Communications Commission (FCC), the National Telecommunications and Information Administration, and other federal agencies. Those efforts should continue with the Program, especially because this is a new, targeted pilot program created by Congress to supplement existing RUS programs that provide support for broadband deployments and that seeks to bring broadband to the most unserved areas. In general, greater coordination with other federal agencies distributing broadband funding will extend the reach of the limited support provided under the Program and other federal programs and guard against waste. It also will ensure that federal agencies are working in tandem to identify areas that need support, which will accelerate the common objective of bringing broadband service to all Americans. It is particularly important that RUS implement the program in sync with the following FCC universal service programs, which were adopted initially in the *USF/ICC Transformation Order* in 2011¹⁰ and updated in subsequent decisions that either provide support or will soon provide support for broadband deployment in unserved and high-cost areas throughout the country:

- **High-Cost Support for Rate-of-Return Carriers.** In areas served by rate-of-return carriers, the FCC provides more than \$2 billion annually for support in high-cost areas, either through the traditional high-cost support program or the Alternative Connect America Cost Model.¹¹ The FCC updated these programs in 2016.¹² Carriers opting to

¹⁰ See *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order*).

¹¹ See, e.g., *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087 (2016).

¹² *Id.*

stay in the traditional program will receive ongoing support to deploy broadband with speeds of at least 10/1 Mbps according to a carrier-specific five-year plan.¹³ Carriers opting for model-based support will receive support over a 10-year term to deploy broadband with speeds of at least 10/1 Mbps to the number of locations identified in the model where for a census block the average cost is above the funding per location benchmark and below the funding cap, and at least 25/3 Mbps to a subset of those locations.¹⁴

- **Connect America Fund Phase II Support.** In areas served by price cap carriers, the FCC provides approximately \$1.8 billion annually for support in areas the FCC has found to be unserved, either to price cap carriers that in 2015 elected to receive support pursuant to the Connect America Cost Model¹⁵ or to carriers that were winning bidders in the Connect America Fund Phase II reverse auction that took place this year.¹⁶ Price cap carriers receiving model-based support are required to deploy broadband with speeds of at least 10/1 Mbps to the number of locations identified in the model where for a census block the average cost is above the funding per location benchmark and below the funding cap.¹⁷ These carriers are obligated to deploy to 40 percent of locations by

¹³ See *id.*, paras. 162-177.

¹⁴ See *id.*, para. 29. Carriers must deploy to 40 percent of locations by 2020, and that amount increases by 10 percent annually. See *id.*, para. 32.

¹⁵ See, e.g., *Wireline Competition Bureau Announces Connect America Phase II Support Amounts Offered to Price Cap Carriers*, WC Docket No. 10-90, Public Notice, 30 FCC Rcd 3905 (2015). In awarding Phase II model-based support, the FCC defined eligible areas as those lacking 4/1 Mbps service. *Id.* The Phase II model-based support program lapses in 2020, at which time the FCC will determine whether and how to award future support in eligible areas, including whether to define eligible areas as those lacking much higher speed service. *Id.*

¹⁶ See, e.g., *Connect America Fund Phase II Auction Scheduled for July 24, 2018*, AU Docket No. 17-182, WC Docket No. 10-90, Public Notice, 33 FCC Rcd 1428 (2018) (*Connect America Fund Phase II Public Notice*); *Connect America Fund Phase II Auction (Auction 903) Closes, Winning Bidders Announced*, AU Docket No. 17-182, WC Docket No. 10-90, Public Notice, DA 18-887 (Aug. 28, 2018) (*Connect America Fund Phase II Closing Public Notice*).

¹⁷ *Connect America Fund Phase II Public Notice*, para. 12.

2017 and all locations by 2020.¹⁸ Carriers that are winning bidders in the auction are required to deploy broadband with speeds that reflect the performance tier of their bid.¹⁹ These carriers are obligated to deploy to 40 percent of locations by the third year of the term and all locations by sixth year.²⁰ For the auction that was just completed, more than half of the “supported” locations will receive broadband service with download speeds of at least 100 Mbps, and virtually all locations will have access to service with speeds of at least 25 Mbps.²¹

- **Remote Areas Fund.** In remote unserved areas, the FCC has announced it will provide support through a Remote Areas Fund.²² The FCC will award this support via a reverse auction²³ and is expected to provide additional details about the program in the near future.

Thus, these FCC universal service programs should bring broadband to most unserved and high-cost areas of the country, as those areas are currently defined.

¹⁸ See *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order, 29 FCC Rcd 15644, paras. 15, 36 (2014).

¹⁹ *Connect America Fund Phase II Public Notice*, para. 12.

²⁰ See *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Order on Reconsideration, 33 FCC Rcd 1380, para. 21 (2018). The FCC is currently vetting winning bidders and support should begin to be provided in 2019. *Connect America Fund Phase II Closing Public Notice*, para. 16.

²¹ See FCC, “Connect America Fund Auction to Expand Broadband to Over 700,000 Rural Homes and Businesses,” News Release (Aug. 28, 2018).

²² See, e.g., *Wireline Competition Bureau Seeks Further Comment on Issues Regarding the Design of the Remote Areas Fund*, WC Docket No. 10-90, Public Notice, 28 FCC Rcd 265 (2013). RUS also should account for the FCC’s E-Rate and Rural Health Care Programs, which provide support that will close the digital divide as these programs enable providers to deploy fiber closer to unserved locations. See FCC, “Universal Service Program for Schools and Libraries (E-Rate),” available at <https://www.fcc.gov/general/universal-service-program-schools-and-libraries-e-rate>; FCC, “Rural Health Care Program,” available at <https://www.fcc.gov/general/rural-health-care-program>.

²³ 47 CFR § 54.801.

In sum, to maximize the value of the Program's support, RUS should coordinate with and account for these other programs. This point was highlighted most recently in a letter to the Secretary from Senate Commerce, Science, and Transportation Committee Chairman, Senator Thune, and Telecommunications Subcommittee Chairman, Senator Wicker.²⁴ FCC Commissioner Michael O'Rielly also raised this same concern shortly after the Program was enacted: "the new program could be instrumental to filling coverage gaps in rural America not yet addressed by private companies and the FCC's USF programs – but only if it is implemented in a thoughtful and coordinated manner."²⁵ Thus, in implementing the Program, RUS should be cognizant of, account for, and coordinate with other federal broadband support programs so it brings broadband to those areas that are most unserved and does so with the fewest federal dollars.

Below, ACA uses these principles as the basis for its comments on the two specific questions raised in the NOI.

²⁴ See Letter from Senator John Thune and Senator Roger Wicker to Secretary of Agriculture Sonny Perdue (Aug. 22, 2018) ("It is crucial that RUS plan projects and coordinate the distribution of funds under the pilot program with the FCC.").

²⁵ Commissioner Michael O'Rielly, "Experienced Advice for New Broadband Program," FCC Blog (Apr. 11, 2018), available at <https://www.fcc.gov/news-events/blog/2018/04/11/experienced-advice-new-broadband-program>. Commissioner O'Rielly also noted that if the Program can reach very high cost areas that are intended to be supported at some time by the FCC's universal service Remote Areas Fund, "then the country will be much closer to achieving the objectives of universal service." *Id.* Commissioner O'Rielly reiterated these points at the Senate Commerce Committee's FCC Oversight hearing on August 16, 2018. See Statement of FCC Commissioner Michael O'Rielly, Before the Committee on Commerce, Science, and Transportation, U.S. Senate, Hearing on "Oversight of the Federal Communications Commission" (Aug. 16, 2018), available at https://www.commerce.senate.gov/public/?a=Files.Serve&File_id=13D02857-E92C-462E-B82F-590CC3814256.

Determining Whether Households Have “Sufficient Access” to Broadband Service

To begin with, the NOI seeks comment on the types of technologies delivering broadband service²⁶ that should be determined to provide “sufficient access.”²⁷ For purposes of the Program, ACA believes RUS should make the same distinction the FCC currently makes and distinguish between “fixed” and “mobile” technologies, with the latter being unable to provide “sufficient access” at this time. The FCC’s distinction is based on its recent finding that fixed and mobile networks are not yet close substitutes.²⁸ Thus, any “fixed” technology meeting the performance parameters, as discussed below, should be considered to provide “sufficient access.”

In determining the services that would be defined as providing “sufficient access” to broadband such that an area would be deemed ineligible for support, ACA submits that Congressional intent is clear that this term should only mean that existing broadband providers in the area are offering service with speeds of at least 10/1 Mbps. If Congress wanted other factors or attributes of broadband service to be considered, it would have done so. That said, if RUS determines that Congress intended other factors or attributes to be considered, RUS should, to maximize use of the limited support provided for in the Program, follow the FCC’s paradigm set forth in the *USF/ICC Transformation Order* to use the following factors: speed, latency, data usage, and affordability.²⁹ In developing a speed benchmark, RUS is directed, at

²⁶ “Broadband Service” is defined in § 950bb(b)(1) in terms of “any technology identified by the Secretary as having the capacity to transmit data to enable a subscriber to the service to originate and receive high-quality, voice, data, graphics, and video.” 7 U.S.C. § 950bb(b)(1).

²⁷ NOI at 35609.

²⁸ See, e.g., *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 17-199, 2018 Broadband Deployment Report, 33 FCC Rcd 1660, para. 18 (2018) (finding that mobile services currently are not “full substitutes for fixed service”).

²⁹ See *USF/ICC Transformation Order*, paras. 92-100.

least initially, to use the 10/1 Mbps benchmark speed set forth in the recently-enacted law.³⁰ By using this speed benchmark, RUS will not only be complying with the statute, but it will be in sync with the benchmark the FCC uses to determine eligible areas for Connect America Fund and high-cost universal service support.³¹ As for latency, ACA recommends RUS follow the FCC's benchmark of "round trip latency of 100 ms or less" set forth in the Connect America Phase II program.³²

As for data usage, the FCC initially required providers receiving support to provide data usage similar to that provided in urban areas without any specific amount.³³ The FCC subsequently specified that both price cap and rate-of-return carriers receiving support would need to provide a monthly usage allowance of 150 GBs.³⁴ In addition, more recently, the FCC applied minimum data usage requirements as a factor in weighting the performance tiers in the Connect America Fund Phase II auction – with the "minimum" tier (10/1 Mbps service) having a data usage requirement of at least 150 GB per month.³⁵ ACA thus recommends that RUS adopt 150 GB as the minimum data usage requirement to determine whether broadband service already is sufficiently available.

As for affordability, it should be a factor in determining whether "sufficient access" exists. Rural residents deserve broadband service that costs approximately the same for the same

³⁰ Consolidated Appropriations Act of 2018, § 779.

³¹ See, e.g., *Connect America Fund*, WC Docket No. 10-90, Order, DA 17-710, para. 3 (July 6, 2018) (*CAF Order*). ACA recognizes that this speed benchmark is below that established by RUS in 2017; however, because the Program was adopted in 2018 and is a "pilot" program, RUS should be bound, at least initially, by Congress's directive.

³² See *Connect America Fund*, WC Docket No. 10-90, Report and Order, 28 FCC Rcd 15060, para. 2 (WCB 2013).

³³ See *USF/ICC Transformation Order*, para. 98.

³⁴ See *Wireline Competition Bureau Announces Results of 2016 Urban Rate Survey for Fixed Voice and Broadband Services*, WC Docket 10-90, 31 FCC Rcd 3393 (2016).

³⁵ *Connect America Fund Phase II Public Notice*, para. 12. See FCC, "Connect America Fund Phase II Auction," available at <https://www.fcc.gov/auction/903>.

amount of usage as service provided in urban areas, where consumers tend to have a greater choice of providers. To implement an “affordability” requirement, ACA recommends RUS follow the approach adopted by the FCC in the Connect America Fund and other high-cost programs – use of the Urban Rate benchmark, which the FCC calculates annually.³⁶ The FCC’s most recent survey indicated the benchmark price for a 10/1 Mbps wireline broadband service with 170 GB data allowance is \$87.68.³⁷ Not only is the FCC’s approach sound, but by using it, RUS will further ensure that the many federal broadband support programs, which share the common goal of bringing broadband service to all locations, operate consistently.

As the Program continues to develop and the Secretary reexamines all of these benchmarks, RUS should, as discussed above, coordinate with the FCC and the National Telecommunications and Information Administration so that all federal agencies adopt similar processes and benchmarks for determining the availability of broadband service.

Finally, ACA submits that RUS should presume that wireline network providers using DOCSIS or all-fiber technologies clearly meet the speed and latency benchmarks because they offer speeds that far exceed 10/1 Mbps at low latency. The FCC’s “2016 Measuring Broadband America Fixed Broadband Report” (*MBA Report*), which tested broadband performance for various technologies, found that for “DOCSIS 3, the maximum advertised download speeds among the most popular service tiers offered by ISPs using cable technologies have increased from 12-30 Mbps in March 2011 to 100-300 Mbps in September 2015,” and all-fiber networks had similar capabilities.”³⁸ Moreover, since 2015, ACA member cable operators, most of which

³⁶ See *USF/ICC Transformation Order*, para. 238.

³⁷ See *Wireline Competition Bureau Announces Results of 2018 Urban Rate Survey for Fixed Voice and Broadband Services*, WC Docket No. 10-90, Public Notice, 32 FCC Rcd 9339 (2017).

³⁸ FCC, *2016 Measuring Broadband America Fixed Broadband Report, A Report on Consumer Fixed Broadband Performance in the United States*, at 8 (Dec. 1, 2016) (*MBA Report*).

operate in rural areas, have increased their speeds significantly.³⁹ As for latency, the MBA Report found that terrestrial-based broadband services have latencies in the 12 ms to 58 ms range,⁴⁰ which is well below the 100 ms threshold adopted by the FCC in its Connect America Fund proceeding.⁴¹ Accordingly, RUS should presume that wireline providers using DOCSIS or all-fiber technology meet these performance benchmarks.

Collecting Accurate Data About the Availability of Broadband Service

The NOI notes that, pursuant to §§ 950bb(d)(5) and (d)(10), RUS uses a Public Notice Filing and Public Notice Response process and the most current National Broadband Map, as well as other data, to determine whether an applicant's proposed service area already has broadband service available – and thus would not be eligible for support.⁴² The NOI seeks comment on how data about the availability of broadband service are to be used or verified.⁴³ ACA appreciates the importance of gathering accurate data about broadband service to determine whether an area is eligible for support, as well as the significant time and effort required of RUS staff to review and determine whether an area is eligible for support. Congress clearly aims to have no location go unserved; yet, as Congress directed in the new law, no existing broadband provider should be overbuilt.⁴⁴

ACA believes RUS can most efficiently achieve its objective of increasing the completeness and accuracy of data about existing broadband service, as well as ensure it does

³⁹ See Comments of American Cable Association, *Wireline Competition Bureau Seeks Comment on the State of Fixed Broadband Competition*, GN Docket No. 18-231, at 6-7 (Aug. 17, 2018).

⁴⁰ *MBA Report* at 21.

⁴¹ See, e.g., *CAF Order*, para. 4.

⁴² NOI at 35609.

⁴³ *Id.*

⁴⁴ Consolidated Appropriations Act of 2018, § 779.

not waste funding or overbuild an incumbent, by adopting and implementing measures that are similar to, or build upon, those used by the FCC in the Connect America Fund challenge process.⁴⁵ The FCC's challenge process sought to determine more accurately the unserved locations that would be eligible for Connect America Fund support by giving existing providers an opportunity to supply additional and much more specific information about where they are providing service in areas presumed to be eligible.⁴⁶ As noted above, §§ 950bb(d)(5) and (d)(10) provide for a similar process, but ACA believes RUS should require that applicants provide more complete and accurate information about why the proposed service territory lacks sufficiently availability broadband service. RUS also should give existing providers a greater opportunity to submit data about areas where they make their broadband service available. ACA, therefore, recommends:

- The Secretary, pursuant to § 950bb(d)(5)(C), should require an applicant for a grant or loan to submit for each census block that overlaps wholly or partially the applicant's proposed service area the following: (1) the number of residential, business, and institutional locations in the census block; (2) a list of all providers offering broadband service in the census block, along with the maximum speed for that service; and (3) if a provider is receiving high-cost support from the FCC to serve the census block, the program providing such support. All of this information is publicly available through the National Broadband Map and through other FCC sources. Moreover, the applicant should be required to certify that it has made reasonable efforts to determine that the

⁴⁵ See *Connect America Fund*, WC Docket No. 10-90, Report and Order, 28 FCC Rcd 7211, para. 2 (WCB 2013).

⁴⁶ *Id.* at paras. 4-22.

proposed service territory is eligible for support.⁴⁷ Further, the applicant should submit information demonstrating that it has made reasonable efforts to contact all incumbent broadband service providers in the proposed service area and adjacent to it to make them aware that an application for RUS support is about to be filed and that the incumbent has an opportunity to comment on its provision of service in the proposed service area.⁴⁸

- The Secretary, pursuant to § 950bb(d)(10)(A), should conduct outreach to the existing service providers identified by the applicant in the application and then give these service providers sufficient time, at least 45 days, to collect and submit information about broadband service they claim to be providing in the area,⁴⁹ as well as about service that other existing providers are offering.⁵⁰
- Existing service providers in their submissions should be required to provide detailed information about where they are offering service in the proposed service areas and, for each location where such service is offered, the network technology used, its performance capabilities, and the price for the service.⁵¹ The existing provider also

⁴⁷ This requirement is consistent with the existing broadband loan and loan guarantee program (7 CFR § 1738.204(a)(5)), which requires the applicant to estimate the number of unserved households in each service area, exclusive of satellite broadband service.

⁴⁸ Consistent with the existing broadband program (7 CFR § 1738.204), RUS should find an application is not complete unless all this information is provided.

⁴⁹ Under the existing broadband program (7 CFR § 1738.204(b)), RUS only publishes a public notice on an RUS webpage and provides 30 days for a response. In the interest of ensuring RUS obtains complete and accurate information and to carry out the intent of the Program, RUS should take more affirmative steps to alert existing broadband providers to the application and then give more time for these providers to respond.

⁵⁰ Should the Secretary not receive information from an existing service provider, the Secretary is directed, pursuant to § 950bb(d)(5)(C), to rely on the National Broadband Map and seek additional data. See also 7 CFR § 1738.204(c), where RUS commits, “[n]otwithstanding non-responses from existing providers” to “use all information available to it in evaluating the feasibility of the loan.”

⁵¹ The information ACA believes should be submitted is generally consistent with the requirements of the existing broadband program (7 CFR § 1738.204(b)). The most critical information RUS

should certify the accuracy of its filing. The Secretary should ensure that all proprietary information that is submitted is kept confidential.⁵²

- To further ensure the accuracy of the information and integrity of the process, the Secretary should have the discretion on a case-by-case basis to request that both the applicant and existing service providers supplement their information.⁵³

In sum, these additional measures should give RUS, providers seeking support, and existing providers greater certainty that the data used to judge an applicant's proposed service area are complete and accurate, while not overly burdening RUS or providers. Moreover, it will further ensure the Program is transparent and achieves its objectives.

needs is where existing broadband service is "sufficiently" available. Some of the information required under 7 CFR § 1738.204(b) does not bear on this issue, *e.g.*, the number of customers that purchase broadband service or that receive non-broadband services, and should not be required. See 7 CFR § 1738.204(b)(2)-(3).

⁵² This requirement would be consistent with the existing broadband program. 7 CFR § 1738.204(e).

⁵³ As discussed above, existing service providers could be asked to provide information both about the areas they serve and where their competitors serve.

In closing, ACA appreciates the opportunity to file comments and is prepared to discuss with RUS the issues raised and recommendations made herein.

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