

# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Rural Utilities Service

#### 7 CFR Part 1739

RIN 0572-AC30

#### Community Connect Broadband Grant Program

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

**ACTION:** Final rule.

**SUMMARY:** The Rural Utilities Service (RUS), a Rural Development agency of the United States Department of Agriculture (USDA), hereinafter referred to as RUS or the Agency, amends its regulations for the Community-Oriented Connectivity Broadband Grant Program (Community Connect Grant Program). The purpose of this regulatory change is to provide the Agency the ability to target limited resources to geographical as well as technological areas of need. This rule is not applicable to Community Connect grant applications filed for funding prior to the publication of a Notice of Funds Availability (NOFA) under this regulation.

**DATES:** This rule is effective June 3, 2013.

**FOR FURTHER INFORMATION CONTACT:** Kenneth Kuchno, Director, Broadband Division, USDA Rural Utilities Service, STOP 1599, 1400 Independence Avenue SW., Washington, DC 20250-1599, Telephone (202) 690-4673, Facsimile (202) 690-4389. Email address: [kenneth.kuchno@wdc.usda.gov](mailto:kenneth.kuchno@wdc.usda.gov).

#### SUPPLEMENTARY INFORMATION:

##### Executive Order 12866

This 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 the Internet at <http://www.cfda.gov>.

##### 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 rule has been reviewed under Executive Order 12988, Civil Justice Reform. The Agency has determined that this 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, must be exhausted before an action against the Department or its agencies may be initiated.

##### Executive Order 13132, Federalism

The policies contained in this 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 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 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 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 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 rule has been examined under Agency environmental regulations at 7 CFR part 1794. The 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.

#### Paperwork Reduction Act of 1995

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).

#### E-Government Act Compliance

Rural Development is committed to the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

##### Executive Order 13175

Executive Order 13175 imposes requirements on Rural Development in the development of regulatory policies that have tribal implications or preempt tribal laws. Rural Development determined that this rule may have a substantial direct effect on one or more Indian tribe(s) or on either the relationship or the distribution of powers and responsibilities between the Federal Government and Indian tribes. Therefore, on January 16, 2013, Rural Development highlighted the Community Connect Grant Program (along with the Distance Learning and Telemedicine Grant Program) during its quarterly Tribal Consultation webinar and teleconference. Forty eight individuals participated in the event, of which 24 represented Tribes or Tribal

Telecommunication companies. Many comments received during the event were positive comments regarding the new Proposed Funded Service Territory process, Broadband Service and Broadband Grant Speeds being determined and updated through the NOFA process and the ability to use operating funds as match. It was asked that further consideration be given to carefully determine what services existing providers might be providing across Tribal lands and that Tribal sovereignty be factored in to the application process and scoring criteria. The teleconference was recorded and the recording and the transcript have become part of USDA Rural Development's Tribal Consultation record. Please contact Rural Development's Native American Coordinator at (720) 544-2911 or [AIAN@wdc.usda.gov](mailto:AIAN@wdc.usda.gov) for more information regarding this Tribal Consultation or USDA Rural Development's Tribal Consultation process in general.

#### Background/Overview

The Rural Utilities Service, a Rural Development agency of the United States Department of Agriculture (the Agency) works to improve the quality of life in rural America by providing investment capital, in the form of loans and grants, for the deployment of rural telecommunications, broadband, electric, water and environmental infrastructure. Financial assistance is provided to rural utilities; municipalities; commercial corporations; limited liability companies; public utility districts; Indian tribes; and cooperative, nonprofit, limited-dividend, or mutual associations. In order to achieve the goal of increasing economic opportunity in rural America, the Agency finances infrastructure that enables access to seamless, nation-wide telecommunications and broadband networks. With access to the same advanced telecommunications networks of its urban counterparts, especially broadband networks designed to accommodate distance learning, telework, e-government and telemedicine, rural America will see improving educational opportunities, health care, economies, safety and security, and ultimately higher employment. Of particular concern to the Agency are communities where broadband service is not available and where population densities are such that the cost of deployment to them is so high that build-out of infrastructure is unlikely. The Agency is committed to helping rural communities gain access

to affordable, reliable, advanced communications services, comparable to those available throughout the rest of the United States, to provide a healthy, safe and prosperous place to live and work.

The Community Connect Grant Program was started as a Pilot Program. After administering the program as a pilot program for two years, the Agency proposed rules for the program and on July 28, 2004, the program was formally implemented. The regulations were amended to clarify, among other things, which rural communities are eligible under the program. The main purpose of this grant program is the construction of broadband facilities in areas where no broadband exists today with a secondary benefit of providing for a community center that provides free broadband service to all critical community facilities in the proposed funded service area for a two year period.

#### Discussion of Changes

The new rule addresses several areas to streamline and improve the program for applicants and the Agency, with the goal of bringing broadband to unserved communities. The new rules provide flexibility to address the dynamic broadband needs of rural Americans and enhance the Agency's ability to target funds to areas where they are needed the most. The new rules also seek to make the application process easier for applicants and evaluators. For example, a single concise project summary and map can be used to inform USDA Rural Development State Directors of pending applications within their states as well as the general public. Major changes include:

1. *Proposed Funded Service Territory.* Since its inception, the Community Connect Grant Program only permitted applicants to use grant funds to serve a single community which included a place recognized by the census or the Rand McNally™ Atlas. This approach, while administratively simple did not accommodate some of the most rural communities which are not census designated places or recognized by a commercial Atlas. It also precluded applicants from developing new service territories in a logical and cost effective manner to maximize the benefit of the grant. The new rule will allow applicants to define their proposed funded service area by utilizing the web based RUS mapping tool. By allowing an applicant the ability to define the exact service area, it is important to note that all premises in the service area must be offered service at the Broadband Grant Speed. The NOFA will

set the minimum and maximum dollar amounts per application.

2. *Matching Fund Simplification.* The current program requires applicants to provide a match equal to 15 percent of the requested funding to be used only for eligible grant purposes. The new rule maintains the current program's 15 percent matching requirement but clarifies that the match must be in cash and can also be used to fund operations of the project. This change gives applicants new flexibility on the use of matching funds and is administratively simpler for applicants, reviewers and the Agency. Clarifying that the match must be in cash available at closing, the new rule removes uncertainty related to valuing and qualifying in-kind contributions. Notwithstanding the 15 percent match, all applicants must be able to demonstrate that they have sufficient resources to construct, manage and sustain the project through and beyond completion.

3. *Scoring Simplification.* The current program scores and ranks applications on three criteria: (a) Rurality; (b) economic need; and (c) benefits. The metrics used for economic need (Median Household Income) and rurality (census and Rand McNally™) at times did not fully accommodate situations where there was a high need for assistance. The criteria may not have adequately measured need, for example, in a small community with substantial unemployment and a high cost of living, or in a community that was so small, rural and remote that the community was not recognized as a census designated place; or a community which is small and with very low-income, but in a county which as a whole has a high median household income. The new criteria focuses on ranking completed applications based on the community connectivity benefits of the project to the proposed funded service area. In making a final selection among and between applications with comparable rankings, the Administrator will take into consideration: (a) Service provided to communities in persistent poverty counties; (b) service provided to communities in out-migration communities; (c) the rurality of the proposed funded service area; (d) the speed of service provided by the project; (e) service to substantially underserved trust areas; (f) services provided to persons with disabilities; and (g) any other socio-economic factors that may be described in the NOFA to differentiate and rank applications.

#### Summary of Comments

In its Proposed Rule, published in the **Federal Register** on November 16, 2012,

(77 FR 68705), the agency requested comments regarding proposed changes to the Community Connect Grant Program. The agency received eighteen sets of comments from the following organization/individuals:

- North-central Alabama Regional Council of Governments
- National Telecommunications Cooperative Association
- County of Nelson
- Hospital Sisters Health System
- National Association of Telecommunications Officers and Advisors
- Camino Fiber Network Cooperative, Inc.
- Plumas-Sierra Rural Electric Cooperative
- Palau National Communications Corporation
- jean public
- Puerto Rico Broadband Task Force
- Rural Wisconsin Health Cooperative
- W. Metts Engineering Company, Inc.
- Telecommunications Board of Puerto Rico
- Wireless Internet Service Providers Association
- Mescalero Apache Telecom, Inc.
- BEK Communications Cooperative
- Gila River Indian Community and Gila River Telecommunications, Inc.
- Associated Communications and Research Services

These comments have been summarized and are addressed below:

#### Matching Funds

*Comment:* Several respondents took issue with eliminating the ability to use in-kind items to satisfy the matching requirement and requiring that the 15 percent match be satisfied by having cash on hand at the closing of the award. In addition, several respondents requested the elimination of the matching requirement. Some respondents asserted that by eliminating the use of in-kind items many potential applicants would not be able to raise the cash requirement and therefore would become ineligible for the program. Others commented that under certain circumstances the matching requirement should be waived all together.

*Response:* It should be noted that although in-kind items to satisfy the matching requirement will no longer be accepted, the purposes of the match have been expanded to allow the matching funds to be used for operating expenses as well as for funding eligible purposes. By allowing the matching funds to be used for operating expenses, the Agency is recognizing that applicants need to fund the expenses of day to day operations and this change

in the program will give them credit for funds that are expended in this way. It must be recognized that for projects to succeed, a certain amount of cash reserves must be available to cover expenses and by requiring a cash match, these expenses can be covered while satisfying the matching requirements.

#### Community Center

*Comment:* One respondent stated that the requirement to provide free service at the Broadband Grant Speed for two years at the community center was not clearly defined. Another respondent had concerns with where the community center would be located under the new rules and suggested keeping the Census Designated Place or Rand McNally community a service area requirement.

*Response:* Although the Agency believes that the requirement for free service at the community center is well defined in the regulation, we will provide a more detailed description of the requirement in the Community Connect Application Guide that will be made available to all applicants when the next grant window is opened for accepting applications. In the early days of the Community Connect Program, the proposed service area could only consist of a single Census Designated Place. Unfortunately, this left many rural areas unable to qualify for a grant and the Agency implemented the ability of an applicant to use a community that was designated in a Rand McNally Atlas. Although using the Atlas made many more rural communities eligible for the grant, it still did not solve the problem. With the revised regulation, an applicant now has the ability to designate any eligible area as their proposed service area with the requirement that the community center must be located in the proposed service area. A community center is an important part of the Program and although its physical location is left up to the applicant as long as it stays in the proposed service area, the intent is that the applicant will place the center in the most easily accessible location to benefit as many residents as possible.

#### Area Eligibility

*Comment:* One respondent was concerned that if middle mile facilities exist in a certain area and are providing service to anchor institutions that the area in question may be ineligible for the grant funds. Another respondent commented that because broadband service can vary from resident to resident in an area as well as within a community that the requirement that the proposed service area have no broadband service be eliminated. Other

respondents commented that using a census designated place or Rand McNally community makes places like Puerto Rico or Palau ineligible.

*Response:* If an area only has middle mile facilities available and service is not provided to residents and businesses in this area, the area is still eligible for grant funds. This also is the case if a business in an area has a T1 line from the local exchange carrier. For an area to be ineligible for consideration, businesses and residents in that area must have the ability to receive broadband service. Although the Agency realizes that an existing service provider for reasons of their own may not provide ubiquitous coverage in an area, if broadband service is available in an area, then that area is ineligible. The Community Connect Grant Program was implemented to get broadband service to areas without any type of broadband service and once this is accomplished we can then concentrate on filling in the holes that may exist in certain cases. Under the new regulation it is no longer a requirement that the proposed service area be a census designated place or a Rand McNally community. The new requirement is to identify the proposed service on the RUS mapping tool and places like Puerto Rico and Palau should no longer experience the issues they had in the past.

#### Application Requirements

*Comment:* Several respondents stated that the requirements for completing a grant application were too onerous and that this would deter potential applicants from submitting an application.

*Response:* The application process is intended to be a business plan that an applicant will follow if awarded a grant. To ensure that the requested amount of the grant is not too much or too little, we require that a detailed project budget be developed. To ensure that the project is sustainable, we require that projected financial statements along with an engineering design be submitted. The Agency recognizes that the application process takes some effort but for successful projects to be funded this is the minimum amount of information that must be submitted.

#### Service to Hospitals and Clinics

*Comment:* A couple of the respondents indicated that rural hospitals and clinics should receive the same two years of free service at the Broadband Grant Speed that the community center receives.

*Response:* As long as the rural hospital or clinic is open to the public, then these facilities are considered

Critical Community Facilities and all Critical Community Facilities in the proposed service area must be offered free service at the Broadband Grant Speed for two years.

#### *Medically Underserved Areas*

*Comment:* A number of respondents encouraged the use of other federal designations such as Medically Underserved Areas/Populations (MUA/P) and Health Professional Shortage Areas (HPSA) as eligibility criteria stating that these designations indicate the rural areas with the greatest health care needs and that broadband service helps alleviate these shortages.

*Response:* Although the Agency recognizes that a number of rural areas lack the necessary medical care and is directly addressing these issues with the Distance Learning and Telemedicine Grant Program, the Community Connect Grant Program was designed to bring broadband service to any area that is not currently receiving it. There are many different types of needs in rural areas and the Community Connect Grant Program was designed to place all applicants on a level playing field.

#### *Eligible Grant Purposes*

*Comment:* One respondent requested that technical assistance for the retention of consultants and experts for economic research, engineering, business planning and community outreach be made an eligible purpose.

*Response:* The Agency agrees that due diligence must be performed in completing the grant application/business plan but is looking for the applicant to fund this due diligence demonstrating a commitment to make the project successful. There are many different items that could be considered in providing funding to implement a broadband system and unfortunately funding is limited and certain items had to be eliminated from eligibility.

#### *Scoring*

*Comment:* One respondent recommended that higher scores be given for applicants that received funding under the American Recovery and Reinvestment Act (ARRA). Another respondent commented that the scoring criteria for receiving points for past experience in managing a broadband system should be enhanced. In addition to the above comments, a number of respondents also commented that the scoring was too subjective and that additional credit should be given to applicants that exceed the minimum requirements for receiving a grant such as providing voice or video services.

*Response:* Under the ARRA programs that provided funding for providing broadband service, thousands of applications were received. Due to the amount of funding that was made available; many of the ARRA applications could not be funded simply because there were not enough funds. To provide added scoring to a Community Connect applicant because they received an ARRA award would not be fair to the other ARRA applicants that did not receive an award. In addition, there are many existing companies that are providing services in rural areas that did not apply for ARRA funds and these companies should not be penalized for that decision. The scoring criteria for management experience adequately describes the requirements for receiving points. However, we agree that the criteria could be better explained and the associated application guide for the program will be enhanced to provide a clearer understanding of the evidence that needs to be submitted to receive points. Also, the scoring criteria was developed to allow the applicant and the Agency the most flexibility in determining the score the applications should receive and although we have used more objective scoring criteria in the past, we believe that the criteria now contained in the regulation captures the needs of the proposed service area. We also believe that the criteria will allow the best applications to be chosen. Although other services such as voice and video provide customers with additional choices, the purpose of the Community Connect Grant Program is to deliver broadband service to unserved areas and adding emphasis to providing other services will take away from this purpose.

#### *Need for Program*

*Comment:* One respondent commented that the Community Connect Program should not be funded because it was unfair to provide funding to rural areas that have low populations instead of areas in cities that have much greater populations.

*Response:* Although the Agency agrees that there are areas within large cities that do not have access to broadband, the requirements of the program limit the funding to rural areas. Without funding from the Community Connect Grant Program, some areas would have no chance of ever receiving broadband service.

#### *Broadband Grant Speed*

*Comment:* One respondent recommended that the definitions for Broadband Service and for the

Broadband Grant Speed be set at 3 megabits per second downstream and 768 kilobits upstream while another respondent recommended that the Broadband Grant Speed be set 25 megabits down and 5 megabits up. In addition, another respondent recommended keeping the definition of broadband service at the existing level of 200 kilobits in both the upstream/downstream directions.

*Response:* As explained in the proposed regulation, the definitions for Broadband Service and the Broadband Grant Speed will be set in the Notice of Funds Availability (NOFA) that will be published annually. The Agency appreciates the recommendations submitted by the respondents and they will be taken into consideration when the NOFA is prepared. Although the 200/200 kilobit definition of broadband service has worked well for the program in the past and has identified areas that have no access to broadband service, this definition has become obsolete as technology has progressed. To ensure that rural areas have a level of broadband service that will promote economic development and provide residents and businesses with the speeds they need in today's world, the Agency developed the concept of the Broadband Grant Speed. The Broadband Grant Speed will be determined in a NOFA that announces the opening of the window for submitting applications and will be set at the level that is needed to ensure that rural America is not being left behind.

#### *Native American Applicants*

*Comment:* One respondent requested that applications submitted by a Tribal entity not have to define their service and that funds be awarded to the Tribal leadership to use to provide broadband service anywhere on the respective reservation where broadband service does not exist.

*Response:* The Proposed Funded Service Area process along with the web based RUS mapping tool will allow Tribes (and all applicants) to geographically establish the Proposed Funded Service Area. This could include an entire Reservation (if the entire Reservation is unserved or the portions of a Reservation that are unserved. As this is a nation-wide, competitive grant program it is not practical for any applicant to not be required to define its service area.

#### *Construction and Advance Procedures*

*Comment:* One respondent requested that formal construction and advance procedures be implemented for the Community Connect Grant Program.

*Response:* Formal construction procedures can provide a level of guidance that could benefit the applicants. The Agency strongly recommends that standard procedures such as those required for other RUS programs be followed. The types of procedures required by our other programs which can result in awards in the tens of millions of dollars could be so overwhelming to some of the small operations that routinely apply for the grants that those entities would elect not to apply. These same entities go to some of the most remote unserved areas and the Agency does not want to deter them from applying for a grant by making the construction requirements too onerous. We will assist all awardees in construction of their systems and make available to them the construction procedures from our other programs. Although the advance of funds procedures differs from the other RUS programs, the advance procedures used for the Community Connect Grant Program are sufficient and there is no need to revise this process.

#### *Mobile Broadband Service*

*Comment:* One respondent commented that the regulation was unclear if mobile carriers providing 3G or 4G met the definition of broadband service for service area eligibility and for providing service at the Broadband Grant Speed.

*Response:* The regulation differentiates between fixed and mobile service. Annually, a NOFA (which announces the opening of an application window) may set the requirements for fixed and mobile broadband service at different speeds. This is a clear indication that mobile broadband service can meet both the definition for Broadband Service that is used for determining if an area is eligible to receive a grant and the definition for Broadband Grant Speed which is the required speed that an awardee of a grant must provide to all residents and businesses in the proposed service area.

#### **List of Subjects in 7 CFR Part 1739**

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

■ For reasons set forth in the preamble, the Rural Utilities Service amends Chapter XVII of title 7 of the Code of Federal Regulations by revising part 1739 to read as follows:

### **PART 1739—BROADBAND GRANT PROGRAM**

#### **Subpart A—Community Connect Grant Program**

Secs.

- 1739.1 Purpose.
- 1739.2 Funding availability and application dates and submission.
- 1739.3 Definitions.
- 1739.4–1739.8 [Reserved]
- 1739.9 USDA Rural Development State Director notification.
- 1739.10 Eligible applicant.
- 1739.11 Eligible Community Connect Competitive Grant 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 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 service that fosters economic growth and delivers enhanced educational, health care, and public safety benefits. The Agency will give priority to rural areas that have the greatest need for broadband services, based on the criteria contained herein and in the Notice of Funds Availability (hereinafter referred to as NOFA) published in the **Federal Register**.

(b) Grant authority will be used for the deployment of service to all premises in eligible rural areas at the Broadband Grant Speed on a “community-oriented connectivity” basis. In addition to providing service to all premises the “community-oriented connectivity” concept will stimulate practical, everyday uses and applications of broadband by cultivating the deployment of new broadband 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 submission.**

(a) The Agency will periodically publish, (usually on an annual basis) in the **Federal Register**, a NOFA that will set forth the total amount of funding available; the maximum and minimum funding for each grant; funding priority; 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. The Agency may publish more than one NOFA should additional funding become available.

(b) Notwithstanding paragraph (a) of this section, the Agency 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:

*Agency or RUS* shall mean the Rural Utilities Service, which administers the United States Department of Agriculture (USDA) Rural Development Utilities Programs.

*Broadband Grant Speed* means the minimum bandwidth described in the NOFA that an applicant must propose to deliver to every customer in the proposed funded service area in order for the Agency to approve a broadband grant. The Broadband Grant Speed may be different for fixed and mobile broadband services and from the minimum rate of data transmission required to determine the availability of broadband service when qualifying a service area.

*Broadband service* means any terrestrial technology having the capacity to provide transmission facilities that enable subscribers of the service to originate and receive high-quality voice, data, graphics, and video at the minimum rate of data transmission described in the NOFA. The broadband service speed may be different from the broadband grant speed for the Community Connect program.

*Community Center* means a building within the Proposed Funded Service Area that provides access to the public, or a section of a public building with at least two (2) Computer Access Points and wireless access, 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 Saturdays or Sunday.

*Computer Access Point* means a new computer terminal with access to service at the Broadband Grant Speed.

*Critical Community Facilities* means the Community Center; any public school, public education center, public library, public medical clinic, public hospital, community college, public university; or law enforcement, fire or ambulance station in the Proposed Funded 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.

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

*Project* means the delivery of service at the Broadband Grant Speed financed by the grant and Matching Contribution for the Proposed Funded Service Area.

*Proposed Funded Service Area (PFSA)* means the contiguous geographic area within an eligible Rural Area or eligible Rural Areas, in which the applicant proposes to provide service at the Broadband Grant Speed.

*Rural area* means any area, as confirmed by the latest decennial census of the Bureau of the Census, which is not located within:

(1) A city, town, or incorporated area that has a population of greater than 20,000 inhabitants; or

(2) An urbanized area contiguous and adjacent to a city or town that has a population of greater than 50,000 inhabitants. For purposes of the definition of rural area, an urbanized area means a densely populated territory as defined in the latest decennial census of the U.S. Census Bureau.

#### §§ 1739.4–1739.8 [Reserved]

#### § 1735.9 USDA Rural Development State Director notification.

Applicants shall complete a notification form which will be a public document that the RUS provides to USDA Rural Development State Directors and others in the state(s) of the PFSA. The notification shall include a brief project description and the location of the PFSA.

#### § 1739.10 Eligible applicant.

To be eligible for a Community Connect competitive 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(e), 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.

(c) As required by the Office of Management and Budget (OMB), all applicants for grants must supply a Dun and Bradstreet Data Universal Numbering System (DUNS) number when applying. The Standard Form 424 (SF-424) contains a field for you to use when supplying your DUNS number. Obtaining a DUNS number costs nothing and requires a short telephone call to Dun and Bradstreet. Please see [http://www.grants.gov/applicants/request\\_duns\\_number.jsp](http://www.grants.gov/applicants/request_duns_number.jsp) for more information on how to obtain a DUNS number or how to verify your organization's number.

(d) Register in the System for Award Management (SAM) (formerly Central Contractor Registry (CCR)).

(1) In accordance with 2 CFR part 25, applicants, whether applying electronically or by paper, must be registered in the SAM prior to submitting an application. Applicants may register for the SAM at <https://www.sam.gov/>.

(2) The SAM registration must remain active, with current information, at all times during which an entity has an application under consideration by an agency or has an active Federal Award. To remain registered in the SAM database after the initial registration, the applicant is required to review and update, on an annual basis from the date of initial registration or subsequent updates, its information in the SAM database to ensure it is current, accurate and complete.

#### § 1739.11 Eligible Community Connect Competitive Grant Project.

To be eligible for a Community Connect competitive grant, the Project must:

(a) Serve a PFSA in which Broadband Service does not currently exist;

(b) Offer service at the Broadband Grant Speed to all residential and business customers within the PFSA ;

(c) Offer free service at the Broadband Grant Speed to all Critical Community Facilities located within the PFSA for at least 2 years starting from the time service becomes available to each Critical Community Facility;

(d) Provide a Community Center with at least two (2) Computer Access Points and wireless access at the Broadband Grant Speed, free of all charges to all users for at least 2 years; and

(e) Not overlap with the service areas of current RUS borrowers and grantees.

#### § 1739.12 Eligible grant purposes.

Grant funds may be used to finance the following:

(a) The construction, acquisition, or leasing of facilities, including spectrum, land or buildings, used to deploy service at the Broadband Grant Speed to all residential and business customers located within the PFSA and all participating Critical Community Facilities, including funding for up to ten Computer Access Points to be used in the Community Center. Buildings constructed with grants funds must reside on property owned by the awardee. Leasing costs will only be covered through the advance of funds period included in the award documents;

(b) The improvement, expansion, construction, or acquisition of a Community Center and provision of Computer Access Points. Grant funds for the Community Center will be limited to ten percent of the requested grant amount. If a community center is constructed with grant funds, the center must reside on property owned by the awardee;

(c) The cost of providing the necessary bandwidth for service free of charge to the Critical Community Facilities for 2 years.

#### § 1739.13 Ineligible grant purposes.

Operating expenses not specifically permitted in § 1739.12.

#### § 1739.14 Matching contributions.

(a) At the time of closing of the award, the awardee must contribute or demonstrate available cash reserves in an account(s) of the awardee equal to at least 15% of the grant. Matching contributions must be used solely for the Project and shall not include any financial assistance from federal sources unless there is a federal statutory exception specifically authorizing the federal financial assistance to be considered as such. An applicant must provide evidence of its ability to comply with this requirement in its application.

(b) At the end of every calendar quarter, the award must submit a

schedule to RUS that identifies how the match contribution was used to support the project until the total contribution is expended.

**§ 1739.15 Completed application.**

Applications should be prepared in conformance with the provisions of this part and all applicable USDA regulations, including 7 CFR parts 3015, 3016, and 3019. Applicants must also conform to the requirements of the individual NOFA to be published when funds are available for the program and are advised to use the Agency's Application Guide for this program, found at the Agency's Web site.

Applicants must submit one paper copy and one electronic copy of the application. The application guide contains instructions and forms, as well as other important information needed to prepare an application and may be updated periodically. Paper copies of the application guide can be requested by contacting the, Director, Broadband Division at the following address: Stop 1599, South Agriculture Building, Room 2868, Washington, DC 20250.

Completed applications must include the following documentation, studies, reports and information, in form and substance satisfactory to the Agency:

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

(b) *An executive summary of the Project.* 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 costs;

(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 Service; and

(6) A list of the Critical Community Facilities that will take service from the Applicant at the Broadband Grant Speed, and evidence that any remaining Critical Community Facility located in the PFSA has rejected the offer;

(c) *Scoring Criteria Documentation.* A narrative, with documentation where necessary, addressing the elements listed in the scoring criteria of § 1739.17;

(d) *System design.* A system design of the Project that is economical and practical, including a detailed description of the facilities to be funded, technical specifications, data rates, and

costs. In addition, a network diagram detailing the proposed system must be provided. The system design must also address the environmental requirements specified in 7 CFR 1794;

(e) *Service Area Demographics.* The following information about the PFSA:

(1) A map, submitted electronically through RUS' web-based Mapping Tool, which identifies the Rural Area boundaries of the PFSA; and

(2) The total population, number of households, and number of businesses located within the PFSA;

(f) *Scope of work.* A description of the scope of work, which at a minimum must include:

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

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

(3) A construction build-out schedule and project milestones, showing the time-frames for accomplishing the Project objectives and activities on a quarterly basis; and

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

(g) *Community-oriented connectivity plan.* A community-oriented connectivity plan consisting of the following:

(1) A listing of all participating Critical Community Facilities to be connected. The applicant must also provide documentation that it has consulted with the appropriate agent of every Critical Community Facility in the PFSA, and must provide statements from each one as to its willingness to participate, or not to participate, in the proposed Project;

(2) A description of the services the applicant will make available to local residents and businesses; and

(3) A list of any other telecommunications provider (including interexchange carriers, cable television operators, enhanced service providers, wireless service providers and providers of satellite services) that is participating in the delivery of services and a description of the consultations and the anticipated role of such provider in the Project;

(h) *Financial information and sustainability.* A narrative description demonstrating the sustainability of the Project: from the commencement of construction to completion, and beyond the grant period; the sufficiency of resources; how and when the matching requirement is met; and the expertise necessary to undertake and complete the Project. The following financial information is required:

(1) If the applicant is an existing company, it must provide complete copies of audited financial statements, if available, for the two fiscal years preceding the application submission. If audited statements are unavailable, the applicant must submit unaudited financial statements for those fiscal years. Applications from start-up entities must, at minimum, provide an opening balance sheet dated within 30 days of the application submission date; and

(2) Annual financial projections in the form of balance sheets, income statements, and cash flow statements for a forecast period of five years, which prove the sustainability of the Project for that period and beyond. These projections must be inclusive of the applicant's existing operations and the Project, and must be supported by a detailed narrative that fully explains the methodology and assumptions used to develop the projections, including details on the number of subscribers projected to take the applicant's services. Applicants submitting multiple applications for funding must demonstrate that each Project is feasible and sustainable on its own, funds are available to cover each of the matching requirements and that all Projects for which funding is being requested are financially feasible as a whole;

(i) *Statement of experience.* A statement of experience which includes information on the owners' and principal employees' relevant work experience that would ensure the success of the Project. The applicant must also provide a written narrative demonstrating its capability and experience, if any, in operating a broadband telecommunications system;

(j) *Legal authority.* Evidence of the applicant's legal authority and existence, and its ability to enter into a grant agreement with the RUS, and to perform the activities proposed under the grant application;

(k) *Additional funding.* Evidence that funding agreements have been attained, if the Project requires funding commitment(s) from sources other than the grant. An applicant submitting multiple applications for funding must demonstrate its financial wherewithal to support all applications, if accepted, and that it can simultaneously complete and operate all of the Projects under consideration. Additionally, commitments for outside funding must be explicit that they will be available if all applications are not funded;

(l) *Federal compliance.* 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) 2 CFR part 417—Nonprocurement Debarment and Suspension;

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

(5) 2 CFR part 421—Requirements for Drug-Free Workplace (Financial Assistance);

(6) Certification regarding Architectural Barriers;

(7) Certification regarding Flood Hazard Precautions;

(8) An environmental report/questionnaire, in accordance with 7 CFR part 1794;

(9) A certification that grant funds will not be used to duplicate lines, facilities, or systems providing Broadband Service;

(10) Federal Obligation Certification on Delinquent Debt; and

(11) Assurance Regarding Felony Conviction or Tax Delinquent Status for Corporate Applicants.

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

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

(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) If the Agency determines that the Project is technically or financially infeasible or unsustainable, the Agency will notify the applicant, in writing, and the application will be returned with no further action.

(d) Applications conforming with this part will be evaluated competitively by the Agency and will be ranked in accordance with § 1739.17. Applications will then be awarded generally in rank order until all grant funds are expended, subject to paragraphs (e) and (f) of this section.

(e) In addition to scoring, the Agency may take geographic distribution into consideration when making final award determinations.

(f) An award may be made out of rank order if a higher ranked application would require an award that exceeded

available funding or would consume a disproportionate amount of funds available relative to its ranking.

(g) The Agency reserves the right to offer an applicant a lower amount than proposed in the application.

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

The ranking of the “community-oriented connectivity” benefits of the Project will be based on documentation in support of the need for services, benefits derived from the proposed services, characteristics of the PFSA, local community involvement in planning and implementation of the Project, and the level of experience of the management team. In ranking applications the Agency will consider the following criteria based on a scale of 100 possible points:

(a) An analysis of the challenges of the following criteria, laid out on a community-wide basis, and how the Project proposes to address these issues (up to 50 points):

- (1) The economic characteristics;
- (2) Educational challenges;
- (3) Health care needs; and
- (4) Public safety issues;

(b) The extent of the Project’s planning, development, and support by local residents, institutions, and Critical Community Facilities. Documentation must include evidence of community-wide involvement, as exemplified by community meetings, public forums, and surveys. In addition, applicants should provide evidence of local residents’ participation in the Project planning and development (up to 40 points).

(c) The level of experience and past success of operating broadband systems for the management team. (up to 10 points)

(d) In making a final selection among and between applications with comparable rankings and geographic distribution, the Administrator may take into consideration the characteristics of the PFSA. Only information provided in the application will be considered. Applicants should therefore specifically address each of the following criteria to differentiate their applications:

- (1) Persistent poverty counties that will be served within the PFSA;
- (2) Out-migration Communities that will be served within the PFSA;
- (3) The rurality of the PFSA;
- (4) The speed of service provided by the project;
- (5) Substantially underserved trust areas that will be served within the PFSA;

(6) Community members with disabilities that will be served within the PFSA; and

(7) Any other additional factors that may be outlined in the NOFA.

#### **§ 1739.18 Grant documents.**

The terms and conditions of grants shall be set forth in grant documents prepared by the Agency. The documents shall require the applicant to own all equipment and facilities financed by the grant. Among other matters, the Agency may prescribe conditions to the advance of funds that address concerns regarding the Project feasibility and sustainability. The Agency may also prescribe terms and conditions applicable to the construction and operation of the Project and the delivery of service at the Broadband Grant Speed to eligible Rural Areas, as well as other terms and conditions applicable to the individual Project. Dividend distributions will not be allowed until all grant funds and matching contributions have been expended.

#### **§ 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. The reporting period will start with the calendar year the award is made and continue for every calendar year through the term of the award. The report must be submitted by January 31 of the following year of the reporting period. 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) The Agency 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.

(e) The applicant must have the necessary processes and systems in place to comply with the reporting requirements for first-tier sub-awards and executive compensation under the Federal Funding Accountability and Transparency Act of 2006 in the event the applicant receives funding unless such applicant is exempt from such reporting requirements pursuant to 2 CFR 170.110(b). The reporting requirements under the Transparency Act pursuant to 2 CFR part 170 are as follows:

(1) First Tier Sub-Awards of \$25,000 or more in non-Recovery Act funds (unless they are exempt under 2 CFR part 170) must be reported by the Recipient to <http://www.fsr.gov> no later than the end of the month following the month the obligation was made.

(2) The Total Compensation of the Recipient's Executives (5 most highly compensated executives) must be reported by the Recipient (if the Recipient meets the criteria under 2 CFR part 170) to <http://www.sam.gov> by the end of the month following the month in which the award was made.

(3) The Total Compensation of the Subrecipient's Executives (5 most highly compensated executives) must be reported by the Subrecipient (if the Subrecipient meets the criteria under 2 CFR part 170) to the Recipient by the end of the month following the month in which the subaward was made.

#### **§ 1739.20 Audit requirements.**

A grant recipient shall provide the Agency with an audit for each 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 the Agency, 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 the Agency's Borrowers." Please note that the first audit submitted to the Agency and all subsequent audits must be comparative audits as described in 7 CFR part 1773.

(b) If the recipient is a Tribal, State or local government, or non-profit organization, the recipient shall provide an audit in accordance with OMB

Circular A-133, "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: April 8, 2013.

**John Charles Padalino,**

*Acting Administrator, Rural Utilities Service.*

[FR Doc. 2013-10502 Filed 5-2-13; 8:45 am]

**BILLING CODE P**

## **DEPARTMENT OF ENERGY**

### **10 CFR Part 719**

#### **48 CFR Parts 931, 952, and 970**

**RIN 1990-AA37**

#### **Contractor Legal Management Requirements; Acquisition Regulations**

**AGENCY:** Office of General Counsel, Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The Department of Energy revises existing regulations covering contractor legal management requirements. Conforming amendments are also made to the Department of Energy Acquisition Regulation (DEAR). The regulations provide rules for handling of legal matters and associated costs by certain contractors whose contracts exceed \$100,000,000 as well as legal counsel retained directly by the Department for matters in which costs exceed \$100,000.

**DATES:** *Effective date:* July 2, 2013.

**FOR FURTHER INFORMATION CONTACT:** Mr. Eric Mulch, Attorney-Adviser, U.S. Department of Energy, Office of General Counsel, 1000 Independence Avenue SW., Washington, DC 20585-0121. Telephone: (202) 287-5746. Email: [eric.mulch@hq.doe.gov](mailto:eric.mulch@hq.doe.gov).

#### **SUPPLEMENTARY INFORMATION:**

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#### **I. Background**

The Department's contracts that include cost reimbursable elements generally allow reimbursement of legal costs, including the costs of litigation, if the costs are reasonable and incurred in accordance with the applicable cost principles and contract clauses.

Consequently, the Department has an ongoing obligation to monitor and control the legal costs that it reimburses.

The Department has a long history of overseeing aspects of its contractors' management of legal matters and associated costs. This practice was formalized in 1994 when the Department published an interim Acquisition Letter as an interim policy in the **Federal Register** on August 31, 1994 (59 FR 44981). The interim Acquisition Letter was finalized as a Policy Statement on April 3, 1996 (61 FR 14763). This Policy Statement was followed by a formal rulemaking that added part 719, Contractor Legal Management Requirements, to Title 10 of the Code of Federal Regulations with an effective date of April 23, 2001 (66 FR 4616, 66 FR 19717).

After a decade operating in accordance with the 2001 rulemaking, the Department determined that it should review, update and revise the rule. Therefore, it did so and issued the results in a Notice of Proposed Rulemaking (NPR) on December 28, 2011 (76 FR 81408). The NPR requested public comments no later than February 27, 2012. The public comment period was reopened on March 2, 2012 and extended until March 16, 2012 (77 FR 12754).

Today's final rule revises the current contractor legal management requirements found in part 719, in Title 10 of the Code of Federal Regulations. The revisions reflect lessons learned by the Department during the years since implementing part 719. The part establishes regulations to monitor and control legal costs and to provide guidance to aid contractors and the Department in making determinations regarding the reasonableness of outside counsel costs, including the costs associated with litigation. Today's amendments to part 719 and the associated portions of the Department of