

ONE HUNDRED THIRTEENTH CONGRESS
Congress of the United States
House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

March 13, 2013

Mr. John Padalino
Acting Administrator
U.S. Department of Agriculture
Rural Utilities Service
1400 Independence Avenue, S.W., Room 5135
STOP 1510
Washington, D.C. 20250-1535

Dear Mr. Padalino:

Pursuant to Rules X and XI of the United States House of Representatives, the Committee on Energy and Commerce is examining the U.S. Department of Agriculture Rural Utilities Service's (RUS) management and oversight of the Broadband Initiatives Program (BIP), particularly its review process for awarding approximately \$66.4 million in BIP grants and loans to Lake County, Minnesota, for the purpose of providing voice, video, and data services to homes and businesses in Lake County and a portion of neighboring Saint Louis County, Minnesota.

The American Recovery and Reinvestment Act of 2009 (ARRA) appropriated \$7.2 billion to expand access to broadband throughout the United States. Of the \$7.2 billion, \$2.5 billion was appropriated to RUS to award BIP grants and loans to expand broadband access to rural and underserved areas of the country.¹ ARRA required the RUS to award all appropriated funds by September 30, 2010, and mandated that all BIP projects be substantially completed within two years and fully completed no later than three years following the date of issuance of a project's award.²

¹ The term "underserved" as it relates to last mile BIP projects was defined in RUS's July 9, 2009, Notice of Funds Availability (NOFA) as a project in which (1) no more than 50 percent of the households in the proposed funded service area have access to broadband with advertised speeds of at least 768 kbps downstream and at least 200 kbps upstream to end users; (2) no fixed or mobile broadband service provider advertises broadband speeds of at least 3 mbps; or (3) the rate of broadband subscribership for the proposed funded service area is 40 percent of households or less. See Broadband Technology Opportunities Program, 74 Fed. Reg. 33104, 33109 (July 9, 2009).

² In October 2011, RUS modified these requirements so that BIP projects must commence within 180 days of the completion of the project's historic preservation or environmental review, whichever comes later, and be fully completed no later than June 30, 2015. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-937, RECOVERY ACT: BROADBAND PROGRAMS ARE ONGOING, AND AGENCIES' EFFORTS WOULD BENEFIT FROM IMPROVED DATA QUALITY, at 6 (Sept. 14, 2012), available at <http://www.gao.gov/assets/650/648355.pdf>. [hereinafter, "Sept. 14, 2012 GAO Report"].

RUS awarded the BIP grants, loans, and loan/grant combinations in two funding rounds, the first beginning in June 2009 and ending in April 2010 and the second beginning in January 2010 and ending in September 2010. By the end of Fiscal Year 2010, RUS awarded funding to 320 projects, using \$2.3 billion for grants and leveraging the remaining \$87 million to back loans worth \$1.2 billion.³ As of June 2012, there were 263 active BIP projects comprising \$3.3 billion in awarded funds.⁴

As a condition to receiving a loan or grant, ARRA required that “at least 75 percent of the area to be served by a project . . . be in a rural area without sufficient access to high speed broadband service”⁵ In RUS’s Notice of Funds Availability (NOFA) setting forth the rules for Round 1 BIP applications, RUS clarified that “to qualify for BIP funding, projects must serve at least 75 percent unserved or underserved rural areas.”⁶

On August 13, 2009, pursuant to the guidelines established in the July 9, 2009, NOFA, Lake County submitted a Round 1 BIP application to support the Lake County Fiber Project.⁷ The application specified that the project would serve 7,340 homes and 585 businesses and institutions within Lake County. To meet that objective, the County requested an \$11,050,770 grant and \$22,436,409 loan from RUS. The County further stated that it would finance the project with \$4 million to bring the total project cost to approximately \$37.5 million.

After completing an initial screening, RUS rejected Lake County’s application on February 18, 2010, because the project did “not meet the technical feasibility requirements . . . of the NOFA.”⁸ RUS, however, also informed Lake County that it had initiated a second round of BIP funding and encouraged the County to submit an application that comported with the revised criteria outlined in a second NOFA posted by RUS on January 22, 2010. These revised criteria modified the eligibility requirements for BIP applicants so that “any rural area in which at least 50 percent of the premises in the area d[id] not have access to broadband service at the rate of 5 Mbps” could qualify for funding.⁹ The projects remained subject to ARRA’s requirement that proposed service areas be at least 75 percent rural.

Pursuant to RUS’s recommendations, Lake County submitted a Round 2 BIP application on March 21, 2010, which added substantial portions of rural Saint Louis County to the proposed

³ See *ARRA Broadband Spending: Hearing Before the Subcomm. on Comm’n & Tech. of the H. Comm. on Energy & Commerce*, 112th Cong. (2011) (statement of Mark L. Goldstein, Dir., Physical Infrastructure Issues, U.S. Gov’t Accountability Office), available at http://archives.republicans.energycommerce.house.gov/Media/file/Hearings/Telecom/021011_ARRA_Broadband/Goldstein.pdf.

⁴ See Sept. 14, 2012 GAO Report, *supra* note 2, at 2. The amount of funds awarded by RUS exceeds its appropriation because RUS can award and obligate funds in excess of its budget authority through the use of loans. *Id.* at 2 n. 6.

⁵ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. A, tit. I, 123 Stat. 118 (Feb. 17, 2009).

⁶ Broadband Technology Opportunities Program, 74 Fed. Reg. 33104, 33111 (July 9, 2009) (discussing eligibility requirements for both BTOP and BIP).

⁷ See Lake County, MN, *Broadband Infrastructure Application Submission to RUS (BIP) and NTIA (BTOP)* (Aug. 13, 2009) [hereinafter, “Lake County Round 1 BIP Application”].

⁸ Letter from David J. Villano, Assistant Adm’r, Telecomm. Program, RUS, to Gary Fields, Lake County, MN (Feb. 18, 2010).

⁹ See Broadband Initiatives Program, 75 Fed. Reg. 3820, 3822 (Jan. 22, 2010).

service area.¹⁰ According to the application, the revised Lake County Fiber Network project would serve a far greater number of premises - 14,941 homes, 1,060 businesses, and 98 critical community facilities - and have a higher price tag consisting of a \$56,413,705 loan and \$9,955,359 grant from RUS.¹¹ The remaining \$3.5 million projected cost of the project would be funded by Lake County's sale of revenue bonds.

On September 13, 2010, after review of the revised application, RUS announced that it would fund the Lake County Fiber Network project with the loan and grant amounts requested. According to recovery.gov, as of today's date, the County has received \$6,217,524 of the loan and \$1,097,210 of the grant award.¹²

While the Committee recognizes the importance of expanding broadband access to rural areas of the country, we are concerned with suggestions that the BIP program may have been used to overbuild existing systems rather than extend service to areas that legitimately meet the underserved/unserved eligibility requirements. Materials reviewed by Committee staff also raise questions as to whether RUS adequately considered the financial viability of the Lake County project before committing \$66.4 million in government funding. In order to help the Committee better understand RUS's review of the Lake County application, please provide written answers to the following questions no later than March 26, 2013.

- Q1. Please provide an overview of your application review process. What information was required from Lake County and how was that information verified?
- Q2. Why did RUS reject Lake County's Round 1 BIP application? Did RUS make recommendations to Lake County as to how it could modify its application to meet the requirements for Round 2 BIP funding? If so, what were those recommendations, who communicated them to Lake County, and what was RUS's rationale for making such recommendations?
- Q3. What review did RUS conduct to verify data regarding served, unserved, and underserved populations in the Lake County Fiber Network project area? Did the Lake County Fiber Network project enter a market already served (in whole or in part) by an existing broadband provider? If so, please list those providers and state whether they offered broadband services at speeds in excess of 5 Mbps. In addition, what percentage of the project's target wholesale and retail customers were already served by one or more broadband providers at the time the Round 2 application was filed?
- Q4. How did RUS define the term "household" for purposes of calculating the number of served, unserved and underserved premises in the Lake County Fiber Network project

¹⁰ USDA RD, *Rural Utilities Service Broadband Initiative Program: Round Two Application Directory, Last Mile and Middle Mile Infrastructure Applications*, at 388 (June 2, 2010), available at <http://www.rurdev.usda.gov/supportdocuments/Broadband-R2%20SEARCHABLE%20PDFwPNR-2010-06-01.pdf>.

¹¹ Lake County, MN, *Broadband Infrastructure Application Submission to RUS – Broadband Infrastructure Program*, at 6-7 (Mar. 21, 2010) [hereinafter, "Lake County Round 2 BIP Application"].

¹² *County of Lake (Award Number 087615451)*, RECOVERY.GOV, <http://www.recovery.gov/Transparency/RecoveryData/Pages/RecipientAwardsList.aspx?duns=087615451> (last visited Mar. 13, 2013).

area? Did that definition make a distinction for seasonal residences (i.e., cabins and summer homes)? If so, did RUS consider this distinction in reviewing the pricing and take rate assumptions used in Lake County's financial projections?

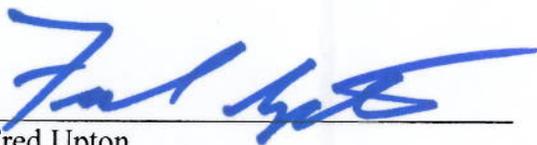
- Q5. Is RUS aware of any misrepresentations or inaccuracies in the Lake County Fiber Network project application? If so, what were those misrepresentations or inaccuracies and how were they addressed by RUS?
- Q6. What review did RUS conduct to ensure that Lake County had the necessary legal authority to build the Lake County Fiber Network project? What review did RUS conduct to ensure that Lake Communications would be capable of operating and managing the proposed network? What review did RUS conduct to ensure that the Lake County Fiber Network project would be financially viable?
- Q7. Why were neither National Public Broadband, Inc. nor Lake Communications listed as co-applicants on Lake County's Round 2 BIP application or considered sub-recipients of the loan and grant proceeds?

As the Committee with jurisdiction over Federal telecommunications policy, we also request that you submit to the Committee the following documents related to RUS's review of the Lake County Fiber Network project:

- D1. All written and electronic communications between (1) any employee, agent or representative of RUS and (2) any employee, agent or representative of (i) Lake County, Minnesota, (ii) Lake Communications, and/or (iii) National Public Broadband, Inc. related to or discussing (a) the financial viability of the Lake County Fiber Network project and/or (b) whether the Lake County Fiber Network project satisfied the ARRA's underserved/unserved eligibility requirements.
- D2. Fully executed Loan/Grant Security Agreement between RUS and Lake County.
- D3. All documents prepared, received or reviewed by RUS to evaluate and verify: (1) whether the "Service Area Details" listed in Lake County's BIP application were accurate; (2) whether the Lake County Fiber Network project area met the RUS's unserved/underserved premises qualification threshold; (3) whether Lake County had the necessary legal authority for the project; and (4) whether Lake County, National Public Broadband, Inc. and Lake Communications had the ability to build and operate the proposed network.
- D4. All documents prepared, received or reviewed by RUS to evaluate and verify the pricing and take rate assumptions used in Lake County's financial proformas, including, but not limited to: (1) any market research and competitive analyses conducted by or on behalf of the County; and (2) any feasibility or sensitivity analyses.
- D5. All quarterly reports, annual reports and annual compliance certificates submitted to RUS which describe the progress and activities of the Lake County Fiber Network project, including subscribership data and financial statements.

Please contact Committee staff to arrange delivery of the materials. An attachment to this letter provides additional information on how to respond to the Committee's request. If you have any questions, please do not hesitate to contact Daniel Tyrrell with Committee staff at (202) 225-2927.

Sincerely,



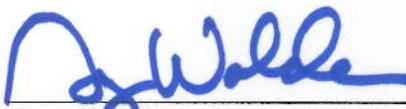
Fred Upton
Chairman



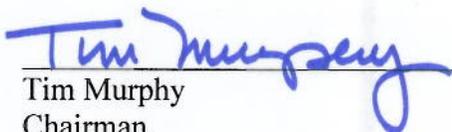
Joe Barton
Chairman Emeritus



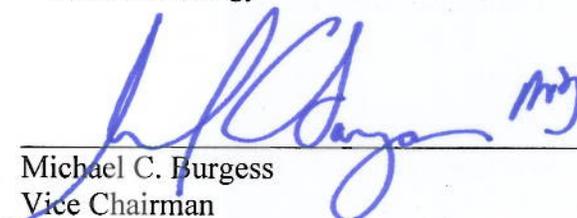
Marsha Blackburn
Vice Chairman



Greg Walden
Chairman
Subcommittee on Communications
and Technology



Tim Murphy
Chairman
Subcommittee on Oversight
and Investigations



Michael C. Burgess
Vice Chairman
Subcommittee on Oversight
and Investigations

cc: The Honorable Henry Waxman, Ranking Member

The Honorable Anna Eshoo, Ranking Member
Subcommittee on Communications and Technology

The Honorable Diana DeGette, Ranking Member
Subcommittee on Oversight and Investigations

The Honorable Tom Vilsack, Secretary
U.S. Department of Agriculture

Attachment

RESPONDING TO COMMITTEE DOCUMENT REQUESTS

In responding to the document request, please apply the instructions and definitions set forth below:

INSTRUCTIONS

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control or otherwise available to you, regardless of whether the documents are possessed directly by you.
2. Documents responsive to the request should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.
3. In the event that any entity, organization, or individual named in the request has been, or is currently, known by any other name, the request should be read also to include such other names under that alternative identification.
4. Each document should be produced in a form that may be copied by standard copying machines.
5. When you produce documents, you should identify the paragraph(s) and/or clause(s) in the Committee's request to which the document responds.
6. Documents produced pursuant to this request should be produced in the order in which they appear in your files and should not be rearranged. Any documents that are stapled, clipped, or otherwise fastened together should not be separated. Documents produced in response to this request should be produced together with copies of file labels, dividers, or identifying markers with which they were associated when this request was issued. Indicate the office or division and person from whose files each document was produced.
7. Each folder and box should be numbered, and a description of the contents of each folder and box, including the paragraph(s) and/or clause(s) of the request to which the documents are responsive, should be provided in an accompanying index.
8. Responsive documents must be produced regardless of whether any other person or entity possesses non-identical or identical copies of the same document.
9. The Committee requests electronic documents in addition to paper productions. If any of the requested information is available in machine-readable or electronic form (such as on a computer server, hard drive, CD, DVD, back up tape, or removable computer media such as thumb drives, flash drives, memory cards, and external hard drives), you should immediately consult with Committee staff to determine the appropriate format in which to produce the information. Documents produced in electronic format should be organized, identified, and indexed electronically in a manner comparable to the organizational structure called for in (6) and (7) above.

10. If any document responsive to this request was, but no longer is, in your possession, custody, or control, or has been placed into the possession, custody, or control of any third party and cannot be provided in response to this request, you should identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control, or was placed in the possession, custody, or control of a third party.
11. If any document responsive to this request was, but no longer is, in your possession, custody or control, state:
 - a. how the document was disposed of;
 - b. the name, current address, and telephone number of the person who currently has possession, custody or control over the document;
 - c. the date of disposition;
 - d. the name, current address, and telephone number of each person who authorized said disposition or who had or has knowledge of said disposition.
12. If any document responsive to this request cannot be located, describe with particularity the efforts made to locate the document and the specific reason for its disappearance, destruction or unavailability.
13. If a date or other descriptive detail set forth in this request referring to a document, communication, meeting, or other event is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
14. The request is continuing in nature and applies to any newly discovered document, regardless of the date of its creation. Any document not produced because it has not been located or discovered by the return date should be produced immediately upon location or discovery subsequent thereto.
15. All documents should be bates-stamped sequentially and produced sequentially. In a cover letter to accompany your response, you should include a total page count for the entire production, including both hard copy and electronic documents.
16. Documents should be delivered to the Committee majority staff in Room 316 of the Ford House Office Building. You should consult with Committee majority staff regarding the method of delivery prior to sending any materials.
17. In the event that a responsive document is withheld on any basis, including a claim of privilege, you should provide the following information concerning any such document: (a) the reason the document is not being produced; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; (e) the relationship of the author and addressee to each other; and (f) any other description necessary to identify the document and to explain the basis

for not producing the document. If a claimed privilege applies to only a portion of any document, that portion only should be withheld and the remainder of the document should be produced. As used herein, "claim of privilege" includes, but is not limited to, any claim that a document either may or must be withheld from production pursuant to any statute, rule, or regulation.

18. If the request cannot be complied with in full, it should be complied with to the extent possible, which should include an explanation of why full compliance is not possible.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; (2) documents responsive to the request have not been destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee since the date of receiving the Committee's request or in anticipation of receiving the Committee's request, and (3) all documents identified during the search that are responsive have been produced to the Committee, identified in a privilege log provided to the Committee, as described in (17) above, or identified as provided in (10), (11) or (12) above.

DEFINITIONS

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, electronic mail ("e-mail"), instant messages, calendars, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, power point presentations, spreadsheets, and work sheets. The term "document" includes all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments to the foregoing, as well as any attachments or appendices thereto. The term "document" also means any graphic or oral records or representations of any kind (including, without limitation, photographs, charts, graphs, voice mails, microfiche, microfilm, videotapes, recordings, and motion pictures), electronic and mechanical records or representations of any kind (including, without limitation, tapes, cassettes, disks, computer server files, computer hard drive files, CDs, DVDs, back up tape, memory sticks, recordings, and removable computer media such as thumb drives, flash drives, memory cards, and external hard drives), and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, electronic format, disk, videotape or otherwise. A document bearing any notation not part of the original text is considered to be a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "documents in your possession, custody or control" means (a) documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, or representatives acting on your behalf; (b) documents that you have a legal right to obtain, that you have a right to copy, or to which you have access; and (c) documents that have been placed in the possession, custody, or control of any third party.

3. The term "communication" means each manner or means of disclosure, transmission, or exchange of information, in the form of facts, ideas, opinions, inquiries, or otherwise, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, e-mail, instant message, discussion, release, personal delivery, or otherwise.

4. The terms "and" and "or" should be construed broadly and either conjunctively or disjunctively as necessary to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes the plural number, and vice versa. The masculine includes the feminine and neuter genders.

5. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, limited liability corporations and companies, limited liability partnerships, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, other legal, business or government entities, or any other organization or group of persons, and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof.

6. The terms "referring" or "relating," with respect to any given subject, mean anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject.

7. The terms "you" or "your" mean and refers to

For government recipients:

"You" or "your" means and refers to you as a natural person and the United States and any of its agencies, offices, subdivisions, entities, officials, administrators, employees, attorneys, agents, advisors, consultants, staff, or any other persons acting on your behalf or under your control or direction; and includes any other person(s) defined in the document request letter.