# Memorandum

May 14, 2021

**Detailed Summary of the Interim Final Rule (IFR) Issued by U.S. Treasury Guidance on use of Coronavirus State and Local Fiscal Recovery Funds from the American Rescue Plan and Use in Broadband Deployment**

On May 10, the Treasury Department released the Interim Final Rule (IFR) for the $350 billion in Coronavirus State and Local Fiscal Recovery Funds under the American Rescue Plan Act (ARPA). The Funds provide emergency funding for state, local, territorial, and Tribal governments to respond to the pandemic and its economic impacts, including making necessary investments in broadband infrastructure. A Fact Sheet was also released. **Note:** after many bullets a short NRECA commentary/analysis is provided in *italics*.

Eligible Areas:

- Award recipients have flexibility to identify the specific locations within their communities to be served and to otherwise design the project. p. 71 - *Applicants can draw their own proposed funding area as in ReConnect which can help avoid already served or funded areas*
- Eligible projects are expected to focus on locations that are unserved or underserved. p. 75
    - Areas are unserved or underserved if they lack access to a wireline connection capable of reliably delivering at least minimum speeds of 25 Mbps download and 3 Mbps upload. p. 75-76 – *This should mean they won't just rely on FCC maps but will require incumbents to prove if they provide a minimum of 25/3 reliably to locations before deeming them ineligible. It is difficult to square the determination that 25/3 is "served," alongside the assertion that 100 Mbps symmetrical service is "necessary to ensure that broadband infrastructure is sufficient to enable users to generally meet household needs."*
- In selecting an area to be served by a project, recipients are encouraged to avoid investing in locations that have existing agreements to build reliable wireline service with minimum speeds of 100 Mbps download and 20 Mbps upload by December 31, 2024, in order to avoid duplication of efforts and resources. p. 76 – *This is interesting. "Encouraged to avoid" locations with a 100/20 commitment by 12/31/2024. This could potentially open up eligibility to many of the CAF II areas with commitments below 100/20 and could also open up some RoR A-CAM (small telco) areas whose commitments are below this speed threshold or has a commitment beyond the date specified. "Encouraged to avoid" could also mean that even areas with such a commitment could be eligible for funding. One could interpret areas preliminarily won in the RDOF Phase I to be eligible for funding since the "agreement" is not confirmed until after the FCC approves an initial awardee's long-form authorizes funding for that specific award which are still under review*
- Under sections 602(c)(1)(A) and 603(c)(1)(A), assistance to households facing negative economic impacts due to COVID-19 is also an eligible use, including internet access or digital literacy assistance. In considering whether a potential use is eligible under this category, a recipient must consider whether, and the extent to which, the household has experienced a negative economic impact from the pandemic. p. 77 – *This can be interpreted as a separate authorization for use of the funds and mean the funds can be used to bring broadband to areas that don't have 25/3 Mbps (as discussed above) OR the funds can be used to assist households hurt by the pandemic. If a household has been negatively impacted that would potentially make it eligible regardless of the level of existing service or other existing deployment obligations in an area that would otherwise restrict use of the funds for broadband*

- To meet the immediate needs of unserved and underserved households and businesses, recipients are encouraged to focus on projects that deliver a physical broadband connection by prioritizing projects that achieve last mile-connections. p. 76 – *Middle-mile would appear to be eligible but not prioritized*

Network Speed Obligations:

- Eligible projects are expected to be designed to deliver, upon project completion, service that reliably meets or exceeds symmetrical upload and download speeds of 100 Mbps. p. 71 – *100/100 Mbps symmetrical is a good minimum goal but the IFR does provide an out for 100/20 Mbps*
- Recognizing that this goal may be impracticable in some instances due to geographical, topographical, or financial constraints, the IFR permits upload speeds of between at least 20 Mbps and 100 Mbps, but the networks should be designed to be scalable to 100/100 Mbps. p. 75 – *As stated above, this provision basically sets 100/20 Mbps as the real minimum level of service obligation but requires the ability to scale up to 100/100 Mbps, but doesn't outline how they would prove scalability*
- Recipients are encouraged to prioritize investments in fiber optic infrastructure where feasible. p. 75 – *This is a positive provision and hopefully will result in most funding going to fiber projects*

Encouraged Priorities:

- Recipients are also encouraged to consider ways to integrate affordability options into their program design. p. 76 – *Affordability is not defined so difficult to determine what this would mean*
- Treasury also encourages recipients to prioritize support for broadband networks owned, operated by, or affiliated with local governments, non-profits, and **cooperatives**—providers with less pressure to turn profits and with a commitment to serving entire communities. p. 76-77 – *Co-ops are specifically mentioned as a prioritized entity to receive these funds which is consistent with a similar statement in the administration's proposed American Jobs Act (infrastructure package) outline*

Restrictions on Use and Timeline (These sections are described in mandatory language while other sections were more permissive):

- The ARPA includes two provisions that further define the boundaries of the statute's eligible uses. p. 78
  - Section 602(c)(2)(A) of the Act provides that States and territories may not "use the funds … to either directly or indirectly offset a reduction in … net tax revenue … resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax … or delays the imposition of any tax or tax increase."
  - Sections 602(c)(2)(B) and 603(c)(2) prohibit any recipient, including cities, nonentitlement units of government, and counties, from using Fiscal Recovery Funds for deposit into any pension fund.
- Other restrictions: Payments from the Fiscal Recovery Funds may not be used as non-Federal match for other Federal programs whose statute or regulations bar the use of Federal funds to meet matching requirements. p. 96 – *These funds can't be used as matching funds for other federal broadband programs*
- Section 602(c)(1) and section 603(c)(1) require that payments from the Fiscal Recovery Funds be used only to cover costs incurred by the State, territory, Tribal government, or local government by December 31, 2024. p. 97
- The definition of "incurred" does not have a clear meaning. Treasury is interpreting the requirement in section 602 and section 603 that costs be incurred by December 31, 2024, to require only that recipients have obligated the Fiscal Recovery Funds by such date. p. 97-98

- The Interim Final Rule adopts a definition of "obligation" that is based on the definition used for purposes of the Uniform Guidance, which will allow for uniform administration of this requirement and is a definition with which most recipients will be familiar.

- Funds are all prospective in nature, Treasury considers the beginning of the covered period for purposes of determining compliance with section 602(c)(2)(A) to be the relevant reference point for this purpose. The Interim Final Rule thus permits funds to be used to cover costs incurred beginning on March 3, 2021. p. 99 – *This appears to be for money spent or obligated by state and local governments. It is not clear if this would apply to any co-op awardee deploying broadband*
- The Act provides that the Secretary will make payments to local governments in two tranches, with the second tranche being paid twelve months after the first payment. p. 102
  - Splitting payments to States into two tranches will help encourage recipients to adapt, as necessary, to new developments that could arise over the coming twelve months, including potential changes to the nature of the public health emergency and its negative economic impacts. P. 103 – *Can be interpreted to mean that Treasury will expect state and localities to change how funds are allocated in the second tranche depending on the state of the emergency and economic conditions at that time*
- State, territorial, and Tribal governments; counties; metropolitan cities; and nonentitlement units of local government (counties, metropolitan cities, and nonentitlement units of local government are collectively referred to as "local governments") may transfer amounts paid from the Fiscal Recovery Funds to a number of specified entities. P.105
  - The IFR permits State, territorial, and Tribal governments to transfer Fiscal Recovery Funds to other constituent units of government or private entities beyond those specified in the statute. Similarly, local governments are authorized to transfer Fiscal Recovery Funds to other constituent units of government (e.g., a county is able to transfer Fiscal Recovery Funds to a city, town, or school district within it) <u>or to private entities</u>. This approach is intended to help provide funding to local governments with needs that may exceed the allocation provided under the statutory formula. p. 105-106 – *A state or local government could transfer some of its funds to a subunit or a private entity to cover costs of a project that exceeds that subunit of governments direct allocation*
- The Fiscal Recovery Funds provide for $19.53 billion in payments to be made to States and territories which will distribute the funds to nonentitlement units of local government (NEUs); local governments which generally have populations below 50,000… Because the statute requires States and territories to make distributions based on population, <u>States and territories may not place additional conditions or requirements on distributions to NEUs, beyond those required by the ARPA and Treasury's implementing regulations and guidance</u>. – *Many co-op areas could fall under the definition of nonentitlement units. Large telco and cable interests have already been advocating for states and localities to further restrict use of these funds and expect they will try to get this portion of the IFR altered*

<u>Public Input</u> (The rules are "interim", and changes may be made in the final rule):

- Although this Interim Final Rule is effective immediately, <u>comments are solicited from interested members of the public</u> and from recipient governments on all aspects of the Interim Final Rule. Comments will be due 60 days after federal register publication. p. 113 – *NRECA plans to file comments. Treasury sought input on five specific questions*