

April 11, 2023

U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

VIA EMAIL

capitalprojectsfund@treasury.gov

RE: Proposed SLFRF and CPF Supplementary Broadband Guidance

COMMENTS OF THE
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

The National Rural Electric Cooperative Association (“NRECA”) appreciates the opportunity to provide the following comments in response to the Proposed SLFRF and CPF Supplementary Broadband Guidance (“Proposed Guidance”) issued by Treasury on March 28, 2023.

NRECA is the national service organization for more than 900 not-for-profit rural electric cooperatives that provide electric power to 56% of the nation’s landmass, approximately 42 million people in 48 states, or approximately 12 percent of electric customers. Rural electric cooperatives serve 88% of the counties of the United States, including 327 of the nation’s 353 persistent poverty counties, which is 92% of these persistent poverty counties.

The nation’s rural electric cooperatives are deeply committed to promoting the deployment of advanced telecommunications capabilities within the rural communities and areas in which they serve, and are expected to play a crucial role in the development of broadband infrastructure to serve rural unserved and underserved locations. Over 200 rural electric cooperative broadband projects are already underway across the country, and NRECA estimates that another 100 or so are currently exploring the feasibility of providing broadband. NRECA members are providing (or will provide) these broadband services either by themselves or through partnerships of some kind with affiliated or unaffiliated ISPs. Many of these projects receive support from ARPA SLFRF funds, and many more will benefit from CPF funding.

NRECA commends the Treasury Department for issuing the Proposed Guidance. The experience of NRECA members to date in deploying broadband infrastructure using SLFRF and CPF funds has revealed various compliance-related uncertainties and open questions, as well as scenarios where a strict application of the Uniform Guidance regulations at 2 CFR Part 200 would lead to nonsensical results. At best, these compliance issues add delay, expense and uncertainty. At worst, they can threaten the viability of an entire project. The Proposed Guidance is a welcome and thoughtful effort to address many of these issues, with potentially significant beneficial impact on grant-funded broadband projects across the country.

While NRECA generally agrees with and supports the Proposed Guidance, the “on the ground” experience of our electric cooperative members suggests that the Guidance could be clarified and thus improved in several important respects. Our comments include six main suggestions, summarized as follows:

- 1. The scope should not be limited to “ISPs”:** The Final Guidance should apply to *all* entities receiving SLFRF or CPF subawards for investment in broadband infrastructure, not just those entities that are “ISPs.”
- 2. Procurement:** The Final Guidance should clarify that all fixed-award subrecipients that receive SLFRF or CPF funding for development of broadband projects are not subject to Part 200 rules relating to procurement.
- 3. Program Income:** The Final Guidance should clarify that the Part 200 program income rules do not apply to income received from fiber Indefeasible Rights of Use (IRU)s and leases.
- 4. Transfer of grant-funded assets:** The Final Guidance should confirm that a transfer of grant-funded assets is permitted upon providing notice to Treasury, and that no affirmative Departmental approval is required.
- 5. Retroactive application:** Given that many states and local governments have already made SLFRF broadband grants, and some CPF funds have been awarded, Treasury should apply the Final Guidance principles retroactively.
- 6. Clarification of terms:** Certain defined and undefined terms used in the Proposed Guidance should be further clarified.

1. The scope of the Final Guidance should not be limited to “ISPs.”

Although the term “ISP” is not defined, the Proposed Guidance focuses almost entirely on ISPs, using the term “ISP” extensively and in an undifferentiated manner. Grant-funded broadband infrastructure projects, however, commonly involve recipients and subrecipients that deploy broadband infrastructure used to access the internet, but that do not normally consider themselves to be ISPs.

Consider, for example, a situation where a state or local government makes a broadband infrastructure SLFRF subaward to a local electric cooperative to support extension of the cooperative’s fiber network to unserved or underserved areas. The cooperative might deploy middle-mile fiber, last-mile fiber, and even service drops using grant funds – but might not itself act as the retail ISP. Under the Proposed Guidance, it is not clear whether the cooperative in this scenario would still be subject to all of the problematic and onerous Part 200 rules that the Proposed Guidance seeks to address, simply because the cooperative does not provide retail Internet access service.

Note that the example described above is not an isolated or unrealistic scenario, since many grant-funded broadband projects that involve electric cooperatives also involve one or more other service-oriented entities.

As more grant-funded projects are launched and the partnership models continue to evolve, SLFRF and CPF subrecipients should have the flexibility to implement approaches with the same level of confidence that the traditional ISPs could enjoy under this guidance. The exceptions in the guidance should be tied to the performance of the work and public benefit received using the grant funds – not to the good or service sold by the subrecipient.

NRECA strongly urges the Department of Treasury to structure the Final Guidance so that it applies uniformly to *all* fixed-award subrecipients receiving SLFRF and CPF subawards for investment in broadband infrastructure, not just to “ISPs.”

2. The Final Guidance should further clarify that the Part 200 cost principles and procurement Rules do not apply to electric cooperatives that receive SLFRF and CPF fixed-amount subawards.

The Proposed Guidance states, “ISPs that receive fixed amount subawards are not required to comply with the cost principles and procurement practices of the Uniform Guidance.” The Proposed Guidance then goes on to state that “*recipients* may issue fixed amount *subawards* for broadband infrastructure projects without further Treasury approval ... and that *recipients* are not required to apply the cost principles and procurement practices of Part 200 to ISPs receiving such fixed amount subawards.” (emphasis added). These statements would benefit from some clarification. Does Treasury mean only that a subaward *to* an ISP may be made without regard to the Part 200 procurement rules? Or does Treasury mean that a subrecipient ISP is not subject to Uniform Guidance procurement rules? If the latter, does this mean that Treasury will not require a subrecipient ISP to engage in a procurement process to select a contractor?

NRECA appreciates Treasury’s implicit recognition that the prescriptive procurement requirements under Part 200 may be contrary to the best interests of SLFRF and CPF broadband projects. NRECA encourages Treasury to clarify that this exception for fixed amount awards applies broadly, not just to “recipients” but also to SLFRF and CPF subrecipients (and per request #1 above not just “ISP” subrecipients), and to the subrecipient-contractor relationships that are formed when subrecipients engage with other entities to develop the network.

3. The Final Guidance should clarify that the Part 200 “program income” rules do not apply to fiber IRUs and leases.

NRECA fully supports Treasury’s clear and firm statements in the Proposed Guidance relating to program income received by ISPs, and NRECA understands the necessary distinction between an ISP treated as a subrecipient and an ISP treated as a contractor. NRECA urges Treasury to adopt a clear and broad principle in the Final Guidance with respect to program income, and accordingly respectfully proposes the following additional clarification in the Final Guidance as to three points.

First, as explained above, Treasury should not limit the program income guidance to only “ISPs.” The broadband infrastructure ecosystem includes a variety of entities other than ISPs: entities may well construct, own, lease, or operate broadband infrastructure without being an “ISP,” and such entities may realize income as a result. As with the Proposed Guidance in general, Treasury should clarify that the program income guidance applies uniformly to all SLFRF and CPF broadband project subrecipients, and not just “ISPs.”

Second, SLFRF and CPF broadband subrecipients may receive income from the grant of an IRU or lease of dark fiber constructed with grant funds. For example, an electric cooperative subrecipient of an SLFRF

grant to construct or expand a fiber network might grant dark fiber IRUs or leases to one or more ISPs, who would then light the fiber and provide retail ISP services. Similarly, an electric cooperative subrecipient could provide a lit-fiber capacity lease to a retail ISP, providing transmission across the cooperative's network but without itself realizing revenue from provision of ISP services. Or, an electric cooperative subrecipient might lease or IRU dark or lit fiber to a Community Anchor Institution, or to a large enterprise customer. In each of these examples, the income received by the subrecipient electric cooperative is not income generated by the co-op's provision of ISP service.

All of the above examples reflect common real-world scenarios, but despite the obvious benefit of promoting such dark fiber or lit fiber availability, none of these examples would be covered by the Proposed Guidance's statement regarding program income. Accordingly, the Final Guidance should specifically state that revenue from fiber IRUs and leases is not program income, and SLFRF and CPF recipients and subrecipients should be able to use such revenue without restriction.

Third, with respect to contractors, the Proposed Guidance allows any recipient to agree to permit a contractor to retain income, subject to the further qualifications in the Proposed Guidance. The Final Guidance should clarify that any recipient *or subrecipient* may agree to permit a contractor to retain income, subject to the further qualifications in the Proposed Guidance.

4. The Final Guidance should confirm that the transfer of grant-funded assets is authorized upon submission of notice to Treasury and does not require affirmative authorization.

NRECA supports the Proposed Guidance regarding the transfer of grant-funded assets. The Proposed Guidance states that holders of title in grant property with a remaining Federal Interest "may otherwise sell Project Property only after provision of notice to Treasury that identifies the successor or transferee and after securing the agreement of the successor or transferee to comply with these requirements and the acknowledgement of the successor or transferee of the federal property interest."

Treasury appears to be proposing a more streamlined approach with respect to sale or conveyance of grant-funded property than that adopted by NTIA under the BTOP program. Crucially, Treasury apparently proposes that owners of grant-funded property may convey property after providing *notice* to Treasury – provided such notice contains certain information – and that affirmative approval from Treasury is not required. This would be a welcome improvement over the process adopted by NTIA for BTOP, in which the property owners must submit a petition for waiver to both NTIA and NOAA and receive affirmative approval from both agencies, a process that commonly delays closing of a proposed transaction by six months or more.

If the notice of conveyance submitted to Treasury includes certain information (as suggested in the Proposed Guidance), there is no cognizable reason why affirmative Departmental approval should be necessary. Indeed, we are aware of no instance in which NTIA or NOAA has denied a requested transfer of BTOP-funded property. An approval requirement along the lines of NTIA's approach for BTOP would simply add unnecessary administrative cost and delay.

In the Final Guidance, Treasury should affirm that transfer of grant-funded property is approved upon submission of qualifying notice documentation. Alternatively, the Final Guidance could state that approval is deemed granted after some reasonable period of time following submission (30 days, for example), to enable Treasury to confirm that the notice documents contain all necessary information.

5. The Final Guidance should apply retroactively.

Finally, NRECA urges Treasury to apply the Final Guidance retroactively. SLFRF grant funds in particular have been flowing for some time now, with recipients and subrecipients using grant funds to develop broadband projects around the country. They have done so to date without full clarity as to the issues to be addressed in the Final Guidance, and they should not be penalized for it. The Final Guidance should explicitly state that it applies in full force and effect to all SLFRF and CPF projects, recipients and subrecipients dating at least to the initial award of funding.

Similarly, to maintain consistency with the period of performance established under the SLFRF Final Rule, Treasury should explicitly permit subrecipients to allocate SLFRF and CPF funding to the cost of project equipment acquired prior to the subrecipient award, but after March 3, 2021.

6. Clarification of terms.

The Uniform Rules at Part 200 contain defined terms for Subaward, Subrecipient, Fixed Amount Awards, and Contract, among others, but uses these terms inconsistently or uses new undefined terms – like “fixed amount subawards” and “ISP” – which could lead to confusion. Treasury should consider further clarifying the operative terms in the Final Guidance.

Again, NRECA appreciates the opportunity to offer our perspectives, and we hope our comments prove useful as Treasury develops the Final Guidance. If you have any questions about the above or if we can be of further assistance, please do not hesitate to contact me.

Respectfully submitted,
National Rural Electric Cooperative Association

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