

Federal Government Issues Multi-Billion Dollar Notice of Funding Opportunity for Broadband

May 16, 2022

Communications and Media

Last Friday, the National Telecommunications and Information Administration (NTIA), which is part of the Department of Commerce, released its widely anticipated Notice of Funding Opportunity (NOFO) for the landmark \$42.5 billion Broadband Equity, Access, and Deployment (BEAD) Program, along with NOFOs for two smaller programs. All of these programs were created by the Infrastructure Investment and Jobs Act (IIJA or the Act). The NOFO provides guidance to states on the process for obtaining funds that they, in turn, will award to service providers and other qualified recipients for building out broadband to unserved and underserved areas.

As expected, the NOFO makes clear that while states will be eligible to receive some initial funding in the near-term, the bulk of funding will become available after the FCC releases improved maps identifying with specificity those parts of the country that lack access to reliable broadband. In the lead-up to the release of the NOFO, Commerce Secretary Gina Raimondo and FCC Chairwoman Jessica Rosenworcel indicated that the FCC expects to release these critical data sets as early as November 2022. The NOFO suggests that funds will then flow to states and be available for grants to service providers and other qualified recipients in 2023.

Among other notable points, the NOFO expresses a clear preference (but not an absolute requirement) for fiber-to-the-home projects. It also leaves for another day the question of whether there will be any waiver of the “Build America, Buy America” requirement that attaches to all infrastructure projects under the IIJA. Broadband industry representatives have expressed concern that, in light of supply chain issues around the availability of fiber optic cable and other equipment, adherence to this requirement will be a stumbling block to prompt deployments. Nevertheless, the issuance of the NOFO is a major step forward in the ongoing goal of bringing broadband to all households across the United States.

Summary of NOFO

Entities Eligible to Receive BEAD Funding

The IIJA authorizes the NTIA to award BEAD funding to states, who then will award grants to “subgrantees” (*i.e.*, service providers and other qualified recipients) for specified broadband infrastructure purposes. The Act does not explicitly define who qualifies as a “subgrantee,” but it specifies that states “may not exclude” a cooperative, nonprofit, public-private partnership,

private company, public or private utility, or local government “from eligibility for grant funds” and it attempts to dissuade enforcement of any state laws prohibiting municipalities from providing broadband service.

While the IJJA itself specified some general requirements as to eligibility for sub-grants and requirements for how funds should be used, including, among others, not using funds for any covered communications equipment or services deemed to pose a national security risk, the NOFO adds critical details. Specifically, any state award of BEAD funding will come with the following obligations:

- Service providers must offer broadband service at a speed of at least 100 Mbps downstream/20 Mbps upstream and latency less than or equal to 100 milliseconds, and avoid network outages that exceed, on average, 48 hours in a year. In the lead-up to the NOFO, there was substantial debate within the industry over whether higher speeds (e.g., of 100 Mbps/100 Mbps) should be prioritized, which many in the industry saw as providing an advantage to all-fiber deployments over satellite or fixed wireless projects. The NOFO resolves this issue by prioritizing projects that would provide fiber connectivity in several ways, including by defining “Priority Broadband Projects” as those “that will provision service via end-to-end fiber-optic facilities;”
- Service providers must offer at least one “low-cost broadband service option” for “eligible subscribers.” With NTIA approval, states will define the contours of “low-cost broadband service options” through their final proposal. The NOFO defined an “eligible subscriber” as “any household seeking to subscribe to broadband internet access that (1) qualifies for the Affordable Connectivity Program (ACP) or any successor program, or (2) is a member of a household that” was at or below 200 percent of the Federal poverty line or qualifies under a low-income program such as Medicaid;
- Service providers must deploy the broadband network and begin providing broadband service to each customer that desires it within four years of receiving funds, unless otherwise extended by the state;
- If laying fiber optic cables or conduit underground, service providers must include interspersed conduit access points at regular and short intervals;
- Service providers must provide at least 25 percent of the project's costs from non-Federal, or specified Federal, sources. Federal sources that can be the source of the 25 percent non-BEAD share include (1) federal regional commission or authority funds and (2) recent funds created by statute, including the Families First Coronavirus Response Act, the CARES Act, the Consolidated Appropriations Act of 2021, and the American Rescue Plan Act. The NOFO, however, provided that funds from the FCC's Universal Service Fund may not be used to match BEAD funds;
- The IJJA included a “Buy American” requirement that effectively required funded broadband networks to be deployed using at least 55% domestic materials. Given the nature of the broadband supply chain, representatives of U.S. broadband providers had expressed concern that this requirement would be incompatible with the ambitious four-year timeline for completion of projects. In response, the NOFO did not address these requests and simply stated that the Commerce Secretary “will seek to minimize waivers, and any waivers will be limited in duration and scope;”
- Service providers must notify the public of the broadband service and implement public awareness campaigns to highlight the benefits of broadband service;

- If a service provider is no longer able to provide broadband service at any time, they must sell the network capacity at a reasonable, wholesale rate on a nondiscriminatory basis; and
- Service providers must provide access to broadband service to each customer served by a BEAD-funded network on reasonable and non-discriminatory terms, and they may not impose data usage caps or unjust or unreasonable network management practices.

The NOFO explains that locations that today are served “exclusively” by satellite or by services using entirely unlicensed spectrum will be considered “unserved” and thus eligible for funding. However, states are not prohibited from awarding BEAD funds to providers intending to deliver qualified broadband service using these technologies, although there is a decided preference for fiber deployments (as discussed further below).

Eligible Broadband Projects and Prioritization of Grants

The IIJA provides that states may use BEAD funds to award subgrants only for the following purposes:

1. Deploying and/or upgrading broadband network facilities for “unserved service projects” and “underserved service projects,” which are respectively defined as projects in which 80 percent or more of the locations served by the project (a) lack access to a connection with a latency less than or equal to 100 milliseconds and (b) either have no access to broadband service or lack access to reliable broadband service offered at a speed greater than 25 Mbps download and 3 Mbps upload (unserved) or 100 Mbps download and 20 Mbps upload (underserved);
2. Deploying and/or upgrading broadband network facilities for “eligible community anchor institutions” (*i.e.*, community support organizations such as schools, libraries, or hospitals that lack access to gigabit-level broadband service);
3. Data collection, broadband mapping, and planning, however, the IIJA provides that subgrantees may use only up to five percent of the jurisdiction’s minimum allocation for planning purposes (including activities such as research and data collection, budget development, and technical assistance);
4. Installing internet and Wi-Fi infrastructure or providing reduced-cost broadband within a multi-family residential building;
5. Broadband adoption, including programs to provide affordable internet-capable devices;
6. Training and workforce development; and
7. Other uses, including Digital Equity programs, proposed by states and approved “in advance in writing” by the NTIA.

The IIJA requires states to award subgrants according to three tiers of priorities.

First, states must prioritize unserved service projects, then underserved service projects, and then eligible community anchor institutions. This is a foundational requirement, as many members of Congress – particularly from rural areas – had expressed concern that areas with *no* broadband (defined as areas without 25/3 Mbps service) be prioritized first.

The NOFO ensures that states will follow this requirement by (1) permitting challenges of a state’s initial proposal regarding whether a particular location is unserved or underserved; (2)

permitting states to seek proposals and grant awards for underserved service, community anchor institutions, and non-deployment projects only if the state has first ensured deployment of service to “all unserved locations;” (3) requiring that states “ensure [they] have a plan for serving all unserved and (where [they] have sufficient funding) underserved locations;” and (4) permitting states with no proposals for unserved or underserved locations to proactively “engage with existing providers and/or other prospective subgrantees to find providers willing to expand their existing or proposed service areas” to cover those locations.

Second, states must prioritize funding for the deployment of “priority broadband projects.” The NOFO defines a “priority broadband project” as “a project that will provision service via end-to-end fiber-optic facilities to each end-user premises.” According to the NOFO, “[o]nly end-to-end fiber will ensure that the network built by the project can easily scale speeds over time to meet the evolving connectivity needs of households and businesses and support the deployment of 5G” and other technologies.

Third, states must prioritize projects based on (a) the deployment of a broadband network to high-poverty areas; (b) the speeds of the proposed broadband service; (c) the expediency with which a project can be completed; and (d) a subgrantee’s demonstrated record and plans to be in compliance with Federal labor and employment laws.

Process/Timing

The IIJA provides for an initial allocation of \$100 million to each state (as well as D.C. and Puerto Rico) and \$25 million to each territory that files a letter of intent with the NTIA by July 18, 2022. As noted above, these jurisdictions may award up to five percent of their initial allocation for planning purposes. “On or after the date on which the broadband DATA maps are made public” by the FCC, the NTIA “shall issue a notice to each [state] that” (1) lists the estimated amount available to each state and (2) “invites the [states] to submit an initial proposal and a final proposal for a grant” for the remainder of the state’s funding.

As previously noted, the FCC expects to issue the broadband maps by November of this year; once the maps are available, states and territories can apply to receive funding based on the number of high-cost areas in their jurisdiction, relative to the country, and the number of unserved locations in their jurisdiction, relative to the country.

While the NOFO does not provide a precise outline of the timing, funding should begin to flow to broadband projects in 2023. The chart below briefly summarizes the next steps in the process.

Event/Proceeding	Responsible Party	Timing
Letter of Intent	States/Territories	Due by July 18, 2022
Request for Initial Planning Funds	States/Territories	Due by August 15, 2022
Five-Year Action Plan	States/Territories	Due within 270 days of receipt of initial planning funds
Program Fund Allocation and Notice of Available Amounts (NAAs)	NTIA	NTIA will publish NAAs “[o]n or after the date on which the Broadband DATA Maps are” released by the FCC
Initial Proposal	States/Territories	Due within 180 days of receipt of the NAA and must go through public comment period

Event/Proceeding	Responsible Party	Timing
Challenge Process	States/Territories/Local Governments/Service Providers	States must conduct a challenge process after it submits its initial proposal, but before allocating BEAD funds
Initial Funding Availability	NTIA	NTIA will review initial proposals “as expeditiously as possible.” Once approved, NTIA will make available at least 20 percent of total grant funds to the state/territory
Subgrantee Selection Process	States/Territories	A state “may initiate its competitive subgrantee selection process upon approval of its Initial Proposal and will have up to one year to . . . complete the selection process, and submit a Final Proposal” At this point, a state may use its initial funding for certain eligible activities
Final Proposal and Release of Remaining Funds	States/Territories/NTIA	After the state has selected subgrantees, it must submit a Final Proposal to NTIA that has gone through a public comment period; if approved, NTIA will then award the remaining funds to the state to award

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Communications and Media practice:

<u>Matt DelNero</u>	+1 202 662 5543	mdelnero@cov.com
<u>Yaron Dori</u>	+1 202 662 5444	ydori@cov.com
<u>Gerard Waldron</u>	+1 202 662 5360	gwaldron@cov.com
<u>Jocelyn Jezierny</u>	+1 202 662 5316	jjezierny@cov.com
<u>Trevor Bernardo</u>	+1 202 662 5010	tbernardo@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.

© 2022 Covington & Burling LLP. All rights reserved.