WEST VIRGINIA
SECRETARY OF STATE
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ADMINISTRATIVE LAW DIVISION

Form #2

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OFFICE WEST VIRGINIA SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: West Virginia Broadband Deployment Council TITLE NUMBER: 208

RULE TYPE: Legislative CITE AUTHORITY: W. Va. Code §31-15C-9

AMENDMENT TO AN EXISTING RULE: YES ____ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: ____

TITLE OF RULE BEING AMENDED: ____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 1

TITLE OF RULE BEING PROPOSED: Broadband Deployment Grants Program

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON June 18, 2012 AT 4:30 PM ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

WV Broadband Deployment Council
ATTN: Andrea Rayl
Building 1, Room 25-W
State Capitol
Charleston, WV 25305
or via email to:
broadbanddeployment@wv.gov

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.

Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

TITLE 208
LEGISLATIVE RULE
BROADBAND DEPLOYMENT COUNCIL

SERIES 1
BROADBAND DEPLOYMENT GRANTS PROGRAM

Statement of Circumstances for Proposed Rule

The West Virginia Legislature has created the Broadband Deployment Council to determine the areas of the state that lack high-speed network services and to award grants to entities with proposals to promote the use and availability of broadband network services in those unserved areas. The Legislature has created a special fund for this purpose and has appropriated a significant amount of money to that fund.

The Broadband Deployment Council is required to promulgate guidelines for the evaluation of grant proposals and for oversight of the grant projects. Because the Council was established as agency with a limited period – the Council's authority ends on December 31, 2014 – the Legislature authorized the Broadband Deployment Council to promulgate its guidelines as emergency rules in West Virginia Code § 31-15C-9.

The attached rule is submitted by the West Virginia Broadband Deployment Council to provide a uniform and consistent framework for the submission of applications for grants, the evaluation of them, and oversight to ensure that grant funds are properly applied.

TITLE 208
LEGISLATIVE RULE
BROADBAND DEPLOYMENT COUNCIL

SERIES 1
BROADBAND DEPLOYMENT GRANTS PROGRAM

Brief Summary of the Rule

This rule establishes a framework of the process of application, review, awarding and administration of grants for the promotion, deployment, and buildout of broadband network services in areas of West Virginia that do not currently have high-speed, broadband access. The Broadband Deployment Council is authorized under the provisions of West Virginia Code §31-15C-1 *et seq.*, to determine what areas of the state are currently without service and require assistance to obtain such service. The Council is then tasked with the assessment of proposals to facilitate the expansion of, and the demand for, broadband network technologies.

Section 2 of the rule defines terms pertinent to the rule.

Section 3 outlines provisions for confidentiality of proprietary information and of other information for which a claim of confidentiality may be made. This section describes how the Council will evaluate claims of confidentiality and notify applicants of such determinations. This section also explains the consequences for improper disclosure of material that is deemed to be confidential.

Section 4 sets out the scope and process for the categorization of areas based upon upon the availability of broadband network services within each area, entities who may be eligible to apply for grants for broadband deployment, and the information that is required to be provided in applications for grants. This section also explains the manner in which an entity may challenge the Council's determination of network availability in a particular area.

Section 5 describes the public notice that is to be given when the Council receives an application for a grant to deploy broadband services in any unserved area.

Section 6 describes the Council's process for evaluating applications for grants, including the criteria by which the applications will be evaluated. Since two types of grants may be awarded – grants for deployment of broadband networks and grants for the promotion of the use of broadband networks – this section provides the criteria for each type of grant. This section outlines the areas in which the Council has discretion as well as limitations on the awards that may be granted.

Section 7 provides for the means of handling potential conflicts of interest for members of the Council and references to the Code's specific provision for conflicts of interest.

Section 8 describes requirements that must be met by grantees as prerequisites to receiving a grant award. This includes the signing of a grant agreement, compliance with state and federal wage laws, and the creation of a dedicated account for receipt of grant funds.

Section 9 sets out the documentation, record-keeping, and audit requirements for grant recipients for the duration of the grant period and it prohibits the commencement of work on grant projects until the approval of the grant agreement.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Broadband Deployment Grant Program

Type of Rule: [X] Legislative [ ] Interpretive [ ] Procedural

Agency: West Virginia Broadband Deployment Council

Address: Attn: Andrea Rayl
State Capitol Complex,
Building 1, Room 25-W
Charleston, WV 25305

Phone Number: 304-558-2000 Email: broadbanddeployment@wv.com

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

The proposed rule should have no change to the state budget. This rule implements a program to provide and oversee grants from funds that were appropriated by the Legislature in previous years. Implementation of this rule will simply permit the drawdown of those previously appropriated funds for development of communications infrastructure in unserved areas of the State.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Broadband Deployment Grant Program

Rule Title:

Broadband Deployment Grant Program

Rule Title:

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

This rule does not involve any fees charged by the agency. Adoption of the rule will not change the expense or income of the WV Broadband Deployment Council.

Upon full implementation of the rule, however, the State is likely to see an undetermined increase in general revenues from the expansion of communication-dependent enterprises into regions of the State that have not previously been served.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

The is no additional information to provide.

Date: May 7, 2012

Signature of Agency Head or Authorized Representative

David Hardy

TITLE 208
LEGISLATIVE RULE
BROADBAND DEPLOYMENT COUNCIL

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2012 MAY 14 AM 11:05

OFFICE WEST VIRGINIA
SECRETARY OF STATE

SERIES 1
BROADBAND DEPLOYMENT GRANTS PROGRAM

§208-1-1. General

1.1. Scope – This Legislative rule establishes general rules for the operation of the Broadband Deployment Grant Program.

1.2. Authority – W. Va. Code § 31-15C-9.

1.3. Filing date –

1.4. Effective date –

§208-1-2. Definitions

As used in this rule, these terms have the following meanings:

2.1. "Applicant" means an eligible entity as defined in these rules.

2.2. "Application" means a written request for broadband deployment grant funds pursuant to this rule containing all forms, information and attachments executed by the applicant and all partners, if applicable.

2.3. "Broadband" and "broadband service" has the meaning ascribed to it in W.Va. Code §31-15C-2(a)(1).

2.4. "Broadband deployment project" has the meaning ascribed to it in W.Va. Code §31-15C-2(a)(2).

2.5. "Broadband service provider" means a telecommunications service provider that provides broadband service.

2.6. "Completed application" means an application submitted by the date and time set for the close of the application acceptance period, having all sections filled out with all the required information; having all required certifications provided; and having all required supporting documentation included.

2.7. "Council" means the West Virginia broadband deployment council created under W.Va. Code §31-15C-3.

2.8. "Demand promotion" means any activity that promotes demand for broadband services.

2.9. "Grantee" means an applicant to whom the Council has awarded a broadband deployment grant.

2.10. "Unserved area" means a community that has no access to broadband service.

§208-1-3. Confidential and Proprietary Information

3.1. Protected Information. As provided in W. Va. Code §31-15C-13, proprietary business information, including, but not limited to, physical plant locations, subscriber levels, and market penetration data, and trade secrets are exempt from disclosure under the provisions of W. Va. Code §29B-1-4.

3.2. Identification of protected information in funding applications. Applicants must specifically identify such information in large, conspicuous typeface "CONFIDENTIAL." Information labeled "CONFIDENTIAL" must identify the basis for the claim of confidentiality, e.g. "Trade Secret" or "Propriety Information," and must also reference the specific subsection of W. Va. Code §29B-1-4 providing protection for that particular content. Any information not marked as confidential may be available for public inspection and copying.

3.3. Determination of Confidentiality.

a. The Council will endeavor to preserve the confidentiality of proprietary business information submitted pursuant to this rule where such information is clearly identified by the applicant.

b. If after review the Council determines that some information fails to qualify as confidential under W. Va. Code §29B-1-4 or these rules, the Council shall promptly notify the applicant. The applicant's information is subject to potential review by the Council's legal counsel, the attorney general, and the courts.

3.4. Authorized Access to Confidential Information. Pursuant to W. Va. Code §31-15C-13 (a), applications may be reviewed by consultants and other agents of the Council. All persons serving as a consultant or agent for this purpose shall be required to comply with the Council's rules regarding the protection of confidential information and shall be subject to the same sanctions for unauthorized disclosure of trade secrets or proprietary business information.

3.5. When a grant application has been submitted to the Council, and while other, competing applications may be received for broadband projects in a substantially similar area or areas, only the name of the grant applicant, the area or areas to be served by the proposed project, a summary description of the nature of the project and the anticipated benefits, shall be considered to be public information. The Council deems all other contents of a grant application to be propriety business information for the duration of any period in which competing applications may be accepted by the Council. After the conclusion of the period specified by W. Va. Code §31-15C-10(a), applications may be open for public inspection, *Provided that*, the Council may not disclose any information determined to be confidential under the provisions of subsections 3.1, 3.2 and 3.3 of this rule.

§208-1-4. West Virginia Broadband Deployment Council Grant Program

4.1. Categorization of Type 1, Type 2 and Type 3 unserved areas.

a. Using information from the West Virginia Broadband Mapping Program database, the Council shall identify unserved areas, pursuant to W. Va. Code §31-15C-6, according to the following categories:

1. Type 1 unserved area: an area in which broadband may be deployed by service providers in an economically feasible manner;

2. Type 2 unserved area: an unserved area in which broadband may be deployed by broadband service providers and other entities in an economically feasible manner, provided some form of public moneys is made available; and

3. Type 3 unserved area: an unserved area in which, at present, cable or wireline broadband cannot be deployed in an economically feasible manner and an intermodal approach employing other technologies, such as satellite and wireless, is required to provide that area with high-speed internet access.

b. The Council shall annually review its categorization of Type 1, Type 2 and Type 3 unserved areas prior to the opening of that year's grant cycle.

c. In order to be eligible for a broadband deployment grant, entities required to file FCC Form 477 with the FCC shall provide Form 477 data to the West Virginia Broadband Mapping Program within the Office of GIS Coordination at least twice annually to coincide with the FCC's filing schedule for Form 477 data collections.

4.2. Eligible Applicants.

The following entities are eligible to apply for broadband deployment project grant funding:

a. Local governments;

b. Broadband service providers;

c. Commercial Mobile Radio Service providers;

d. Telecommunications service providers;

e. Non-profit organizations;

f. Community organizations; and

g. Public-private partnerships.

4.3. Individuals are not eligible to apply for grant funding.

4.4. Applicant Qualifications.

a. Applicants for broadband infrastructure projects must have demonstrated experience in building, operating and maintaining a similar system, or a partner must have that experience.

b. Applicants for demand promotion projects must have demonstrated qualifications to conduct the type of project they are proposing.

4.5. Application.

a. An applicant shall apply for broadband deployment funds by completing the forms supplied by the Council and providing all required information, certifications and supporting documentation.

b. The application will require the applicant to specify the proposed location of the project, the types of unserved areas the project proposes to address, the estimated total cost of the project, the amount of assistance requested of the Council, and the specific uses to which the grant funds would be applied.

c. The applicant shall describe the cost-effectiveness of the project.

d. The applicant shall describe the economic development benefits of the project.

e. The applicant shall provide information concerning the availability of all sources of funding that could help finance the project, including, but not limited to, private grants or federal funding and the efforts undertaken to obtain such funding, and the amounts of these funds to be applied to the project.

f. The applicant shall describe the applicant's experience with providing the same or similar services and carrying out projects of a similar nature. If the project requires the construction of broadband network infrastructure, the applicant shall demonstrate its experience operating and maintaining such networks, or any partners' experience operating and maintaining such networks.

g. The applicant shall describe the degree to which the project advances statewide broadband access and other state broadband planning goals.

h. The applicant for a broadband infrastructure project shall describe the proposed technologies, bandwidths, upstream data rates and downstream data rates provided by its project.

i. The applicant shall indicate the date the project is scheduled to commence and the date the project is scheduled to be completed. Projects described in the application shall be entirely complete by the end of the grant agreement term.

j. To the extent that the applicant may be aware of alternative proposals or projects for providing similar services to the same area, the applicant shall explain how the proposed project compares with those alternatives in terms of the number of people served, the amount of financial assistance sought, and the long-term viability of the project.

k. The applicant for a broadband infrastructure project shall describe the environmental impact of the project.

l. The applicant shall demonstrate the long-term financial sustainability of the project.

m. The applicant shall provide a detailed explanation of why the requested grant funds are necessary to the completion of the project and why a grant from the Council is the most economically feasible and viable alternative to completing the project.

n. The applicant for a broadband infrastructure project shall provide proof of compliance with all local, state and federal permitting, licensing and certification requirements necessary for the proposed project.

o. The applicant shall disclose in the application whether the applicant or any project partner has filed for bankruptcy in the preceding eight years. This information shall not constitute a basis for disqualification of the application or less favorable consideration, but may, like any other information in the application, serve as a basis for the Council to request additional information regarding the current operation of the applicant and the nature of other sources of project funding.

p. The applicant shall disclose whether the applicant or any project partner has ever been subject to a claim, demand, civil action, or administrative action of any kind, for failure to complete, or substantially perform under, a contract or agreement to provide services of the same or similar nature to the services described in the application.

q. The applicant shall disclose whether the applicant or any project partner has ever failed to meet the conditions of a bond for the performance of services of the same or similar nature to the services described in the application.

r. The applicant must provide a certification from a professional engineer, licensed to practice in the State of West Virginia, verifying that the project will perform as outlined in the application and that the portion of the project for which grant funds are required can be completed within the grant period.

s. False or deceptive statements or omissions of any material information in the application may be grounds for denial of the application, the cancellation of any grant to the applicant organization currently or previously approved by the Council, and the disqualification of the applicant and partner organizations, and their representatives, from future grant awards.

t. The Council may request such additional information as it deems necessary to evaluate any application, including, but not limited to, financial and budgetary information related to the application or to the applicant or to any partners to the application.

u. Failure to provide such additional information as the Council reasonably requests by a specific date may, at the Council's option, disqualify the entire application.

4.6. If any eligible applicant desires to use grant funding for a broadband deployment project in an area or community, not categorized as an unserved area, where the applicant alleges that the actual data rates of service in the community do not meet the rates for broadband data service as defined in W.Va. Code §31-15C-2, the eligible entity may submit an application for the Council's consideration and evaluation, *Provided that*, the application also includes objective, clear and convincing evidence that the

area is not receiving effective services with the required data rates. If the Council receives any application, under the provisions of this subsection, alleging that broadband service to a community does not meet the transmission speed specifications of W. Va. Code § 31-15C-2(a)(1), the Council shall then deliver a copy of the applicant's allegations, together with copies of the evidence attached to the application, to that community's broadband service provider, who shall have sixty to respond to the allegations and evidence submitted by the applicant.

§208-1-5. Required Public Notice

5.1. Pursuant to W. Va. Code §31-15C-10(a), the Council shall post with the Secretary of State a sixty-day notice reflecting the first completed application received for each Type 2 or Type 3 unserved area.

§208-1-6. Application evaluation

6.1. During the thirty days that follow the sixty-day required public notice period, the Council shall review all applications for completeness and conformance with the statute, this rule, and the grant guidance and application instructions.

6.2 The Council shall reject an application that is incomplete or not in conformance with the statute, this rule, and the grant guidelines and application instructions.

6.3 The Council shall not approve any project for broadband service that does not include a minimum downstream transmission rate of 600 kilobits per second (Kbps) and a minimum downstream-to-upstream ratio of 8.5:1 for services with a downstream rate of up to five megabits per second (Mbps). In those cases where a project's broadband service's downstream rate is five Mbps or greater, a minimum upstream data rate of 588 Kbps is required and allow information applications and market demands to dictate acceptable downstream-to-upstream data ratios.

6.4. The Council shall not duplicate or displace broadband service in areas already served or where private industry feasibly can be expected to offer services in the reasonably foreseeable future.

6.5. Projects for grant awards may involve or require the placement of infrastructure within or through areas served by existing broadband services, however, grant moneys may not be used to build out, or provide, broadband services within those areas already served. Applicants and award recipients must be able to segregate project funds by funding source and only apply Council grant funds toward the provision of services to unserved areas.

6.6. The Council reserves the right to reject any application on the basis of the amount of funding sought; to request the applicant to revise its application; to resubmit it in a future grant cycle; to award more or less than the full amount requested in the application; or to require overlapping applications to coordinate in the provision of service to the public.

6.7. The Council shall evaluate broadband infrastructure applications based on the following criteria:

a. The cost-effectiveness of the project;

b. The economic development benefits of the project;

c. The availability of alternative sources of funding that could help finance the project, including, but not limited to, private grants or federal funding and the efforts undertaken to obtain such funding;

d. If the project requires the construction of a network, the applicant's experience operating and maintaining such network;

e. The extent to which the project advances statewide broadband access and other state broadband planning goals;

f. The proposed technologies, bandwidths, upstream data rates and downstream data rates and downstream-to-upstream data ratios;

g. The planned date the project would commence and the planned date the project would be completed;

h. The amount of financial assistance sought;

i. The long-term financial sustainability of the proposed project;

j. The amount of matching funds provided by the applicant;

k. How the proposed project compares with other proposals for the same unserved area with regard to number of people served, the amount of financial assistance sought, and the long-term sustainability of the proposed project; and

l. Any other criteria the Council deems necessary and prudent.

6.8. The Council shall evaluate demand promotion applications based on the following criteria:

a. The cost-effectiveness of the project;

b. The economic development benefits of the project;

c. The availability of alternative sources of funding that could help finance the project, including, but not limited to, private grants or federal funding and the efforts undertaken to obtain such funding;

d. The extent to which the project advances statewide broadband access and other state broadband planning goals;

e. The planned date the project would commence and the planned date the project would be completed;

f. The amount of financial assistance sought;

g. The long-term financial sustainability of the proposed project;

h. The applicant's experience with similar or related programs;

i. The overall advantages of the projects and benefits to be achieved in comparison to existing offerings and means of promoting the use of broadband services; and

j. The amount of matching funds provided by the applicant.

6.9. The scoring of applications shall be based on a point scale and shall include, but is not limited to, all factors required in WV Code 31-15C-9. The application will be judged using the following three scoring categories:

a. Project Scope;

b. Project Viability; and

c. Project Budget and Sustainability

6.10. Applications will be reviewed in two phases; an initial evaluation followed by a due diligence phase. The due diligence phase will require applicants to submit more detailed financial information to enable the Council to render a final decision.

6.11. The funding decisions of the Council shall be final.

§208-1-7. Conflict of Interest

Pursuant to W.Va. Code §31-15C-3(f), any person employed by, owning an interest in or otherwise associated with a broadband deployment project, project sponsor or project participant may serve as a council member and is not disqualified from serving as a council member because of a conflict of interest prohibited under W. Va. Code §6B-2-5 and is not subject to prosecution for violation of said section when the violation is created solely as a result of his or her relationship with the broadband deployment project, project sponsor or project participant so long as the member recuses himself or herself from board participation regarding the conflicting issue in the manner set forth in legislative rules promulgated by the West Virginia Ethics Commission.

§208-1-8. Grant Award

8.1. Successful grant applicants will be notified of their award upon approval.

8.2. Grantees will be required to enter into a legally binding agreement with the Council.

8.3. Federal and state prevailing wages must be paid for construction work performed on projects involving West Virginia Broadband Development funds. Federal wage rates may be obtained from the West Virginia Development Office. State prevailing wage rates may be obtained from the West Virginia Secretary of State, Administrative Law Division at (304) 558-6000. The higher of either federal or state wage rates for each work classification must be paid.

8.4 The expenditure of public funds is governed by guidelines set forth by federal law, the state of West Virginia as well as any existing local purchasing procedures. In all cases, the grantee must follow the most stringent of the federal, state or local purchasing and bidding requirements.

8.5. To facilitate the accurate accounting of the use of state funds, grant recipients must designate, and deposit grant funds into, a separate account from which funds may only be spent for the purposes described in the application and the grant documents.

8.6. The Council may require the applicant to display appropriately the Council's phone number and web address on any marketing or publicity materials relating to the funded project.

§208-1-9. Reimbursement, Reporting, Record Keeping and Auditing

9.1. Activities that are a part of the grant project may not precede the grant agreement approval date.

9.2. Grantees shall incur costs and seek reimbursement from the Council only after the grant agreement has been fully executed.

9.3. The period of service for all submitted invoices must fall within the grant period as approved by the Council.

9.4. Reimbursement requests must include expenditure and activity reports as well as supporting documentation, including but not limited to, copies of receipts, proof of payment and/or payroll records.

9.5. Grantees shall report monthly. If the grantee fails to submit an acceptable report or audited financial statement within the timeframe designated in the grant award, the Council may take appropriate actions, including suspension of payments, suspension of award, or termination.

9.6. All grants and grantees are subject to the provisions of W. Va. Code §12-4-14, and the rules of the West Virginia Department of Administration, 148 CSR 18, promulgated thereunder, regarding accounting of state grant moneys and the required reporting of expenditures.

9.7. All records must be maintained for a period of three years after completion of the final audit.