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NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: WV Broadband Deployment Council TITLE NUMBER: 208

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 Grant Program

THE ABOVE PROPOSED LEGISLATIVE RULES, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE, IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.

Authorized Signature

TITLE 208
LEGISLATIVE RULE
BROADBAND DEPLOYMENT COUNCIL

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

SERIES 1
BROADBAND DEPLOYMENT GRANTS PROGRAM

§208-1-1. General

1.1. Scope – This Legislative rule establishes general standards 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 this rule.

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

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

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

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

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

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

§208-1-3. Confidential and Proprietary Information

3.1. Proprietary 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 proprietary information in large, conspicuous typeface "CONFIDENTIAL." For information labeled "CONFIDENTIAL," the applicant shall identify the basis for the claim of confidentiality, e.g. "Trade Secret" or "Propriety Information," and shall 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 shall try to preserve the confidentiality of proprietary business information submitted pursuant to this rule where the 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 as proprietary information under this rule, 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 comply with this rule regarding the protection of confidential information and are subject to the same sanctions for unauthorized disclosure of proprietary business information.

3.5. When a grant application has been submitted to the Council, and when, during the sixty-day period, other, competing applicants submit applications 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, are public information. The Council considers 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 are 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 Federal Communication Commission 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 Federal Communication Commission's filing schedule for Form 477 data collections.

4.2. Eligible Applicants. The following entities may 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 may not apply for grant funding.

4.4. Applicant Qualifications.

a. An applicant for a broadband infrastructure project or the applicant's project partners must have demonstrated experience in building, operating and maintaining a similar system.

b. An applicant for a demand promotion project must have demonstrated qualifications to conduct the type of project the applicant proposes.

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. An applicant must submit a complete application. To complete an application, the applicant shall:

1. 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;

2. Describe the cost-effectiveness of the project;

3. Describe the economic development benefits of the project;

4. 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 that funding, and the amounts of these funds to be applied to the project;

5. Describe the applicant's, or any project partner'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 networks;

6. Describe the degree to which the project advances statewide broadband access and other state broadband planning goals;

7. For a broadband infrastructure project, describe the proposed technologies, bandwidths, upstream data rates and downstream data rates provided by its project;

8. 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 period;

9. To the extent that the applicant may be aware of alternative proposals or projects for providing similar services to the same area, 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;

10. For a broadband infrastructure project, describe the environmental impact of the project;

11. Demonstrate the long-term financial sustainability of the project;

12. 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;

13. For a broadband infrastructure project, provide proof of compliance with all local, state and federal permitting, licensing and certification requirements necessary for the proposed project;

14. 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 or any project partner and the nature of other sources of project funding;

15. 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;

16. 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; and

17. 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.

c. 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 project partners, and their representatives, from future grant awards.

d. The Council may request any necessary additional information to evaluate any application, including, but not limited to, financial and budgetary information related to the application or to the applicant or to any project partners.

e. The Council may disqualify the application of any applicant who fails to provide any additional information requested by the Council within the time the Council requests.

4.6. If an 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 applicant 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 has sixty days 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 submit a notice to the Secretary of State for publication in the State Register, upon receipt of 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 instructions provided with the application forms.

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

6.3 The Council shall not approve any project for broadband services that does not provide transmission rates for broadband service as defined in W. Va. Code §31-15C-2 and specified in W. Va. Code §31-15C-9.

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, an award recipient may not use grant moneys 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 may only apply Council grant funds toward the provision of services to unserved areas.

6.6. The Council may reject any application on the basis of the amount of funding sought; request the applicant to revise its application and resubmit it in a future grant cycle; award more or less than the full amount requested in the application; or 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 that 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 considers 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 that 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;

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

k. The extent to which the proposal serves the powers and duties of the Council as set out in W. Va. Code §31-15C-4.

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

a. Project Scope;

b. Project Viability; and

c. Project Budget and Sustainability

6.10. The Council will review applications will be reviewed in two phases; an initial evaluation phase 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 are 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 this section. The member shall recuse himself or herself from participation in Council discussions regarding the conflicting issue in the manner set forth in the West Virginia Ethics Commission rule, "Interest in Public Contracts," 158 CSR 8.

§208-1-8. Award of Grants

8.1. Upon approval of an application, the Council shall notify successful grant applicants of their award.

8.2. An award recipient shall enter into a legally binding agreement with the Council.

8.3. An award recipient shall pay federal and state prevailing wages for construction work performed on projects involving West Virginia Broadband Development funds. An award recipient may obtain federal prevailing wage rates from the West Virginia Development Office and state prevailing wage rates from the West Virginia Secretary of State, Administrative Law Division at (304) 558-6000. An

award recipient must pay the higher of either federal or state wage rates for each work classification on construction projects using grant funds.

8.4 The expenditure of public funds is governed by guidelines set forth by federal law, and the state of West Virginia, as well as any existing local purchasing procedures. In all cases, the award recipient shall 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, award recipients shall 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 agreement.

8.6. The Council may require an award recipient 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. Award recipients may not incur costs or seek reimbursement from the Council until the grant agreement has been fully executed.

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

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

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

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

9.7. Award recipients shall maintain all records for a period of three years after completion of the final audit by the State Auditor.