

NTIA Issues Important Guidance to Broadband Providers and States on Over \$40 Billion Broadband Equity, Access and Deployment Program

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On May 13, 2022, the U.S. Department of Commerce's National Telecommunications and Information Administration (NTIA) released the Notice of Funding Opportunity (NOFO) for the Broadband Equity, Access and Deployment (BEAD) Program. The BEAD Program is part of the Infrastructure Investment and Jobs Act. Through the BEAD Program, NTIA will make available \$41.6 billion to the 50 states, the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa and the Commonwealth of the Northern Mariana Islands (collectively "State governments"), principally to expand broadband deployment and close the digital divide. State governments will then distribute the substantial majority of these funds to broadband providers, using a competitive process that must be approved by NTIA.

In the NOFO, NTIA provides critical guidance to both State governments and broadband providers about how the BEAD Program will be implemented. Here are **key points** that broadband providers should understand.

- **Fiber First** – State governments are required to prioritize funding broadband deployment projects that will provide service through end-to-end fiber-optic facilities to each end-user premises. Unless the per-location BEAD subsidy for a proposed fiber project would exceed a per-location cost threshold set by a State government, a waiver is obtained from NTIA for a particular project, or a proposed fiber project does not meet all of the requirements set forth in the NOFO, a State government must select a fiber project if one is proposed for a location or set of locations.
- **Satellite and Unlicensed Last** – Satellite broadband service and broadband service delivered exclusively through unlicensed spectrum are excluded from NTIA's definition of "Reliable Broadband Service." As a result, locations only served by satellite and/or unlicensed broadband service will be considered "unserved" for purposes of the BEAD Program. Moreover, State governments may not use BEAD Program funds for satellite projects or projects exclusively using unlicensed spectrum unless no technology defined by NTIA as reliable could be deployed consistent with the requirements contained in the NOFO for a subsidy at a particular

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location that is less than a State government's pre-established per-location cost threshold.

- **Enforceable Deployment Commitments Matter** – Whether locations are unserved or underserved by broadband will be primarily determined by the maps the Federal Communications Commission (FCC) will release pursuant to the Broadband DATA Act. However, absent a waiver from NTIA, a State government may not treat as unserved or underserved for purposes of the BEAD Program any location that, while currently unserved or underserved, is already subject to an enforceable federal, state or local commitment through a grant, loan, loan guarantee or support program to deploy what is considered qualifying broadband (for residential locations, that is broadband with a speed of at least 100/20 Mbps and latency less than or equal to 100 milliseconds using a technology that NTIA considers reliable).
- **Primary Selection Criteria** – In selecting among competing fiber projects or competing non-fiber projects, State governments must place the most weight on these three factors: (1) the amount of BEAD Program funding that will be required on a per-location basis to complete the project (the less funding, the better); (2) the broadband provider's commitment to provide the most affordable total price to a customer for symmetrical 1 Gbps service (for fiber projects) or for 100/20 Mbps service (for non-fiber projects); and (3) a broadband provider's demonstrated record of and plans to be in compliance with federal labor and employment laws.
- **Regulation of Data Caps and Network Management Practices** – State governments must ensure that broadband providers do not impose data usage caps on any plans offered over any network funded through the BEAD Program. Neither may broadband providers employ unjust or unreasonable network management practices over such networks. Notably, the NOFO does not define what is an unjust or unreasonable network management practice.
- **Patience Will Be a Virtue** – Given all of the steps that must be taken before State governments can select broadband projects and distribute funding to broadband providers under the program, it is difficult to see how a significant amount of funding will get out the door before 2024. For example, NTIA cannot inform each State government of its funding allocation until the FCC completes its broadband maps and those maps aren't likely to be released until November at the earliest. Then, State governments will have 180 days to submit an Initial Proposal for NTIA's approval. Prior to submitting an Initial Proposal, State governments must put it out for public comment and incorporate feedback received through local coordination. After submitting the Initial Proposal, a State government cannot begin conducting the competitive process for selecting broadband projects until NTIA approves the Initial Proposal, and the State government conducts a challenge process allowing local governments, broadband providers and nonprofit organizations to contest whether particular locations in the State are unserved or underserved by broadband. Following the completion of the challenge process, a State government must submit any successful challenges to NTIA for review and approval.

We have produced a comprehensive summary of the BEAD Program NOFO, which can be found [here](#).

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