

ALERT

Congress Approves Infrastructure Bill with \$65 Billion for Broadband Programs

November 9, 2021

On November 5, 2021, the U.S. House of Representatives voted 228-206 to approve the "Infrastructure Investment and Jobs Act" (Infrastructure Bill). The Infrastructure Bill, which had already cleared the Senate in August, will now proceed to the President's desk. The Bill provides \$65 billion in new federal funding for broadband infrastructure and promises to significantly increase the reach and speed of today's broadband networks. It also establishes various new programs that direct funding toward broadband adoption, inclusion, and affordability. The most significant funding (\$42.5 billion) is allocated for a broadband infrastructure deployment program to be administered by the National Telecommunications and Information Administration (NTIA). The following provides a summary of the broadband-centric programs contained in the Infrastructure Bill.

I. Broadband Equity, Access, and Deployment Program

The Infrastructure Bill establishes the "Broadband Equity, Access, and Deployment Program" (the "Program") and directs NTIA to administer \$42.5 billion in funding through formula-based grants to the states. The states in turn would competitively award grants to support broadband infrastructure deployment, mapping, and adoption. NTIA must issue a Notice of Funding Opportunity (NOFA) for the Program within 180 days. The NOFA will establish a process for states to apply for funding by submitting a letter of intent (LOI), as well as an Initial Proposal and a Final Proposal based on templates to be provided by NTIA.

Available Funding

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The NTIA program will allocate three discrete categories of funding to individual states.

1. **Minimum Allotment:** The first category of funding (\$5.3 billion) is a minimum allotment of \$100 million to each state, with an additional \$100 million in funding to be allocated equally among certain U.S. territories.
2. **High Cost Funding:** The second category (\$4.25 billion) would be allocated for broadband deployment projects based on unserved locations in high-cost areas in each state, as determined by NTIA based on factors defined in the bill (e.g. geographic remoteness, low population density, poverty, etc.).
3. **Unserved Funding:** The third category of funding (approximately \$32.2 billion) would be allocated for broadband deployment projects based on any unserved locations in each state.

Funding Allocations

On or after publication of the broadband maps (“DATA Maps”) by the Federal Communications Commission (FCC) pursuant to the recently enacted Broadband DATA Act, NTIA must allocate the High Cost Funding and the Unserved Funding to states. Once a state submits an LOI, Initial Proposal, or Final Proposal, NTIA will allocate High Cost Funding and Unserved Funding to states based on two formulas defined in the bill, which compare the number of high cost and unserved areas in a given state against the national average. In the event a state fails to submit the required application, a political subdivision or consortium of political subdivisions of the state may do so in its place. In the event neither do so, NTIA must reallocate the grant funding to other states. The bill describes the timeline for states to submit these letters and proposals at length, indicating the information that NTIA is permitted to require of applicants at each stage of the process, as well as the percentage of funding that is released at each stage of the process.

Local Coordination Requirements

The Program requires substantial coordination by the state with local and regional entities. For example, each state’s five-year action plan must be informed by collaboration with such local entities. In addition, states must allow an opportunity for political subdivisions to submit plans for consideration by the state, and to comment on the state’s Initial Proposal and Final Proposal.

Project Requirements

Once a state completes the NTIA process, it may use its funds to “competitively award” subgrants to eligible entities. Eligible entities include cooperatives, nonprofit organizations, public-private partnerships, private companies, public or private utilities, public utility districts, or local governments. With respect to local governments, the Infrastructure Bill is silent about states with laws preempting municipal broadband networks. In awarding grants, states must ensure that any subgrantee has the requisite financial, managerial, technical, and operational capabilities to provide the services promised in the subgrant.

Use of Grant Funding

Although the Program does not define to whom a state may award subgrants, states are prohibited from excluding cooperatives, nonprofit organizations, public-private partnerships, private companies, public or private utilities, public utility districts, or local governments from eligibility. Any such subgrantees may use their competitively awarded funding for a number of projects listed and defined in detail in the bill text, including unserved service projects, connecting eligible community anchor institutions, data collection, broadband mapping and planning, installing broadband infrastructure to multifamily housing, and programs to promote broadband adoption and provide affordable internet-capable devices. Subgrantees must provide service in accordance with certain requirements relating to latency, speed, the length of network outages, and the availability of low-cost service for low-income subscribers. The network must be deployed, and service commenced, no later than four years after the date of the subgrant.

Matching Requirement

A state must provide, or must require a subgrantee to provide, a matching contribution equivalent to at least 25% of project costs. In general, the match must come from non-federal funds, but some federal sources are expressly permitted.

Funding Prioritization

The bill requires states to prioritize subgrants to unserved service projects until the state certifies it will ensure universal coverage of all unserved locations, then to underserved service projects until the state certifies it will prioritize underserved service projects, and then to eligible community anchor institutions. In addition, states must prioritize projects based on a number of other considerations, including poverty, the speeds of proposed services, and compliance with federal labor and employment laws.

Challenge Process

The bill establishes a challenging process that allows broadband service providers to challenge determinations made by states as to the eligibility of entities for grant funds and whether particular locations are deemed unserved or underserved. The challenge process includes deadlines and public notice requirements that states must meet in making these determinations, reserving to NTIA the final authority to modify or reverse such eligibility determinations.

Reporting Requirements

The bill establishes periodic reporting requirements for states and subgrantees regarding the use of grant funds, information on the types of customers being served, and broadband speeds, among other things listed at length in the bill.

II. Enabling Middle Mile Broadband Infrastructure

The Infrastructure Bill also establishes a \$1 billion grant program at NTIA for the construction, improvement, or acquisition of middle mile infrastructure on a technology-neutral, competitive basis to eligible entities. NTIA is instructed to establish an application process for middle mile grants to eligible entities that meet certain conditions, including fiscally sustainable middle mile strategies, nondiscrimination, supplemental investments, or conditions relating to national security. The bill prioritizes funding for middle mile infrastructure to serve households in unserved areas and requires that buildout be completed within five years of the grant being made.

III. Digital Equity Act Competitive Grant Programs

The Infrastructure Bill also includes \$2.75 billion in funding under the Digital Equity Act of 2021 to create two distinct grant programs to be administered by the Department of Commerce: a Capacity Grant Program, directed toward broader state efforts to achieve digital equity and inclusion; and a \$250 million per year Competitive Grant Program focused more narrowly on covered populations, such as senior citizens, veterans, minorities, and individuals with a language barrier. Recipients of Competitive Grant Program funding must generally expend the funds within four years of the award.

IV. Broadband Affordability

The bill also makes the FCC's Emergency Broadband Benefit (EBB) Program permanent, renaming it the "Affordable Connectivity Program," and allocating it \$14.2 billion. The program provides a monthly subsidy for low-income families to purchase any internet service of their choosing without submitting to credit checks, with a higher subsidy for qualifying families in high cost areas, as well as expanding the program to include households participating in the federal Women, Infants, and Children (WIC) program. It also requires participating providers to carry out public awareness campaigns to promote the program.

Consumer Protection

The bill requires the FCC to establish a consumer complaint process and issue regular public reports about complaints it receives and permits the FCC to conduct outreach to encourage eligible households to enroll. The bill also requires the FCC to establish rules to protect customers who enroll in the program from upselling or downselling by providers, among other practices that undermine the program's purpose. Within one year of enactment, the FCC must issue final rules regarding annual data collection relating to price and subscription rates for internet service and make such data publicly available. Additionally, the bill requires the FCC to establish rules requiring providers to display broadband consumer labels, disclosing information to consumers regarding their internet service plans. Finally, the Infrastructure Bill requires the FCC to adopt rules within two years of the bill's enactment to address discrimination in access to broadband internet service on the basis of income, race, ethnicity, color, religion, or national origin.

For a detailed summary and analysis of the Infrastructure Investment and Jobs Act, please reach out to a member of our team. We have a deep and experienced bench on issues relating to broadband infrastructure deployment and funding opportunities. Our experts regularly handle federal and state issues relating to such funding opportunities.