

SPECIAL MEETING of the WYOMING BUSINESS COUNCIL BOARD OF DIRECTORS

Monday, July 12, 2021 | 1:00 P.M. | via Zoom Webinar

Join the webinar here: <https://zoom.us/j/295704768>

Join by phone at 1-346-248-7799 or 1-669-900-6833

WPMA Notice: This Special Meeting of the Wyoming Business Council Board of Directors is called for the consideration of rulemaking actions related to the Broadband Development Grant Program. No other business will be discussed or taken at this meeting.

1:00 P.M. CONVENE PUBLIC MEETING

- Pledge of Allegiance Video – *all panelists will be muted*
- Roll call of members present

1:05 p.m. ADMINISTRATIVE RULES FOR THE BROADBAND DEVELOPMENT GRANT PROGRAM

- **Review and Discussion of proposed rulemaking** – Agency Services Manager Warren Appel, Broadband Manager Ryan Kudera
 - **ACTION ITEM:** Consideration of adoption of amended Regular Rules for Chapter 1 – General Provisions
 - **ACTION ITEM:** Consideration of adoption of new Regular Rules for Chapter 2 – Middle Mile Program
 - **ACTION ITEM:** Consideration of adoption of new Emergency Rules for Chapter 3 – Confidential Provider Information

1:30 p.m. OTHER BOARD MATTERS and ADJOURNMENT

- **Standing Committees** will meet this quarter during the week of August 23:
 - **Investments Committee:** Tuesday, August 24 at 10:00 a.m.
 - **Strategy Execution Committee:** Tuesday, August 24 at 2:00 p.m.
 - **Operations Committee:** Wednesday, August 25 at 10:00 a.m.
 - **Services Committee:** Friday, August 27 at 10:00 a.m.
- **Next Regular Meeting of this Board:** Thursday, September 30 LIVE IN CASPER (details TBA)

TO: Wyoming Business Council Board of Directors
Ms. Kim DeVore, Co-Chair
Ms. Pam Thayer, Services Committee Chair

FROM: Warren R. Appel, Agency Services Manager
Ryan Kudera, Broadband Manager

DATE: July 12, 2021

RE: Administrative Rules for the Broadband Development Grant Program

Madam Co-chair and Ms. Thayer,

Staff is requesting several actions at the July 12, 2021 Special Meeting of the Board of Directors relating to rulemaking for the Broadband Development Grant Program. A narrative on these rules appears below, and the full packet of proposed rules is attached to this memorandum for your reference.

AMENDMENTS TO CHAPTER 1 RULES, NEW CHAPTER 2 RULES

During the 2021 Legislative Session, several portions of the statutes pertaining to the Broadband Development Grant Program (W.S. § 9-12-1501 *et seq.*) saw changes and new additions under Senate File 0076 / Senate Enrolled Act No. 0065.

Relevant to Chapter 1, the new legislation requires the WBC to specify definitions for several new terms, as well as the creation of a formal challenge process for awards made under the program. The requisite amendments are reflected in the attached Chapter 1 document.

Chapter 2 consists of entirely new rules for the “Middle Mile Program” created under the legislation and spells out application requirements, review procedures, and funding limitations.

The WBC is statutorily exempt from the Wyoming Administrative Procedures Act (WAPA) under W.S. § 9-12-102(g)(iii), which, among other things, permits the WBC to promulgate rules without conducting a formal public comment period and/or public hearing. The WBC leverages this exemption to expedite and simplify the rulemaking process as its *de facto* process in most rulemaking and intends to do so with the Chapter 1 and 2 rulemaking.

NEW CHAPTER 3 RULES:

A specific change to program statutes under SF0076 was the mandate for the WBC to adopt rules related to the handling of confidential provider information by September 1, 2021. Of note, the legislation specifically compels the WBC to subject these rules to a formal public comment period.

To meet this September 1 deadline, staff have worked closely with counsel in the AG's office to craft the Chapter 3 rules being presented for consideration as Emergency Rules. Adoption of these rules as Emergency Rules affords staff up to a maximum of 240 days to complete the regular rulemaking/public comment process, and it is the intent of staff to begin the "Regular" rulemaking process commensurate with the adoption of these Emergency Rules.

Staff will present Chapter 3 rules for consideration of adoption as Regular Rules at a future meeting of this board, to include any revisions/changes as identified during the public comment period.

RECOMMENDATIONS:

Staff recommends and requests the following actions by this Board:

- 1. The adoption of amended Regular Rules for Chapter 1;**
- 2. The adoption of new Regular Rules for Chapter 2; and**
- 3. The adoption of new Emergency Rules for Chapter 3.**

Respectfully Submitted,

/s/
Warren R. Appel
Ryan Kudera

Wyoming Broadband Development Grant Program
Chapter 1
General Provisions

Section 1. Purpose. These rules are adopted pursuant to W.S. 9-12-1501 et seq. which provide for the making of grants to eligible applicants in order to promote the expansion of access to broadband service in unserved areas of the state.

Section 2. Authority. Authority for the promulgation of these rules is granted in W.S. 9-12-1501, W.S. 9-12-1503, W.S. 9-12-1508, and W.S. 9-12-1510.

Section 3. Definitions.

(a) “Adequate consideration” means consideration that is fair and reasonable under the circumstances of the agreement because the reasonable value of the goods or services received in exchange for the transferred property approximates the reasonable value of the property transferred.

(b) “Advisory Council” means the Wyoming Broadband Advisory Council.

(c) “Board” means as defined in W.S. 9-12-102(a)(i).

(d) “Broadband Map” means the official broadband map developed and maintained by the Council for evaluation of broadband deployment in Wyoming.

(e) “Business corridor” means an area where multiple business are, or have undertaken permitting, construction or other substantial steps to be, located in proximity to each other such that the provision of broadband services at the speeds specified in W.S. 9-12-1501(b) is technologically and economically feasible.

(f) “Challenge” means any challenge to an application submitted under this program made pursuant to W.S. 9-12-1504.

(g) “Council” means as defined in W.S. 9-12-102(a)(ii).

(h) “Eligible applicants” are public and private partnerships composed of those entities identified as eligible applicants per W.S. 9-12-1501(c), as well as governmental entities as specified under W.S. 9-12-1501(d).

(i) “FCC” means the Federal Communications Commission.

(j) “Last-mile” means as defined in W.S. 9-12-1501(h)(i).

(k) “Middle-mile” means as defined in W.S. 9-12-1501(h)(ii).

(l) “Program” means the Wyoming Broadband Development Grant Program.

(m) “Speed test results” means the quantitative analysis of a broadband connection’s upload and download speeds as measured in Megabits per second (Mbps) or Gigabits per second (Gbps), as well as the connection’s latency as measured in milliseconds (ms).

(n) “Staff” means the staff of the Wyoming Business Council.

(o) “Unserved area” means as defined by W.S. 9-12-1501(e).

Section 4. Challenge Process.

(a) All challenges to any application submitted under this program shall be submitted in writing to the Broadband Manager or their designee by email or physical delivery, and shall include as much detail as possible.

(b) The Broadband Manager or their designee shall acknowledge receipt of the challenge with the challenging party in writing within seven (7) working days.

(c) Challenges will be evaluated by the Council, who may seek additional information from the challenging party.

(i) Challenges may be dismissed by the Council in the event the challenging party fails to provide any requested information in a timely manner.

(d) Challenged applicants shall be contacted by the Council for additional information and shall be given an opportunity to respond.

(e) A determination on the challenge shall be communicated to the challenging party as well as the challenged applicant in writing as soon as practical, but not more than thirty (30) days from the date the challenge was acknowledged.

(f) Challenges shall either be upheld or dismissed.

(g) Challenges which are dismissed by the Council may, at the request of the challenging party, be heard in public session at the next public meeting of the Board.

(i) The challenging party and the challenged applicant shall be notified in writing of the date, time and place of the meeting at which the challenge will be heard. There shall be no distinction made between parties attending the meeting virtually or in-person.

(ii) In the event the challenging party does not present to offer testimony in support of their challenge, the Board may, at its sole and final discretion, summarily dismiss the challenge.

(iii) The Board shall have final discretion to uphold or reverse any challenge determination made by the Council, and all actions taken shall be recorded in the meeting minutes.

(iv) Decisions made by the board under this Section of these rules are to be considered non-precedential and shall not bind the Board to take any future action predicated on that decision.

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Wyoming Broadband Development Grant Program
Chapter 2
Middle Mile Program

Section 1. Purpose. These rules are adopted pursuant to W.S. 9-12-1510 et seq. which provide for the making of grants for middle mile projects meeting the requirements of 9-12-1510(a).

Section 2. Authority. Authority for the promulgation of these rules is granted in W.S. 9-12-1510.

Section 3. Application process; application requirements.

(a) An eligible applicant shall submit an application to the Council on a form prescribed by the Council. The Council shall be responsible for receiving and reviewing applications, entering into contracts, and authorizing the distribution of funds subject to approval by the Governor or their designee.

(b) On the Council's prescribed form, an eligible applicant shall provide the following information:

- (i) A summary of the proposed project;
- (ii) The location of the proposed project, including a shapefile depicting the location and boundaries of the proposed project area or, for a middle-mile project, a map depicting the location and endpoints;
- (iii) The type and quantity of broadband infrastructure to be deployed for the project, including initial speeds to be achieved and initial price of the service to be provided;
- (iv) Evidence demonstrating the applicant's experience and ability in building, operating and managing broadband service networks;
- (v) Evidence regarding the unserved nature of the area where the project is to be located, which may include but is not limited to:
 - (A) Any broadband provider's response which asserts the unserved nature of the proposed project area;
 - (B) Data from Form 477 of the Federal Communications Commission;
 - and
 - (C) Data from the Broadband Map.
- (vi) The number of households and businesses passed as well as the percentage of households passed in relation to the most current number of households in the project area

which shall have access to broadband service as a result of the project or whose broadband service shall be upgraded as a result of the project;

(vii) Acknowledgment by the governing body, and any partnering business entity/entities by a person with legal authority to bind the business entity, that funding may only be provided in accordance with a contract executed in conformance with W.S. 9-12-1501 through 1509, and which is subject to availability of, and approval for distribution of, funds.

(A) If the application is not submitted jointly with a business entity, an account of the request for proposals issued by the governmental entity applying and responses to the request, if any; and

(viii) Additional information as required by Staff of applicant to enable the Council to properly assess the application for funding. Staff may request an applicant modify an application based on current broadband access in the proposed project area prior to award of funding under this program.

(c) The Broadband Manager is available to assist applicants with the development of projects and the preparation of applications made under this Section.

(d) A governmental entity which qualifies as an eligible applicant under W.S. 9-12-1501(c)(ii) shall develop a request for proposals inviting business entities to participate in projects proposed for funding.

(e) At least thirty (30) days prior to the first day of the funding period for which applications may be submitted, the Council shall publish on its official website the specific criteria and quantitative weighting scheme or scoring system to be used by the Council in the evaluation and ranking of applications.

(f) Staff shall review each application to determine eligibility and completeness within fifteen (15) working days of receipt wherever practical.

(i) Otherwise-eligible applicants submitting incomplete applications shall be provided an opportunity to amend or correct the application and must do so within ten (10) working days of notice of any identified insufficiency or incompleteness. Applications which remain incomplete after this period shall not be considered further.

(g) Complete applications shall be forwarded by Staff to the Advisory Council for review with a recommendation to approve or deny the application.

(i) Staff shall prioritize proposed projects recommended to the Advisory Council on the basis of the actual scores resulting from the project evaluation. This score is not intended to be the only basis for a recommendation by Staff nor award decision by the Board. The final recommendation and award decision on any proposed projects shall be at the discretion of the Board and the Governor or their designee.

(ii) The Advisory Council shall consider each complete application and shall refer the application to the Board with a recommendation of “fund as requested” or “do not fund.”

(h) Under extraordinary circumstances, the Advisory Council may recommend a project to the Board contingent on a waiver of these rules for that project if the Advisory Council determines such a waiver would be consistent with the purpose of the Program. The Board may, by majority vote, waive any requirement(s) in this Section. Any such waiver action shall be noted in the meeting minutes and shall be considered non-precedential and shall bind neither the Board nor the Advisory Council on future actions related to waivers.

Section 4. Arbitration; marketing requirements.

(a) Eligible applicants shall:

(i) Allow the Council to participate in arbitration related to reasonable rates in the event of unsuccessful negotiations between a funding recipient and another broadband provider for access to infrastructure; and

(ii) Provide to the Council upon request any marketing information based on current leases to assist the Council in determining reasonable rates for access to infrastructure for projects funded under this Program. Any information provided under this subparagraph shall be considered confidential information as set forth in Chapter 3 of these Rules and shall not be disclosed by the Council.

Section 5. Funding Limitations.

(a) Funding shall be provided on a reimbursement basis according to the terms set forth in a Contract or Grant Agreement.

(b) Funding shall otherwise be provided as described in W.S. 9-12-1510.

Wyoming Broadband Development Grant Program
Chapter 3
Confidential Provider Information

Section 1. Purpose. These rules are adopted in order to establish guidelines for the handling and disclosure of confidential, trade secret, and proprietary information disclosed to or collected by the Wyoming Business Council through its administration of the Broadband Development Grant Program.

Section 2. Authority. These rules are promulgated as required by W.S. 9-12-1503(c)

Section 3. Definitions.

(a) “Act” means the Wyoming Public Records Act as set forth in W.S. 16-4-201 et seq.

(b) “Application Information” means all information contained within any application made to the Program, as well as all information provided as Addenda, Appendices or Attachments thereto, provided for purposes of project evaluation and funding determinations.

(c) “Confidential Information” means:

(i) Applicant tax information as set forth in W.S. 16-4-203(d)(xv).

(ii) Geophysical location information for critical infrastructure, including but not limited to:

(A) Points of Presence, Heads Ends, Network Operations/Security Centers, and Data Centers.

(B) Cable vaults, chases and/or conduits except where these exist in public rights-of-way.

(C) Tower sites, including height, antenna azimuth and transmit power, and related backhaul.

(D) Any information which actually identifies any individual broadband user(s)/consumer(s), or which could reasonably be utilized to identify any individual broadband user(s)/consumer(s).

(iii) Lists or descriptions of equipment proposed or actually installed, as well as the proposed or actual configurations thereof.

(iv) Business Plans, Marketing Plans, Commercialization Plans, Deployment/Security Plans, Financial Records and similar information as set forth in W.S. 16-4-203(d)(v).

(v) Other information of a kind that would customarily not be released to the public by the person or entity from whom it was obtained.

(d) “Proprietary information” means information that, if released, would impair the government’s future ability to obtain necessary information or would cause substantial harm to the competitive position of the persons or entities providing the information.

(e) “Public Meeting” means as defined in W.S. 16-4-403.

(f) “Trade secret” means a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.

Section 4. Disclosure of Public Records.

(a) Any record that does not qualify as confidential, trade secret, or proprietary is presumed to be a public record subject to release under the Wyoming Public Records Act. In addition to the items deemed subject to disclosure per W.S. 9-12-1503(c)(i) through 1503(c)(v), the following records are subject to public disclosure:

- (i) Coverage/service area maps and shapefile information included with an application;
- (ii) Actual speed test results including download, upload and latency speeds;
- (iii) Proposed and/or actual costs and/or fees charge to or paid by consumers in any project area funded under the Program; and
- (iv) De-identified/anonymized physical address information for locations proposed for funding or actually funded/served by the Program.

Section 5. Hearing procedure.

(a) The Board may hold a hearing at its discretion or on the request of any interested person to determine whether any information classified as confidential, trade secret, or proprietary should be subject to public disclosure.

(i) Interested persons must make a written request to the Broadband Manager or their designee requesting a hearing, specifying the relevant information sought to be subject to public disclosure, and the justification for the request. A request submitted by email shall be deemed sufficient.

(A) At the discretion of the Council, an action item related to the request shall be added to the agenda for the next Regular Public Meeting of the Board. In such event, the requesting party and all affected parties shall be notified of the date, time and place of the meeting at which the request shall be considered.

(B) Prior to any action on a request, the requesting party as well as the party or parties affected by the request shall have the opportunity to offer testimony related the request and any objections thereto, and field questions from the Board in public session.

(I) In the event the requesting party fails to attend the scheduled meeting of the Board to present testimony, the Board may summarily dismiss the request and the dismissal shall be noted in the meeting minutes.

(II) There shall be no distinction made between persons attending the Public Meeting virtually and those attending in-person.

(b) Public comment shall be accepted prior to any action by the Board.

(c) At its sole discretion, the Board may enter executive session to receive legal counsel related to the request pursuant to W.S. 16-4-405.

(d) All actions related to any decision by the Board to deem public any information following a hearing held pursuant to these rules shall be recorded in the meeting minutes.

(e) Any hearing which occurs pursuant to this Section of this Chapter of these rules shall be considered non-precedential and shall not bind the Board to take any future action predicated on that decision.