

WSR 23-02-014

PROPOSED RULES

DEPARTMENT OF COMMERCE

(Public Works Board)

[Filed December 22, 2022, 3:06 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 22-17-074.

Title of Rule and Other Identifying Information: WAC 399-80-010
Broadband service expansion grant and loan program.

Hearing Location(s): On February 7, 2023, at 10:00 a.m., at Department of Commerce, Building 5, Columbia Room (110), 1011 Plum Street [S.E.], Olympia, WA 98501. In-person and virtual meeting available <https://wastatecommerce.zoom.us/j/81071547463?pwd=M1VlVmpDSllLVkw3cC9NT1JRbmZpUT09>, Meeting ID 810 7154 7463, Passcode 710301.

Date of Intended Adoption: February 15, 2023.

Submit Written Comments to: Sheila Richardson, 1011 Plum Street S.E., P.O. Box 42525, Olympia, WA 98504, email Sheila.richardson@commerce.wa.gov, 564-999-1927, by February 7, 2023.

Assistance for Persons with Disabilities: Contact Sheila Richardson, phone 564-999-1927, email Sheila.richardson@commerce.wa.gov, by February 7, 2023.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The Washington legislature has approved several changes regarding administration of the public works board broadband programs under ESHB 1673, some of which will require an update to chapter 399-80 WAC.

Changes to RCW 43.155.160. This includes the following updates:

- Enablement and creation of a preapplication process for the broadband program (subsections (4)(a), (4)(b), and (5)).
- Updates the application notice requirements to broadband providers and removes previous contact requirements (subsection (5)(o)).
- States the public works board must publish proposed geographic broadband project service areas on its website as well as preapplications (within three business days of the close of the preapplication cycle), and sets an objection period for 30 days for the proposed project (subsections (7)(a), (7)(b), and (7)(c)).
- Removes the utilities and transportation commission (UTC) technical feasibility review (subsection (10)).
- Authorizes the public works board to make low-interest or interest-free loans or grants to eligible applicants for emergency public works broadband projects (subsection (14)).

It also includes updates for RCW 42.56.270(4). Changes were made to protect financial, commercial, and proprietary information.

Reasons Supporting Proposal: The proposed rule will support public, private, and nonprofit broadband service providers' access to grants and loans from the public works board's broadband program. Without this rule making, the public works board would be unable to open future funding cycles in a manner consistent with enacted legislation.

Statutory Authority for Adoption: RCW 43.155.040(5), 43.155.160(9)(e), and 43.155.160(14)(a).

Statute Being Implemented: RCW 43.155.160.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Public works board, governmental.

Name of Agency Personnel Responsible for Drafting and Enforcement: Sheila Richardson, 1011 Plum Street S.E., P.O. Box 42525, Olympia, WA 98504-2525, 564-999-1927; Implementation: Public Works Board, 1011 Plum Street S.E., P.O. Box 42525, Olympia, WA 98504-2525, 564-999-1927.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is not required under RCW 34.05.328. Public works board (department of commerce) is not explicitly listed in subsection (5)(b)(i) and does not intend to make this section voluntarily applicable to this rule update per subsection [(5)(b)](ii). One of the primary purposes for the rule amendments is to clarify language, consistent with the provisions of RCW 34.05.328 (5)(b)(iv). Therefore, unless subsection [(5)(b)](ii) is invoked by the joint administrative rules review committee after filing the CR-102, no cost-benefit analysis is required.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.025(3) as the rules relate only to internal governmental operations that are not subject to violation by a nongovernment party; rules are adopting or incorporating by reference without material change federal statutes or regulations, Washington state statutes, rules of other Washington state agencies, shoreline master programs other than those programs governing shorelines of statewide significance, or, as referenced by Washington state law, national consensus codes that generally establish industry standards, if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule; and rules only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect.

December 27, 2022
Amanda Hathaway
Rules Coordinator

OTS-4271.1

AMENDATORY SECTION (Amending WSR 20-09-144, filed 4/21/20, effective 5/22/20)

WAC 399-80-010 Broadband service expansion grant and loan program. (1) The board, in collaboration with the office, shall establish a competitive grant and loan program to award funding to eligible applicants in order to promote the expansion of access to broadband service in unserved areas of the state.

(2)(a) Grants and loans may be awarded under this section to assist in funding acquisition, installation, and construction of middle mile and last mile infrastructure that supports broadband services and

to assist in funding strategic planning for deploying broadband service in unserved areas.

(b) The board may choose to fund all or part of an application for funding, provided that the application meets the requirements of subsection ~~((9))~~ (11) of this section.

(3) Eligible applicants for grants and loans awarded under this section include:

(a) Local governments;

(b) Tribes;

(c) Nonprofit organizations;

(d) Cooperative associations;

(e) Multiparty entities comprised of public entity members;

(f) Limited liability corporations organized for the purpose of expanding broadband access; and

(g) Incorporated businesses or partnerships.

(4) (a) The board shall develop administrative procedures governing the ~~((application))~~ preapplication and award process. The board shall act as fiscal agent for the program and is responsible for receiving and reviewing applications and awarding funds under this section.

(b) At least ~~((sixty))~~ 60 days prior to the first day ~~((applications))~~ preapplications may be submitted each fiscal year, the board must publish on its website the specific criteria and any quantitative weighting scheme or scoring system that the board will use to evaluate or rank applications and award funding.

(c) The board may maintain separate accounting in the statewide broadband account created in RCW 43.155.165 as the board deems necessary to carry out the purposes of this section.

(d) The board must provide a method for the allocation of loans, grants, provision of technical assistance, and interest rates under this section.

(5) An applicant for a grant or loan under this section must provide the following information on the ~~((application))~~ preapplication:

(a) The location and description of the project;

(b) Evidence regarding the unserved nature of the community in which the project is to be located;

(c) Evidence that proposed infrastructure will be capable of scaling to greater download and upload speeds;

(d) The number of households passed that will gain access to broadband service as a result of the project or whose broadband service will be upgraded as a result of the project;

~~(e) ((The estimated cost of retail services to end users facilitated by a project;~~

~~(f) The proposed actual download and upload speeds experienced by end users;~~

~~(g) Evidence of significant community institutions that will benefit from the proposed project;~~

~~(h) Anticipated economic, educational, health care, or public safety benefits created by the project;~~

~~(i) Evidence of community support for the project;~~

~~(j) If available, a description of the applicant's user adoption assistance program and efforts to promote the use of newly available broadband services created by the project;~~

~~(k) The estimated total cost of the project;~~

~~(l) Other sources of funding for the project that will supplement any grant or loan award;~~

~~(m) A demonstration of the project's long-term sustainability, including the applicant's financial soundness, organizational capacity, and technical expertise;~~

~~(n) A strategic plan to maintain long-term operation of the infrastructure;~~

~~(o)) Evidence that ((no later than six weeks)) before submission of the application, the applicant contacted, in writing, all entities providing broadband service near the proposed project area to ask each broadband service provider's plan to upgrade broadband service in the project area to speeds that meet or exceed the state's definition for broadband service as defined in RCW 43.330.530, within the time frame specified in the proposed grant or loan activities;~~

~~((p)) (f) If applicable, the broadband service providers' written responses to the inquiry made under ((o)) (e) of this subsection; (and~~

~~(q)) (g) The proposed geographic broadband service area and the proposed broadband speeds in the form and manner prescribed by the board;~~

(h) Evidence of community support for the project; and

(i) Any additional information requested by the board.

(6) An applicant for a grant or loan under this section must provide the following information on the application:

(a) ((Within thirty days of the close of the grant and loan application process,)) The final location and description of the project;

(b) Evidence that the proposed infrastructure will be capable of scaling to greater download and upload speeds;

(c) The number of households passed that will gain access to broadband service as a result of the project or whose broadband service will be upgraded as a result of the project;

(d) The estimated cost of retail services to end users facilitated by a project;

(e) The proposed actual download and upload speeds experienced by end users;

(f) Evidence of significant community institutions that will benefit from the proposed project;

(g) Anticipated economic, educational, health care, or public safety benefits created by the project;

(h) If available, a description of the applicant's user adoption assistance program and efforts to promote the use of newly available broadband services created by the project;

(i) The estimated total cost of the project;

(j) Other sources of funding for the project that will supplement any grant or loan award;

(k) A demonstration of the project's long-term sustainability, including the applicant's financial soundness, organizational capacity, and technical expertise;

(l) A strategic plan to maintain long-term operation of the infrastructure;

(m) If applicable, documentation describing the outcome of the broadband service providers' written responses to the inquiry made prior to or during the preapplication phase; and

(n) Any additional information requested by the board.

(7) (a) The board shall publish on its website for at least 30 days the proposed geographic broadband service area and the proposed broadband speeds for each ((application)) proposed broadband project submitted in the preapplication period.

(b) The board shall, within three business days following the close of the preapplication cycle, publish on its website preapplications as described in subsection (5) of this section.

(c) The board shall set an objection period of at least 30 days.

(d) The board shall publish objection information received during the objection period that includes: (i) The objecting provider; (ii) the reason for objection; (iii) a description of how the current or proposed infrastructure meets or exceeds speeds contained in the definition of broadband service in RCW 43.330.530; (iv) existing or planned service plans or tiers and associated speeds; and (v) information about the objector's project status including percentage completed.

(8) (a) Any existing broadband service provider near the proposed project area may, (~~within thirty days of publication of the information under (a) of this subsection,~~) submit in writing to the board, an objection to (~~an application~~) a proposed broadband project. An objection must contain information demonstrating that:

(i) The project would result in overbuild, meaning that the objecting provider currently provides, or has begun construction to provide, broadband service to end users in the proposed project area at speeds equal to or greater than the (~~state speed goals contained in RCW 43.330.536~~) speeds contained in the definition of broadband in RCW 43.330.530(2); or

(ii) The objecting provider commits to complete construction of broadband infrastructure and provide broadband service to end users in the proposed project area at speeds equal to or greater than the (~~state speed goals contained in RCW 43.330.536~~) speeds contained in the definition of broadband in RCW 43.330.530(2), no later than (~~twenty-four~~) 24 months after the date awards are made under this section for the grant and loan cycle under which the (~~application~~) preapplication was submitted.

(~~(e)~~) (b) Objections submitted to the board under this subsection must be certified by affidavit.

(c) The board shall provide a period, as specified, for applicants to submit responses to posted objections.

(d) The board may evaluate the information submitted under this section by the objecting provider and applicant and must consider it in making a determination on the (~~application~~) proposed broadband project objected to. The board may request clarification or additional information. The board may choose to not fund a project if the board determines that the objecting provider's commitment to provide broadband service that meets the requirements of (~~(b)~~) (a) of this subsection in the proposed project area is credible. In assessing the commitment, the board may consider whether the objecting provider has or will provide a bond, letter of credit, or other indicia of financial commitment guaranteeing the project's completion.

(e) If the board denies funding to an applicant as a result of a broadband service provider's objection made under this section, and the broadband service provider does not fulfill its commitment to provide broadband service in the project area, then for the following two grant and loan cycles, the board is prohibited from denying funding to an applicant on the basis of a challenge by the same broadband service provider, unless the board determines that the broadband service provider's failure to fulfill the provider's commitment was the result of factors beyond the broadband service provider's control. The board is not prohibited from denying funding to an applicant for reasons other than an objection by the same broadband service provider.

(f) An applicant or broadband service provider that objected to the application may request a debriefing conference regarding the board's decision on the application. Requests for debriefing must be coordinated by the office and must be submitted in writing in accordance with procedures specified by the office.

(g) ~~((Confidential))~~ An objecting provider may mark any proprietary business and financial information ((submitted by an objecting provider under this subsection is exempt from disclosure)) as confidential that the objecting provider is willing to defend in court as exempt under chapter 42.56 RCW.

~~((7))~~ (9) (a) In evaluating applications and awarding funds, the board shall give priority to applications that are constructed in areas identified as unserved.

(b) In evaluating applications and awarding funds, the board may give priority to applications that:

(i) Provide assistance to public-private partnerships deploying broadband infrastructure from areas currently served with broadband service to areas currently lacking access to broadband services;

(ii) Demonstrate project readiness to proceed;

(iii) Construct infrastructure that is open access, meaning that during the useful life of the infrastructure, service providers may use network services and facilities at rates, terms, and conditions that are not discriminatory or preferential between providers, and employing accountable interconnection arrangements published and available publicly;

(iv) Are submitted by tribal governments whose reservations are in rural and remote areas where reliable and efficient broadband services are unavailable to many or most residents;

(v) Bring broadband service to tribal lands, particularly to rural and remote tribal lands or areas servicing rural and remote tribal entities;

(vi) Are submitted by tribal governments in rural and remote areas that have spent significant amounts of tribal funds to address the problem but cannot provide necessary broadband services without either additional state support, additional federal support, or both;

(vii) Serve economically distressed areas of the state as the term "distressed area" is defined in RCW 43.168.020;

(viii) Offer new or substantially upgraded broadband service to important community anchor institutions including, but not limited to, libraries, educational institutions, public safety facilities, and health care facilities;

(ix) Facilitate the use of telemedicine and electronic health records, especially in deliverance of behavioral health services and services to veterans;

(x) Provide technical support and train residents, businesses, and institutions in the community served by the project to utilize broadband service;

(xi) Include a component to actively promote the adoption of newly available broadband services in the community;

(xii) Provide evidence of strong support for the project from citizens, government, businesses, and community institutions;

(xiii) Provide access to broadband service to a greater number of unserved households and businesses, including farms;

(xiv) Utilize equipment and technology demonstrating greater longevity of service;

(xv) Seek the lowest amount of state investment per new location served and leverage greater amounts of funding for the project from other private and public sources;

(xvi) Include evidence of a customer service plan;

(xvii) Consider leveraging existing broadband infrastructure and other unique solutions;

(xviii) Benefit public safety and fire preparedness; or

(xix) Demonstrate other priorities as the board, in collaboration with the office, may prescribe by rule.

(c) The board shall endeavor to award funds under this section to qualified applicants in all regions of the state.

(d) The board shall consider affordability and quality of service to end users in making a determination on any application.

(e) The board, in collaboration with the office, may develop additional rules for eligibility, project reapplications, project applications, the associated objection process, and funding priority, as provided under this subsection and subsections (3), (5), ~~((and))~~ (6), (7), and (8) of this section.

(f) The board, in collaboration with the office, may adopt rules for a voluntary nonbinding mediation between incumbent providers and applicants to the grant and loan program created in this section.

~~((8))~~ (10) To ensure a grant or loan to a private entity under this section primarily serves the public interest and benefits the public, any such grant or loan must be conditioned on a guarantee that the asset or infrastructure to be developed will be maintained for public use for a period of at least ~~((fifteen))~~ 15 years.

~~((9))~~ (11) (a) No funds awarded under this section may fund more than ~~((fifty))~~ 50 percent of the total cost of the project, except as provided in (b) of this subsection.

(b) The board may choose to fund up to ~~((ninety))~~ 90 percent of the total cost of a project in financially distressed areas as the term "distressed area" is defined in RCW 43.168.020, and in areas identified as Indian country as the term "Indian country" is defined in WAC 458-20-192.

(c) Funds awarded to a single project under this section must not exceed ~~((two million dollars))~~ \$2,000,000, except that the board may choose to fund projects qualifying for the exception in (b) of this subsection up to, but not to exceed, ~~((five million dollars))~~ \$5,000,000.

~~((10))~~ Prior to awarding funds under this section, the board must consult with the Washington utilities and transportation commission. The commission must provide to the board an assessment of the technical feasibility of a proposed application. The board must consider the commission's assessment as part of its evaluation of a proposed application.

~~((11))~~ (12) The board shall have such rights of recovery in the event of default in payment or other breach of financing agreement as may be provided in the agreement or otherwise by law.

~~((12))~~ (13) The community economic revitalization board shall facilitate the timely transmission of information and documents from its broadband program to the board in order to effectuate an orderly transition.

~~((13))~~ (14) (a) Emergency public works broadband projects include construction, repair, reconstruction, replacement, rehabilitation, or improvement to critical broadband infrastructure that has been made necessary by a natural disaster or damaged by unforeseen events. To ensure limited resources are provided as efficiently as

possible, the board shall grant priority to emergency public works projects that replace existing infrastructure of the provider whose facilities were damaged by the unforeseen event and shall not provide funds to a new provider to overbuild the existing provider. The loans or grants may be used to help fund all or part of an emergency public works broadband infrastructure project less any reimbursement from any of the following sources: (i) Federal disaster or emergency funds, including funds from the federal emergency management agency; (ii) state disaster or emergency funds; (iii) insurance settlements; and (iv) litigation. Applicants must reimburse the department any moneys received from the above listed sources for four years after formal project closeout. Applicants eligible to receive moneys must use their best efforts to seek reimbursement in a timely manner.

(b) Eligible applicants for grants and loans awarded under this subsection are the same as those described in subsection (3) of this section.

(c) The board has discretion to waive certain program requirements in subsections (4) through (8) of this section if the applicant seeking emergency funding is the existing provider proposing to replace existing infrastructure impacted by the emergency.

(d) The board allocates funds to the emergency program biennially and the program is open until funds are expended.

(e) Eligible applicants must apply using the application and process provided by the board.

(f) Board deliberations—Emergency loan applications. The board will consider and approve or disapprove all eligible applications for emergency financial assistance at regular or special meetings of the board. The applicant will be notified of meetings at which its application will be considered.

(15) The definitions in RCW 43.330.530 apply throughout this section unless the context clearly requires otherwise.

(16) A "proposed broadband project" in subsections (7) and (8) of this section means a project that has been submitted as a preapplication to the board.

[Statutory Authority: RCW 43.155.040(5). WSR 20-09-144, § 399-80-010, filed 4/21/20, effective 5/22/20.]