

MEMORANDUM

TO: OKLAHOMA BROADBAND OFFICE
FROM: DEPUTY ATTORNEY GENERAL NIKI BATT
SUBJECT: JUNE 15, 2023 EMAIL FROM MIKE ROBINS
DATE: JULY 7, 2023

QUESTION: Is it fair and reasonable for the Oklahoma Broadband Office (“OBO”) to create two classes of applicants for the “ARPA Broadband Investment Project” \$382,144,000.00 grant program? Specifically, the first class of applicants will be the applicants who submitted applications through the 2021-2022 ARPA online portal (“ARPA Portal”). The second class of applicants will be projects not originally apply through the ARPA Portal that provide service to the regions of the state that currently are not covered under the proposed original applications but are deemed serviceable locations by the FCC.

REPORTED BACKGROUND INFORMATION: In addition to the above question, you reported, “internally, the OBO has started to evaluate the original applicants along with using the FCC coverage map to determine “hot spots” in the state where coverage should be prioritized. Despite having \$4 billion dollars of submitted proposals, there are still regions of the state that the FCC has deemed serviceable but are lacking coverage from the 133 original applicants. Since these regions would not be currently covered under any of the original applicants, the OBO would like to reserve a percentage of the overall \$382,144,000.00 award for future applicants (hereafter “un-proposed serviceable locations applicants”) that can provide service to the un-served locations. Both original applicants and the un-proposed serviceable locations applicants will complete the same additional application and scored using the same criteria. The only difference between the class of original applicants and the class of un-proposed serviceable locations applicants is that the later will not have to complete the online portal original application and they will only be allowed to propose programs under the predetermined percentage.

The OBO is reserving a percentage of the total funding for the class of un-proposed serviceable locations applicants to prepare for any future unforeseen issues as the FCC map is still being finalized and the Oklahoma Broadband Map of the state will be completed in August of 2023. By reserving a percentage for un-proposed serviceable locations applicants, this will provide an opportunity for eligible service providers who previously missed the original applicant deadline and have smaller grant programs that can be completed by the Treasury’s ARPA obligation deadline of December 31, 2024, to submit their proposal.”

ANALYSIS: The ARPA Broadband Investment Project (“ARPA BIP”) was funded in H.B. 1101, 58th Leg, 2d, 2d Ex. Sess. (Okla. 2022) (“HB1011”). This legislation states in relevant part,

There is hereby appropriated to the State Broadband Grant Program Revolving Fund from any monies not otherwise appropriated from the Statewide Recovery Fund of the State Treasury created in Enrolled House Bill No. 3349 of the 2nd Session of the 58th Oklahoma Legislature, the sum of Three Hundred Eighty-two Million One Hundred Forty-four Thousand Dollars {\$382,144,000.00) to be budgeted and expended in accordance with the provisions of Section 10 of Enrolled House Bill No. 3363 of the 2nd Session of the 58th Oklahoma Legislature. Such funds shall be utilized in a manner consistent with the recommendations adopted by the Joint Committee on Pandemic Relief Funding on September 20, 2022.¹

HB1011's reference to Section 10 of Enrolled House Bill No. 3363 of the 2nd Session of the 58th Oklahoma Legislature ("HB3363") is now codified in statute at 74 O.S. § 9209. This provision, in relevant part, states:

The Office, with the participation and advice of the Broadband Expansion Council and approval from the Board, shall establish the State Broadband Grant Program. **The Program shall include development of competitive grants to be awarded to applicants** seeking to expand access to broadband Internet services in this state, focusing on areas considered unserved and underserved by the FCC . . .

74 O.S. § 9209(A) (Emphasis added).

Pursuant to its statutorily granted rulemaking authority, the OBO developed proposed permanent rules outlining several requirements for the competitive grant awarding process. Following public comment and a hearing, these rules were formally adopted by the Broadband Governing Board ("BGB") on March 31, 2023. These rules have now gone through legislative review and approval. The rules take effect on or around September 11, 2023. Specifically, OKLA. ADMIN. CODE 93:10-3-2. Award process states:

- (a) **Grant applicants will submit applications through an online intake portal.** A Risk Assessment will be done. Submission of a final application does not guarantee the award of a grant.
- (b) **The BGB may assign preference to a class of applicants for any application.**
- (c) At the judgment of the BGB, applications may be evaluated and scored by OBO employees, content experts, proposal review panels or any combination of employees, experts, or review panels. Evaluation results and recommendations shall be provided to the directors for each application reviewed.
- (d) Applications approved by the OBO staff will then be presented to the BGB for final approval.
- (e) Applications submitted to the agency remain confidential until a decision is made by the BGB.

¹ After replaying the September 20, 2022 meeting of Joint Committee on Pandemic Relief Funding, I was unable to find any specific recommendations outlined by the Committee other than those legislative functions promulgated in HB3363. My understanding is that the OBO is likewise not aware of any specific directives beyond the mandates in HB3363 and other related legislation.

(f) **The final decision to award shall be made at the sole discretion of the BGB, based upon the evaluation and scoring performed on the application.**

(g) All applicants will receive written notification of final award status.

(h) Disbursement and reporting policies and cadences will be determined by the completed risk assessment and will also include the federal rules and regulations set forth for each grant program

(i) Approved applications will then enter a grant agreement with the OBO.

(j) The BGB may use the contents of applications in conjunction with reporting duties of the BGB and OBO.

(Emphasis added).

The hallmark of any competitive grant program involves the awarding agency announcing the funding opportunity via a Funding Opportunity Announcement or similar publication. These announcements are based upon the awarding agency’s legislative mandate, budget, and other programming and technical requirements. They also serve as a measure to ensure fairness to all interested in participating.

Indeed, the OBO acknowledged that it would abide by the notice and application requirements center to competitive grant programs. The Broadband Office 2022 Annual Report² contained reference to the ARPA BIP program, including, “\$382,144,000 – funded in House Bill 1101 to standup a broadband grant program. The first program approved by the board from these funds is detailed below.³ In the coming months, **the OBO will release separate a Notice of Funding so that community organizations may apply for the remaining grant funds.**” (Annual Report, pg. 3) (Emphasis added). Also included with the Broadband Office 2022 Annual Report is the Oklahoma Broadband Plan (“the Plan”), dated December 29, 2022. The Plan indicates by reference that it will publicize grant programs. (The Plan at pg. 7).

ANSWER: The OBO’s proposed two class approach will likely subject it to criticism, if not litigation, because of the heavy focus on those applicants that submitted proposals through the ARPA Portal. Reliance on the ARPA Portal is largely backward-looking because applicants submitted projects or proposals to the State, prior to the creation of the OBO or the Oklahoma Broadband Expansion Act, 74 O.S. § 9200, *et seq.* This approach seemingly fails to provide notice of a funding opportunity to potential applicants. This lack of notice fails to ensure all potential applicants are on equal footing by outlining the technical and programmatic aspects of the project, as well as a defined timeline to submit applications.

However, the OBO should consider merging the two classes to accomplish the same important goal of awarding grants to providers that will ensure unserved and underserved areas have access to highspeed broadband, and is able to do by the December 31, 2024 deadline. To do so, the OBO would publish a Funding Opportunity Announcement detailing the particulars of the specific grant program, the terms and conditions of the award, scoring criteria, etc. This announcement could include a statement incorporating all projects previously submitted to the ARPA Portal. The OBO should determine a reasonable timeline from the notice of funding

² The Broadband Office 2022 Annual Report is available at <https://oklahoma.gov/broadband/office/about.html>

³ The referenced project was the OKWIN award, which will no longer be awarded by the OBO.

opportunity to the time the application window closes. This timeline could coincide with the August arrival of the finalized Oklahoma Broadband Map so that the project awards proceed without delay. The scoring criteria could include a preference for those projects previously submitted through the ARPA Portal.⁴ Of course, any proposed grant program must also be approved by the BGB.

The above-described approach would further insulate the OBO from attack or potential liability in any future litigation. This approach is consistent with the statutory mandate to establish a competitive grant program and is consistent with the OKLA. ADMIN. CODE 93:10-3-2. This approach also has the added benefit of ensuring that any advances in technology can be presented, reviewed, and considered. I am happy to discuss if you would like to further explore this approach.

THE LEGAL OPINION CONTAINED IN THIS MEMORANDUM IS THAT OF THE
AUTHOR AND NOT AN OFFICIAL ATTORNEY GENERAL OPINION.

⁴ The Plan also states that “Broadband-related projects submitted through the ARPA portal may be reviewed for potential funding.” (The Plan at pg. 12). *See also* 93:10-3-2(b), “[t]he BGB may assign preference to a class of applicants for any application.”