
August 4, 2023

National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Ave. N.W.
Washington, DC 20220

VIA EMAIL
BEAD@NTIA.gov

RE: BEAD Program Uniform Guidance Request for Comment – (NTIA-2023-0007)

COMMENTS OF THE
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

The National Rural Electric Cooperative Association (“NRECA”) appreciates the opportunity to provide the following comments in response to the BEAD Uniform Guidance Request for Comment (“RFC”) issued by NTIA on July 6, 2023.

NRECA is the national service organization for more than 900 not-for-profit rural electric cooperatives that provide electric power to 56% of the nation’s landmass, approximately 42 million people in 48 states, or approximately 12 percent of electric customers. Rural electric cooperatives serve 88% of the counties of the United States, including 327 of the nation’s 353 persistent poverty counties, which is 92% of these persistent poverty counties. All of NRECA’s distribution members are small businesses as defined by the U.S. Small Business Administration.

The nation’s rural electric cooperatives are deeply committed to promoting the deployment of advanced telecommunications capabilities within the rural communities and areas in which they serve and are expected to play a crucial role in the development of broadband infrastructure to serve rural unserved and underserved locations. Over 200 rural electric cooperative broadband projects are already underway across the country, and NRECA estimates that another 100 or so are currently exploring the feasibility of providing broadband. NRECA members are providing (or will provide) these broadband services either by themselves or through partnerships of some kind with affiliated or unaffiliated ISPs.

We anticipate that many NRECA member cooperatives will seek BEAD funding support for rural broadband projects, and many NRECA members also currently receive broadband support from other federal and/or state funding sources. Other NRECA members do not provide broadband infrastructure or services and may have no plans to do so, but nevertheless wish to ensure that BEAD funding adequately supports the broadband needs of their constituents.

Before proceeding to NRECA's detailed comments, we wish to highlight two points:

First, NRECA commends NTIA for proposing actions that are generally consistent with the Treasury Department's recent "Supplemental Broadband Guidance" ("Guidance") relating to broadband projects funded through the Capital Projects Fund ("CPF") and the ARPA State and Local Fiscal Recovery Fund ("SLFRF"). The Treasury Department Guidance is well-reasoned, and recognizes that many Part 200 provisions would be detrimental to grant-supported broadband infrastructure projects.

Accordingly, our comments generally urge NTIA to adopt policies and guidance that are consistent with the Treasury Guidance. Doing so makes sense as a substantive matter, and also avoids a scenario where broadband projects are subject to significantly different compliance requirements, based solely on which federal agency is involved.

Second, as explained further in our response to Question 9 below, NRECA notes that the RFC did not raise or address issues relating to the transfer of BEAD-funded property. As we have learned in the context of BTOP-funded networks, obtaining agency approval for transfer of grant-funded network infrastructure imposes significant delay, complication and expense, with dubious value in terms of protecting the Federal government's interest in the property.

The Treasury Guidance adopted a "notice only" approach to this question, which would avoid the undue delay and expense involved in obtaining agency approval while adequately protecting the Federal government's interest. NRECA urges NTIA to adopt a comparable "notice only" requirement for transfer of BEAD-funded network infrastructure.

NRECA's full comments follow, organized in accordance with the 15 questions posed in the RFC.

Question 1 – Program Income. NRECA strongly supports NTIA's proposal to seek OMB exemption from the Uniform Guidance's program income requirements, enabling recipients and subrecipients to retain program income without restriction, including for profit.

The RFC is silent on one key issue, however. In the Treasury Department Guidance, Treasury explicitly stated that "income from indefeasible rights of use (IRUs) and leases relating to broadband infrastructure will not be considered program income." (Treasury Guidance, at 2). Income from IRUs and leases promises to be a crucial part of many BEAD-funded broadband projects, particularly those involving partnerships with multiple entities. While a blanket statement enabling unrestricted use of program income is welcome, NRECA urges NTIA to explicitly state that income from IRUs and leases will not be considered program income at all, or, if it is to be considered program income, that it may be retained and used without restriction.

Questions 2-4 – Fixed Amount Subawards. NRECA supports NTIA’s proposal to seek exceptions from OMB to enable Eligible Entities to issue fixed amount subawards in any amount for BEAD broadband infrastructure projects. NRECA believes that the subgrantee selection process, as developed by state broadband offices, made publicly available as part of Initial Proposals, and reviewed and approved by NTIA, will ensure that each project has “measurable goals and objectives” and will provide a “reasonable estimate of actual cost.”

Question 5 – Payment of Fixed Amount Subawards. Based on NTIA guidance to date, many prospective subawardees expect awards to be paid on a periodic reimbursement basis. NTIA should avoid imposing any requirements that significantly departs from this principle, unless presented as additional options. NRECA encourages NTIA to adopt clarifications enabling payment of fixed amount subawards to be made in various ways, including, potentially, multiple partial payments based upon agreed milestones. NTIA might consider enabling reimbursement payment to be made based on percentage of project completion, with significant flexibility granted to Eligible Entities and subgrantees with respect to the applicable completion percentages. For example, a project might reasonably enable reimbursement payment to be made for every 5% of project completion, measured as a portion of project cost. That approach would seemingly be acceptable under 2 CFR § 200.201(b)(1) as a payment based upon “measurable goals and objectives.”

While NTIA might reasonably present it as one option among several, NRECA urges NTIA *not* to adopt a requirement that payment of fixed amount subawards must be made in a single payment at award completion. Such a requirement would severely restrict the ability of smaller and less-capitalized applicants from participating in the BEAD program, and would be, frankly, a disastrous outcome.

In short, NRECA urges NTIA to provide Eligible Entities and subgrantees the greatest flexibility possible with respect to subaward payment methodologies.

Question 6 – Fixed Amount Subaward Cost Principles. NRECA notes that Eligible Entities will require BEAD applicants to provide a reasonable estimate of actual costs during the competitive subgrant process, and suggests that NTIA need not issue a special award condition dictating the use of certain cost principles. Eligible Entities have every incentive to ensure that subgrant applications reflect reasonably accurate cost data, and periodic expense reporting and other existing accounting methods will adequately ensure that awards reasonably approximate the actual cost of broadband infrastructure projects.

NTIA will have the opportunity to review Eligible Entities’ plans and processes to competitively issue subawards, and could require additional clarity on this point from Eligible Entities on a case-by-case basis, if required.

Question 7 – Additional Adjustments for Fixed Amount Subaward. No comment.

Question 8 – Procurement. NRECA strongly supports NTIA’s proposal to issue a special award condition authorizing Eligible Entities to provide subrecipients an exception from the

procurement requirements when using fixed amount subawards. As the RFC correctly notes, many broadband providers already utilize competitive procurement processes.

However, the RFC goes on to propose that the special award condition would require Eligible Entities “to obtain certifications from subrecipients that the subrecipient used competitive procurement processes in executing the project.” It is unclear how NTIA proposes to reconcile these apparently competing principles: if Eligible Entities may provide an exception from competitive procurement requirements, why would NTIA also require Eligible Entities to obtain a certification that subrecipients used competitive procurement processes?

Many broadband providers already have longstanding – and cost-effective – relationships with construction contractors, service provider partners and others, and many already utilize (or have utilized) competitive procurement processes to identify them. Eligible Entities will competitively award subgrants, providing further pressure on subrecipients to implement cost-effective relationships with suppliers and contractors.

Imposing a competitive procurement process for fixed-amount subawards would add unnecessary delay and administrative expense, with no clear benefit to the program in terms of addressing the risk of waste, fraud and abuse. NTIA should adopt a proposed special award condition that closely mirrors the Treasury Department’s guidance on this point, and should *not* require Eligible Entities to obtain certifications from subrecipients that the subrecipient used competitive procurement processes in executing the project.

Question 9 – Useful Life of BEAD-Funded Equipment. NRECA supports the use of a uniform Federal Interest period as proposed by NTIA, but urges NTIA to adopt a shorter Federal Interest period more closely aligned with the Treasury Department.

We recognize that NTIA has previously specified the useful life of fiber optic cable and other outside plant at 20 years,¹ but there is no compelling reason why NTIA should be bound to that particular time period as the Federal Interest period for all BEAD-funded broadband infrastructure property.

The Federal government’s interest in grant-funded property will be adequately protected even if the Federal Interest period is significantly shorter. Unlike other types of property that can readily be used for other purposes (*e.g.*, buildings, vehicles, or construction equipment), broadband infrastructure is generally usable for only one purpose: the provision of broadband service. Accordingly, there is little risk that the property will be coopted for an unrelated purpose, and the benefits of the Federal investment lost.

Nor should NTIA adopt various useful life periods applicable to different categories of broadband infrastructure and equipment. As we have learned from the BTOP experience, having different useful life periods for different pieces of what is otherwise a cohesive infrastructure adds unnecessary complexity with zero benefit to the program, eligible entities or subrecipients.

¹ *E.g.*, Broadband Technology Opportunities Program Useful Life Schedule, Version 1, August 25, 2010, https://www2.ntia.doc.gov/files/fact_sheet_useful_life_schedule_082510_v1.pdf

Notice-only Transfer. NRECA notes that the RFC did not address a key issue that was directly addressed in the Treasury Department’s Guidance, namely, the requirements that must be met before Federal Interest property can be transferred. As we have learned in the years since the BTOP program, obtaining agency consent to transfer grant-funded property has turned out to be an inordinately time-consuming endeavor. NTIA and NOAA require the grant recipient to submit a petition for waiver after the conveyance agreement is effectively complete. From that point, the agencies take six months or more to render a decision on the petition. In effect, this process adds a six-month (or more) waiting period before parties may proceed to acquire or transfer a grant-funded network, even if the acquiring entity will use it for the same purpose. This delay has proven to be a significant problem, and it should not be replicated in the BEAD context.

NRECA strongly urges NTIA to mirror the Treasury Department approach and adopt a “notice-only” provision relating to transfers of grant-funded property that remain subject to the Federal Interest. So long as the parties submit a written certification acknowledging the ongoing Federal Interest and certifying that the property will be used for its original purpose, the transaction should be allowed to proceed.

Question 10 – Use Requirements for Fixed-Amount Subawards. The prospect of BEAD-funded broadband infrastructure property being used for a purpose other than the provision of broadband service is relatively low. Accordingly, NTIA should employ its authority to apply less restrictive requirements relating to the use of BEAD-funded property involving fixed-amount subawards, reducing administrative burden and expense. NTIA should consider applying requirements comparable to those adopted by the Treasury Department in its CPF and SLFRF program.

Question 11 – Equipment Management Requirements. NRECA agrees with NTIA’s suggestion to provide an exception to the Uniform Guidance equipment management requirements for broadband infrastructure subawardees who certify that they use commercially reasonable equipment management practices.

Question 12 – BEAD Equipment Upgrades. NTIA proposes to issue a special award condition relating to equipment upgrades for BEAD-funded projects. The proposed special award condition would require subrecipients to track and report the fair market value of equipment be replaced, the value of the replacement equipment, and the Federal and non-Federal share of each.

While NRECA commends NTIA for ensuring that BEAD subrecipients have enhanced flexibility to upgrade and evolve BEAD-funded networks, NRECA is concerned that NTIA’s proposed tracking requirements may prove to be overly cumbersome. NRECA suggests that NTIA should adopt streamlined equipment replacement and disposition conditions more closely aligned with those adopted by the Treasury Department, which eliminates cumbersome tracking requirements for transactions in the ordinary course of business.

Question 13 – Lien Requirements. NRECA supports NTIA’s proposal to use the same approach as the Treasury Department with respect to recordation of liens.

Question 14 – Audits. NRECA supports NTIA’s proposal to issue a special award condition vesting authority in Eligible Entities to determine the form and frequency of audits from commercial subrecipients, comparable to the Treasury Department’s approach.

In conclusion, NRECA fully supports NTIA’s aim of providing additional flexibility to BEAD subrecipients, but urges NTIA to incorporate the several modifications suggested here in its final guidance. NRECA particularly urges NTIA to adopt policies and guidance that are consistent with the Treasury Guidance. Doing so makes sense as a substantive matter, and also avoids a scenario where broadband projects are subject to significantly different compliance requirements, based solely on which federal agency is involved.

Respectfully submitted,

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