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ACLP - Maximizing BEAD's Reach - February 2024

New York Law School

Navigating the BEAD Weeds

MAXIMIZING BEAD'S REACH

February 2024



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1. INTRODUCTION

As the country continues to move closer to the formal allocation of BEAD funds, it is useful to begin parsing some of the more technical elements of how states will administer their grant programs. BEAD is an incredibly complex program, the nuances of which will differ from state to state. However, each state must administer BEAD in a manner that achieves several overarching goals, foremost among which is prioritizing the allocation of available funds to bring broadband to as many unserved and underserved locations as possible.

In the absence of clear processes aimed at streamlining application and review phases, this may prove to be a difficult task.

A review of each state’s pre-public comment draft Initial Proposal indicates that 24 states are confident that available BEAD funding will address all remaining unserved and underserved locations, either via fiber exclusively or via a mix of technologies, including fiber, cable, fixed wireless, and, potentially, satellite.¹ Ten states have noted that it is too early to determine whether available funds will close their digital divides.² The remaining 16 states predict that available funding will be inadequate to bring broadband to all remaining unserved and underserved areas.³ Of these states, some, like New York, have based this initial assessment on modeling focused solely on fiber deployments. In other instances (e.g., Arizona), it is unclear whether the state feels funding will be insufficient for serving the unserved with fiber or with any technology. The following table offers a high-level summary of states’ initial predictions.

Overview of Whether States Believe Available BEAD Funding Will Be Sufficient to Serve All Unserved & Underserved Areas

States Confident BEAD Funding Will Be Sufficient (24)	AL, AR, CO, DE, FL, HI, IL, KY, LA, ME, MA, MI, MO, NH, NJ, NM, NC, OH, RI, SC, VT, VA, WV, WI
States Not Confident BEAD Funding Will Be Sufficient (16)	AZ, CA, CT, GA, ID, KS, MD, MN, MT, NE, NV, NY, TX, UT, WA, WY
States That Have Yet to Determine (10)	AK, IN, IA, MS, ND, OK, OR, PA, SD, TN

As the BEAD process proceeds, these projections will likely change to reflect new models and new deployments made via other grant programs (e.g., CPF- and ARPA-funded state grant programs). Moreover, the true reach of BEAD funds, and the extent to which they will support fiber and other broadband technologies, will likely be influenced by several factors, many of which can be influenced by the states and NTIA, which is reviewing states’ proposed designs for their grant programs.

Regardless of these factors, state broadband offices must still address a core question presented by BEAD: What can states do to ensure that as many unserved and underserved locations as possible benefit from BEAD funding? This analysis focuses on several approaches, including Alternative Percentages, Deconfliction, and No-Bid scenarios, that states have developed to help realize this goal.

2. ALTERNATIVE PERCENTAGES

A foundational element of the BEAD application process is the way prospective subgrantees identify where they would like to build subsidized networks. As detailed at length in a previous ACLP analysis, states will employ a host of approaches when establishing these BEAD “project areas” (PAs).⁴ In a nutshell, a handful of states will permit applicants to propose their own PAs; some will use existing geographic units, like municipal or county boundaries, to serve as their PAs; others will create bespoke PAs that will group unserved and underserved locations together.

Most states will require prospective subgrantees to commit to serving every unserved and underserved location in the PAs on which they bid. However, in recognition of the likelihood that this all-or-nothing approach might discourage bids in certain areas, states have begun to embrace a variety of alternative approaches to maximizing the reach of their BEAD allocations.

For example, some states, like Oregon, have recognized that “there may be locations [in a PA] that will be so costly to build that including those locations as required deployment targets may serve to make the entire [PA] non-viable at a cost that fits into the finite BEAD budget (i.e., the costs would exceed the Extremely High Cost Per Location Threshold) or may serve to reduce or eliminate the chance of any applications being received for that [PA].”⁵ To address this dynamic, states like Oregon, New York, Connecticut, Kentucky, and New Mexico will offer applicants the “option of submitting a bid...that represents some amount less than 100 percent of unserved and underserved locations, removing that percentage of eligible locations that the modeling suggests would create risk either of excessive total grant outlay or of reducing the chances of receiving any bids at all for that [PA].”⁶

Other states have incorporated a similar approach in their application scoring rubric. In Georgia, for example, applicants that commit to serving 100% of a PA will receive maximum points; those that commit to serving less than 100% will receive fewer points.⁷ Indiana and Montana, among others, have proposed similar approaches.⁸ In Arkansas, applications with PAs that encompass a majority of locations that are unserved will receive maximum points.⁹

These “alternative percentage” approaches may be most impactful in states that establish large PAs, where the chances are high that financially feasible locations will be bundled with extremely high-cost locations.¹⁰ However, this mechanism promises to be impactful elsewhere, particularly in instances where serving all eligible locations in a PA proves impractical. For example, an ISP with existing locations in one part of a PA might wish to

edge out its network to cover a large swath of unserved households, but bringing service across the county might be financially infeasible even with BEAD subsidies. Ultimately, but for the adoption of “alternative percentage” approaches, requiring subgrantees to serve every eligible location in a large PA “may make the entire areas non-viable for bids at a cost that fits into the finite BEAD budget and could reduce or eliminate the chance of any bids being received for that [PA].”¹¹

3. DECONFLICTION

In states with smaller PAs, administrative issues might arise when untangling applications with overlapping project areas. Proposals that include overlapping PAs will almost certainly arise in the handful of states that let applicants propose their own PAs. However, it will also likely occur in states that set their PAs at the Census Block Group (CBG) level (an area that encompasses anywhere from 600 to 3,000 people) and in states that have designed bespoke PAs that are similar in size to CBGs.¹² In short, smaller PAs increase the odds of overlapping proposals because applicants will have many more options for piecing together service areas of varying sizes.

NTIA anticipated the likelihood of states receiving overlapping proposals in its NOFO, which requires states to set forth a process for “deconflicting” them.¹³ In particular, states “must develop a mechanism for de-conflicting overlapping proposals (for example, by de-scoping some locations from a provider’s proposed project area) to allow for like-to-like comparison of competing proposals.”¹⁴

In the absence of a straightforward process for addressing overlapping BEAD proposals in a timely manner, states might be overwhelmed by what could be a laborious and daunting process of sifting through eligible locations that received multiple bids and determining which applicant should win funding to serve them. This could delay the allocation of grant funds and increase the chances of a state missing the deadline for allocating its funding.

A review of the wide variety of state deconfliction proposals by the ACLP has yielded several approaches that appear, at least on paper, to be best positioned for addressing overlapping proposals in the fairest and most expeditious manner possible. These include:

- **Severability of Certain Locations.** An applicant should have the opportunity to identify which locations it is willing to “sever” or separate from its proposal in the event those locations overlap with another proposal. This is like the “alternative percentage” approach discussed above but would only be triggered in the event of an overlap.

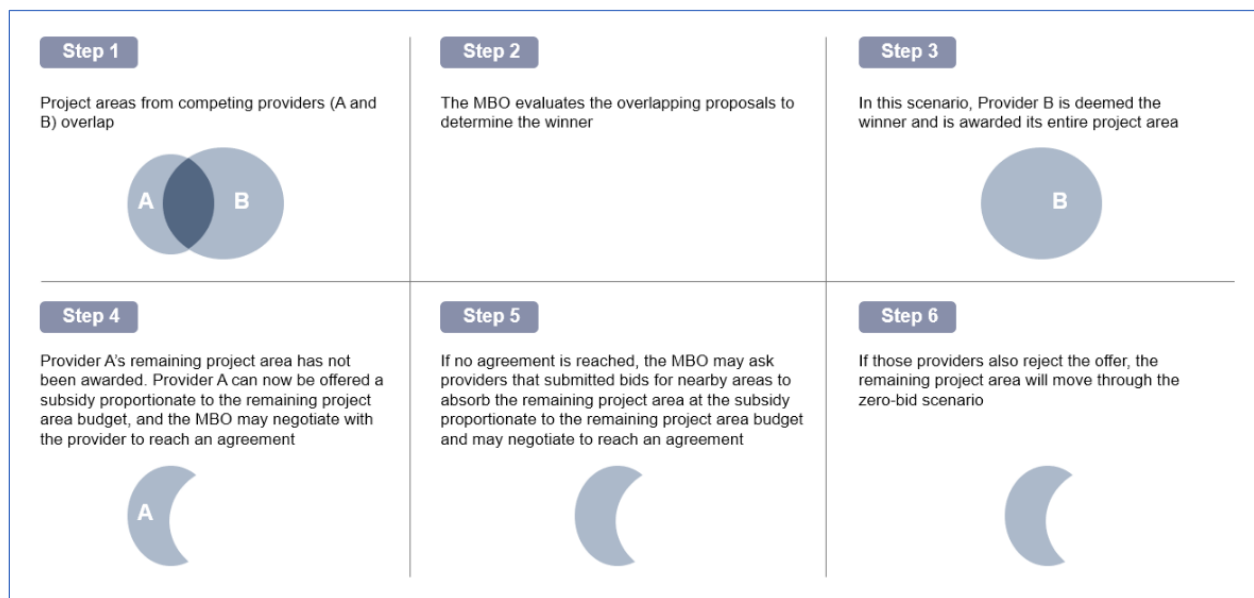
Louisiana, the first state to receive NTIA approval to launch its BEAD program, will institute this approach. Specifically, applicants will be allowed to submit “two effective “bids”: (1) the overall application, including all selected [PAs], and a total amount of funding requested for all [PAs], expressed as a percentage of the total reference funding for all; and (b) the independent per-[PA] funding request for any SPA designated as “separable.” [The state] will always assume that the applicant’s

first choice is to be awarded its total application at the overall funding level in (1), and will make the alternative “separable” [PA] awards in (2) only if necessary, based on the presence of a superior competing application.”¹⁵

- **Reviewing Overlapping Proposals Head-to-Head.** Applications that include overlapping elements should be evaluated and scored “head-to-head” vis-à-vis the areas of overlap. The applicant with the higher score should “win” and receive funding to serve those locations. Several states, including Arizona, have adopted this approach.¹⁶
- **Efficiently Addressing the “Severed” Locations.** For the “severed” locations in the proposal that did not win in head-to-head scoring, states should offer the losing applicant funding to serve those areas. If the applicant refuses, then the state might reconsider them along with other “no-bid” locations (discussed in Section 4).

The schematic below neatly summarizes a version of this process developed by Montana.

Montana’s Approach to Awarding Overlapping Projects¹⁷



4. ADDRESSING LEFTOVER AND NO-BID LOCATIONS

By permitting applicants to omit very high-cost locations or locations that prove to be financially infeasible from their bids via the processes discussed above, states might be left with a small number of extremely expensive unserved and underserved locations. Per NTIA requirements, states’ initial proposals include a variety of remedies for these situations.¹⁸

Many proposed remedies involve some measure of direct contact with ISPs to determine whether and how these entities might extend their networks to serve these areas. For example, Louisiana will “attack any such remaining locations via a targeted outreach and

negotiation strategy with the proximate providers and/or newly awarded subgrantees with the greatest apparent ability to make targeted extensions of service to individual locations passed over in the main [BEAD] process.”¹⁹ Ohio has proposed engaging ISPs to understand why a certain area remains economically undesirable even with substantial BEAD subsidies and taking action to address those barriers.²⁰

Other states will award points to applicants that commit to serving poor or high-cost areas, creating additional incentives to include these locations in their PAs. New Mexico, for example, will award up to 30 points to applications that include at least one high-cost area.²¹ Alabama will “award up to 10 points to applications that demonstrate that the proposed project will include high percentages of unserved locations.”²² Similarly, Virginia will award more points to applicants that commit to serving a greater percentage of the PA – those that commit to serving 100% will receive more points than those who commit to serving the minimum of 95%.²³

If the cost of serving certain locations exceeds a state’s extremely high-cost per household threshold, then the state can explore the use of non-fiber alternative technologies, including fixed wireless and satellite, to bring service to these locations.²⁴ This may be necessary in states with sizeable numbers of “off-grid” locations that are nevertheless included in the FCC’s fabric map and thus eligible for BEAD funding. States like Vermont are actively encouraging bidders from the outset to “consider how hybrid networks could assist in ensuring their proposals reach all unserved and underserved locations in the [PA].”²⁵

5. CONCLUSION

As NTIA reviews and recommends edits to state Initial Proposals, it should focus on doing everything possible to encourage states to streamline how they navigate the modification and deconfliction of applications and otherwise ensure that available BEAD funds go as far as they can go towards closing remaining digital divides. Engaging with applications that include a diverse array of PAs and untangling them from those with overlapping locations will be much easier if states adopt a clear and simple framework for navigating these issues, elements of which are discussed above. In other words, given the array of alternative tools and approaches discussed here, states should not hesitate to adopt smaller PAs. Regardless of the path that states elect to take, speed and efficiency should be prioritized, and states must be prepared to address locations that are severed or left out entirely from applications. Fortunately, maximizing the reach of BEAD funds can be straightforward if states follow the above-mentioned examples and principles.

NOTES

¹ ACLP Review of State BEAD Initial Proposals – Public Comment Drafts (on file). For links to each version of states' Initial Proposals, please visit <https://broadbandexpanded.com/resources/beadinitialproposal>.

² ACLP Review of State BEAD Initial Proposals – Public Comment Drafts (on file).

³ ACLP Review of State BEAD Initial Proposals – Public Comment Drafts (on file).

⁴ Navigating the BEAD Weeds: Project Areas, ACLP at New York Law School (Nov. 2023), https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1017&context=reports_resources (“BEAD Weeds: Project Areas”).

⁵ BEAD Initial Proposal Volume 2 (Submitted to NTIA), at p. 22, Oregon, https://broadbandexpanded.com/files/iija_plans/OR%20-%20BEAD%20Initial%20Proposal%20-%20Volume%202%20Submitted.pdf.

⁶ *Id.*

⁷ BEAD Initial Proposal Volume 2 (Submitted to NTIA), at p. 40, Georgia, https://broadbandexpanded.com/files/iija_plans/GA%20-%20BEAD%20Initial%20Proposal%20-%20Volume%202%20Submitted.pdf.

⁸ BEAD Initial Proposal Volume 2 (Initial Draft), at p. 20, Indiana, https://broadbandexpanded.com/files/iija_plans/IN%20-%20BEAD%20Initial%20Proposal%20-%20Volume%202%20Draft.pdf; BEAD Initial Proposal Volume 2 (Submitted to NTIA), at p. 40, Montana, https://broadbandexpanded.com/files/iija_plans/MT%20-%20BEAD%20Initial%20Proposal%20-%20Volume%202%20Submitted.pdf.

⁹ BEAD Initial Proposal Volume 2 (Initial Draft), at p. 40-41, Arkansas, https://broadbandexpanded.com/files/iija_plans/AR%20-%20BEAD%20Initial%20Proposal%20-%20Volume%202%20Draft.pdf.

¹⁰ *BEAD Weeds: Project Areas*.

¹¹ BEAD Initial Proposal Volume 2 (Submitted to NTIA), at p. 57, New York, https://broadbandexpanded.com/files/iija_plans/NY%20-%20BEAD%20Initial%20Proposal%20-%20Volume%202%20Submitted.pdf.

¹² For further discussion, see *BEAD Weeds: Project Areas*.

¹³ *BEAD Notice of Funding Opportunity*, at p. 38, NTIA (May 2022), <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf>.

¹⁴ *Id.*

¹⁵ BEAD Initial Proposal Volume 2 (Approved by NTIA), at p. 44, Louisiana, https://broadbandexpanded.com/files/iija_plans/LA%20-%20BEAD%20Initial%20Proposal%20-%20Volume%202%20Final.pdf (“LA V2 Final”).

¹⁶ BEAD Initial Proposal Volume 2 (Initial Draft), at p. 36-37, Arizona, https://broadbandexpanded.com/files/iija_plans/AZ%20-%20BEAD%20Initial%20Proposal%20-%20Volume%202%20Draft.pdf.

¹⁷ BEAD Initial Proposal Volume 2 (Submitted to NTIA), at p. 48, Montana, https://broadbandexpanded.com/files/iija_plans/MT%20-%20BEAD%20Initial%20Proposal%20-%20Volume%202%20Submitted.pdf.

¹⁸ *BEAD NOFO* at p. 38.

¹⁹ *LA V2 Final* at p. 45.

²⁰ BEAD Initial Proposal Volume 2 (Submitted to NTIA), at p. 96, Ohio, https://broadbandexpanded.com/files/iija_plans/OH%20-%20BEAD%20Initial%20Proposal%20-%20Volume%202%20Submitted.pdf.

²¹ BEAD Initial Proposal Volume 2 (Initial Draft), at p. 40, New Mexico, https://broadbandexpanded.com/files/iija_plans/NM%20-%20BEAD%20Initial%20Proposal%20-%20Volume%202%20Draft.pdf.

²² BEAD Initial Proposal Volume 2 (Initial Draft), at p. 38, Alabama, https://broadbandexpanded.com/files/iija_plans/AL%20-%20BEAD%20Initial%20Proposal%20-%20Volume%202%20Draft.pdf.

²³ BEAD Initial Proposal Volume 2 (Submitted to NTIA), at p. 12, Virginia, https://broadbandexpanded.com/files/iija_plans/VA%20-%20BEAD%20Initial%20Proposal%20-%20Volume%202%20Submitted.pdf.

²⁴ For further discussion, see Carol Matthey, *Ensuring Bids for ALL Eligible Locations in BEAD: The Challenge Ahead*, Dec. 11, 2023, Medium.com, <https://medium.com/@CarolMatthey/ensuring-bids-for-all-eligible-locations-in-bead-the-challenge-ahead-43b0f82b5753>.

²⁵ BEAD Initial Proposal Volume 2 (Submitted to NTIA), at p. 36, Vermont, https://broadbandexpanded.com/files/iija_plans/VT%20-%20BEAD%20Initial%20Proposal%20-%20Volume%202%20Submitted.pdf.