

**BEFORE THE NEW MEXICO DEPARTMENT OF INFORMATION TECHNOLOGY
AND THE CONNECT NEW MEXICO COUNCIL**

**IN THE MATTER OF ADOPTION OF)
GRANT PROGRAM RULES)
_____)**

DOCKET NO. 23-0001

HEARING OFFICER’S FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

THIS MATTER is a proceeding to adopt a proposed rule, and it comes before the New Mexico Department of Information Technology (“DoIT”) and the Connect New Mexico Council (“Council”) following a public hearing for comment pursuant to the Notice of Proposed Rule-Making (“NOPR”) filed in this docket and published as required by law.

The Hearing Officer, having reviewed the NOPR and the proposed rule, having conducted a public hearing, having reviewed the written comments submitted to the docket, and being otherwise fully informed in the premises, makes the following findings, conclusions, and recommendations:

FINDINGS:

1. DoIT and the Council have jurisdiction over the subject matter and the parties pursuant to the Department for Information Technology Act, NMSA 1978, Sections 9-27-1 et seq., and the Connect New Mexico Act, NMSA 1978, Sections 63-9K-1 et seq..
2. DoIT and the Council designated Bryan E. Brock as the Hearing Officer to preside over this matter.
3. DoIT and the Council issued a NOPR and published the NOPR in the New Mexico Register and in the *Albuquerque Journal* on December 27, 2022.

4. The NOPR gave notice of a public hearing, scheduled for January 30, 2023, to accept oral comments on a new rule, 1.12.21 NMAC, GRANT PROGRAM RULES.
5. The NOPR informed the parties and the public of the process by which the Hearing Officer would conduct the hearing and how parties and the public could make comments on the proposed new rule and have the comments considered.
6. The NOPR further advised that a copy of the full text of the proposed new rule was available on the DoIT website and the New Mexico Sunshine Portal.
7. The purpose of the proposed new rule is to establish standards and practices for the development, challenge, application, award and administration of grant programs funded with appropriations to DoIT, the Council and attached agencies, bodies, offices and boards.
8. Statutory authority for promulgation of the proposed new rule is found at NMSA 1978, Sections 9-27-6 (A) and (B), and Section 63-9K-4 (C).
9. DoIT and the Council, through their designated Hearing Officer, conducted the public hearing on January 30, 2023.
10. Mr. Todd Baran, General Counsel for DoIT, and Mr. Matt DeTura, Counsel for External and State Affairs for CTIA¹, made oral comments at the public hearing.
11. Mr. DeTura timely submitted written comments on the proposed new rule.
12. Mr. Baran timely submitted response comments.
13. All comments, oral and written, have been made part of the record.

¹ CTIA is a trade association headquartered in Washington, D.C. representing the wireless communications industry in the United States. It was originally known as the Cellular Telecommunications Industry Association, and later as the Cellular Telecommunications and Internet Association. The organization now operates as CTIA.

14. Mr. Baran’s oral comments provided context and history related to the rule-making. Mr. Baran described how the State Legislature created the Office of Broadband Access and Expansion and the Connect New Mexico Council, and how they are administratively attached to each other and to the Department of Information Technology. Mr. Baran also described the funding that the entities have received, and the legislative directive to conduct a rule-making proceeding to establish a grant program to disburse those funds and future funds. Mr. Baran then described the process whereby the entities worked together to prepare a draft rule, how the entities shared the draft rule with external stakeholders, and how the entities and the external stakeholders worked together to exchange comments and make revisions to the draft rule prior to its publication, which initiated the formal rule-making process. Finally, Mr. Baran outlined the provisions of the final proposed rule and stated that the resulting grant program development process is fair, consistent, transparent, well-informed and sufficiently flexible so that money will be deployed to do the best work for New Mexico.

15. Mr. Baran proposed no amendments to the proposed rule in his oral comments.

16. Mr. DeTura’s oral comments provided that CTIA participated as an external stakeholder in the process that Mr. Baran described, and that CTIA is encouraged by the work that DoIT and the Council have done to establish the rule. Mr. DeTura further commented that CTIA has continually advocated for funding to be distributed in a manner that is technologically and competitively neutral, and does not unnecessarily limit technological solutions used for broadband service. As an example, Mr. DeTura stated that 5G home broadband services could be a hugely valuable asset in bringing broadband to new communities, so long as there are reasonable minimum criteria to ensure that applicants can timely, promptly, and

efficiently deliver those broadband services. Mr. DeTura commented that CTIA is heartened that the proposed rule provides merit-based programs, does not use eligibility and program specifications that favor a particular applicant without good cause, and provides a waiver process for matching funds, all of which will create a level playing field for distribution of broadband grant money. Mr. DeTura closed by stating that DoIT has done a good job putting together a rule that will govern this important process efficiently and effectively.

17. Mr. DeTura proposed no amendments to the proposed rule in his oral comments.

18. Mr. DeTura's written comments reiterate and expand upon his oral comments made at the hearing, providing more support for and information related to 5G fixed wireless (wireless broadband) access, and more detailed information and support for the particular clauses in the proposed rule that he discussed in his oral comments.

19. Mr. DeTura proposed no amendments to the proposed rule in his written comments.

20. Mr. Baran's written response comments clarify that the proposed rule requires an agency grant program to align with the purpose specified in the funding source and that a particular funding source may or may not include wireless broadband as a connectivity solution. Mr. Baran's comments further state that if a funding source does not preclude awards funding wireless solutions, the proposed rule requires public notice of the proposed project parameters and a comment period within which CTIA and other groups will have an opportunity to advocate for funding wireless broadband projects. Mr. Baran's comments close by stating that, once the rule becomes effective, DoIT looks forward to receiving program design comments that provide technically and economically feasible solutions and ensure prudent expenditure of broadband funding.

21. Mr. Baran proposed no amendments to the proposed rule in his written comments.

22. The Hearing Officer identified the following typographical errors in the proposed rule and recommends the following changes: In 1.12.21.1, the first instance of “DoIT” should be replaced with the word “Department.” In 1.12.21.7, “63-9k-2” should be preceded by the word “Section” and the lowercase “k” should be replaced with an uppercase “K.” Also in 1.12.21.7, the phrase “Section 9- 27 NMSA 1978” should be replaced with the phrase “Section 9-27-3 NMSA 1978.” In 1.12.21.7(C), the uppercase “G” in the word “Grantee” should be replaced with a lowercase “g.” In 1.12.21.7(I), “63-9k-3” should be preceded by the word “Section” and the lowercase “k” should be replaced with an uppercase “K.” In 1.12.21.7(K), the second instance of “DoIT” should be replaced with the word “Department.” In 1.12.21.7(O), “63-9k-6” should be preceded by the word “Section” and the lowercase “k” should be replaced with an uppercase “K.” In 1.12.21.7(Y), a period should be inserted at the end of the sentence. In 1.12.21.7(AA), “13-1-1 et seq.” should be preceded by the word “Sections.” In 1.12.21.7(EF), the uppercase “C” and “S” in “Cabinet Secretary” should be replaced with a lowercase “c” and “s”, and the uppercase “S” in the next instance of the word “Secretary” should be replaced with a lowercase “s.” In the third sentence of 1.12.21.8(H)(3), the uppercase “S” in the word “Sponsoring” should be replaced with a lowercase “s.” In 1.12.21.8(I)(13), the uppercase “G” in the word “Grantee” should be replaced with a lowercase “g” and the uppercase “A” in the word “Award” should be replaced with a lowercase “a.” In 1.12.21.8(I)(14) and (15), the uppercase “A” in the word “Award” should be replaced with a lowercase “a.” In 1.12.21.9(A), the uppercase “P” in the word “Program” should be replaced with a lowercase “p.” In 1.12.21.9(B)(3), the uppercase “F” and “S” in the

words “Funding Source” should be replaced with a lowercase “f” and “s” and the uppercase “P” in the word “Program” should be replaced with a lowercase “p.” In 1.12.21.9(D)(9), the word “as” should be inserted between the words “such” and “a.” In the first sentence of 1.12.21.9(K)(5), the uppercase “A” in the word “Applicant” should be replaced with a lowercase “a.” In 1.12.21.10(B), the uppercase “A” in the word “Award” should be replaced with a lowercase “a.” In the second sentence of 1.12.21.13(G), the phrase “not a corporal entity” should be replaced with the phrase “a corporate entity.” In 1.12.21.13(H)(4), the phrase “sua sponte” should not be italicized. In the first sentence of 1.12.21.14(F), the uppercase “A” in the word “Award” should be replaced with a lowercase “a.”

23. The Hearing Officer takes administrative notice that the changes proposed meet the rule-drafting conventions of the Administrative Law Division. Additionally, the Hearing Officer finds that the changes proposed do not alter the subject matter of the proposed rule or the issues determined by the proposed rule, and are otherwise within the scope of the rule-making proceeding.

24. Consistent with NMSA 1978, Section 14-4-3(A), to the extent that the Administrative Law Division may require formatting of the final rules different from originally proposed or as amended by this Recommendation, the Hearing Officer recommends following those formatting requirements.

CONCLUSIONS:

A. DoIT and the Council have jurisdiction over the subject matter and the parties.

B. DoIT and the Council issued a NOPR and published the NOPR in the New Mexico Register and in the *Albuquerque Journal* on December 27, 2022 in compliance with NMSA 1978, Section 14-4-5.2.

C. The NOPR provided interested persons and the public appropriate notice of the hearing and the opportunity to offer oral and written comments.

D. The Hearing Officer has considered all oral and written comments.

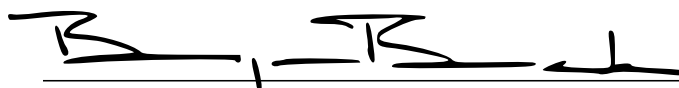
E. Adoption of the rule with the changes set forth above is reasonable, lawful and adequately supported by the record.

F. The rule should be adopted with the changes set forth above, effective April 1, 2023.

WHEREFORE, in light of the findings and conclusions above, the Hearing Officer **RECOMMENDS** that DoIT and the Council prepare and execute a Final Order that permanently adopts the proposed amendments to the rule attached hereto as Exhibit A.

The Hearing Officer also **RECOMMENDS** that DoIT and the Council enter a copy of the Hearing Officer's Findings, Conclusions, and Recommendations, with its attachments, as a part of the record of this proceeding and provide a copy to any persons who have so requested or who should receive a copy as otherwise required by law or policy.

ISSUED this 1st day of March, 2023.

A handwritten signature in black ink, appearing to read 'B. E. Brock', is written over a horizontal line.

Bryan E. Brock, Hearing Officer

EXHIBIT A

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 12 INFORMATION TECHNOLOGY
PART 21 GRANT PROGRAM RULES

1.12.21.1 ISSUING AGENCY: Department of Information Technology (“DoIT”)
[1.12.21.1 NMAC - N, 04/01/2023]

1.12.21.2 SCOPE: These rules apply to the development, award and administration of grant programs within the jurisdiction of DoIT, the Office of Broadband Access and Expansion (“OBAE”), the Connect New Mexico Council (“Council”), or to any public body administratively attached to DoIT, directly or indirectly. These rules also apply to a subject grant program, as applicable, and to any person who applies, or intends to apply, for a grant under a program that is subject to these rules. These rules do not apply to contracting.
[1.21.21.2 NMAC - N, 04/01/2023]

1.12.21.3 STATUTORY AUTHORITY: Paragraphs A and B of Section 9-27-6 NMSA 1978; Paragraph C of Section 63-9K-4 NMSA 1978;
[1.21.21.3 NMAC - N, 04/01/2023]

1.12.21.4 DURATION: Permanent.
[1.12.21.4 NMAC - N, 04/01/2023]

1.12.21.5 OBJECTIVE: These rules establish standards and practices for the development, challenge, application, award and administration of subject grant programs.
[1.12.21.5 NMAC - N, 04/01/2023]

1.12.21.6 EFFECTIVE DATE: April 1, 2023, unless a later date is cited at the end of a section.
[1.12.21.6 NMAC - N, 04/01/2023].

1.12.21.7 DEFINITIONS: These rules are subject to all applicable statutory definitions in Section 63-9K-2 NMSA 1978 and in Section 9-27-3 NMSA 1978, and to these supplemental definitions:

A. “Application” means the compilation of information and materials that comprise a formal request to receive an award.

B. “Assistance Grant Program” means a grant award process that does not require a merit process.

C. “Award” means the appropriation of funds to a grantee under the terms of an award agreement.

D. “Award Agreement” means the documentation that governs the terms and conditions of an award.

E. “Constructive notice” means that notice of an action or event was sent to a person, or published to an audience that included the person, as required by these rules, even if the person did not actually read the notice.

F. “Contract” means any type of agreement, regardless of what it may be called, where the principal purpose is to acquire services or materials, or a combination of these.

G. “Contracting” means the process of procurement and negotiation that results in a contract.

H. “Contractor” means a person who agrees to provide goods or services pursuant to the terms of a Contract.

I. “Council” means the Connect New Mexico Council established by Section 63-9K-3 NMSA 1978.

J. “Director” means the director of the Office of Broadband Access and Expansion.

K. “DoIT” means the New Mexico Department of Information Technology and, as applicable, its staff and contractors.

L. “DoIT’s law clerk” means any person identified as such by the Secretary, the designee of any such person, or the designee of the Secretary.

M. “Eligible Entities” means those entities specified in a NOFO as required or acceptable grantees.

N. “Eligible Project Area” means those geographic boundaries, or other criteria that delineate eligible project boundaries, specified in a NOFO or funding source as locations for the expenditure of program funds.

O. “Fund” means the Connect New Mexico Fund established by Section 63-9K-6 NMSA 1978.

P. “Funding Source” means the appropriation, grant, donation or other commitment to provide funding for a grant program and that specifies funding conditions.

- Q.** “**Grant**” means a commitment by a public body to provide funding to a grantee or subrecipient, pursuant to an award agreement, to accomplish a purpose authorized by law as described in the award agreement.
- R.** “**Grantee**” means any person who or entity that receives an award.
- S.** “**Last Mile Infrastructure**” means a network for which the predominant purpose is to provide broadband service to end-users (e.g., homes, businesses, community institutions).
- T.** “**Middle Mile Infrastructure**” means a network for which the predominant purpose involves connecting a last-mile network to a regional or national Internet backbone to enable transport of local traffic to the public internet; services may include interoffice transport, carrier-neutral internet exchange facilities, transport connectivity to data centers, lit service transport, leased dark fiber, and other similar services.
- U.** “**Matching Contributions**” means a monetary, non-monetary, or a combination of these that a grantee is required to contribute to a project to receive an award.
- V.** “**Merit Based Grant Program**” means a grant funding opportunity that requires a merit process.
- W.** “**Merit Process**” means collecting information through an application, assessing each application on the basis of evaluation factors, and determining whether the application merits funding according to the established criteria and based on available funds.
- X.** “**Notice of Funding Opportunity (NOFO)**” means an announcement of grant funding availability that provides information about the authorizing legislation, program purpose, program eligibility factors, allowable expenditures, match requirements, key performance requirements, evaluation criteria and compliance requirements.
- Y.** “**Office of Broadband Access and Expansion**” and “**OBAE**” mean the office as established by the “Broadband Access and Expansion Act” Section 63-9J NMSA 1978.
- Z.** “**Pass Through Entity (PTE)**” means the grantee of an award who uses the award funds to support a subsequent program. If a state agency is the grantee of an award that will be subsequently awarded to one or more subrecipients, that entity shall be a PTE with respect to that grant award.
- AA.** “**Procurement Code**” means the New Mexico Procurement Code, Sections 13-1-1 et seq. NMSA 1978
- BB.** “**Project**” means the deliverables promised by a grantee pursuant to the terms of an agreement.
- CC.** “**Program**” means the set of requirements and processes pursuant to which a specified amount of funding is allocated to accomplish specified objectives through one or more grant awards.
- DD.** “**Program Administrator**” means a person authorized by a sponsoring body to manage a program and make written determinations within authorized limits.
- EE.** “**Secretary**” means the confirmed or acting cabinet secretary for DoIT, or the secretary’s lawful designee.
- FF.** “**Sponsoring Body**” means the public body subject to these rules that develops and administers a program, either as original grantor or as a pass through entity.

[1.12.21.7 NMAC - N, 04/01/2023]

1.12.21.8 GENERAL RULES: These rules govern all subject grant programs:

- A. Program Administrator.** A sponsoring body shall designate at least one person to serve as the program administrator for each grant program. The sponsoring body for a program shall notify applicants and grantees (as applicable) of any change to the program administrator(s) within 30 days of the change.
- The program administrator for a subject program shall be retained and subject to discharge by the sponsoring body subject to the provisions of the State Personnel Act and procurement laws, and to the advice and consent of the sponsoring body, as applicable.
- The program administrator shall report to the sponsoring body for a subject grant program.
- B. Program purpose.** A sponsoring body shall design a grant program to accomplish a purpose authorized by the funding source and that conforms to all applicable laws. The purpose and scope of a program shall be determined by the sponsoring body. The program purpose shall be stated in the NOFO for a merit-based program, and in the authorization order for an assistance grant program.
- C. Appropriations.** These rules do not apply to any appropriation lawfully used by a sponsoring body:
- (1) to fund program administration;
 - (2) for a purpose specified in a funding source;
 - (3) budgeted for a purpose other than program funding; or
 - (4) for contracting.
- D. Notice.** Whenever these rules require notice, the required information shall be directed to the intended recipient(s) through e-mail, or through first-class mail if no e-mail address is on file. Notice shall be deemed delivered one day after transmission for e-mailed notice and three days after posting for mailed notice.

E. Publication. Whenever these rules require publication, the required information shall be disseminated through mass communication channels reasonably calculated to reach the intended recipients. Such channels shall include display on the public notice section of the DoIT website, and may also include, but are not limited to, website postings, text messaging, subscription list-serves, newspapers and social media outlets.

F. Service. Whenever these rules require “service”, that shall be accomplished either through e-mail or first-class mail to the intended recipient. E-mail service shall be effective upon the sender’s receipt of a return receipt, acknowledgment of receipt, or reply to the service e-mail. Mail service shall be effective three days after posting.

G. Time. In computing any period of time prescribed or allowed by these rules:

(1) the day from which period of time begins to run shall not be included. The last calendar day of the time period shall be included in the computation unless it is a Saturday, Sunday or a day on which a legal holiday is observed. In such a case, the period of time runs to the close of business on the next regular workday. If the period is less than 11 days, a Saturday, Sunday or legal holiday is excluded from the computation.

(2) the time allowed to respond or do some other act within a prescribed period after service of a notice, pleading or paper, and the service is by first class mail, three calendar days shall be added to the prescribed period.

H. Waiver and variance. For good cause, a program administrator may waive, vary or excuse compliance with, any time limit or ministerial requirement in these rules or of a NOFO. Upon a finding of good cause, a program administrator may waive substantive requirements of a NOFO, subject to veto of the sponsoring body within 30 days of receiving notice of the waiver.

(1) A waiver shall only be valid if documented in a writing physically or digitally signed by the program administrator.

(2) A person aggrieved by a program administrator’s determination to grant or not grant a waiver or excuse pursuant to this rule may, within seven days of receiving notice of the program administrator’s determination, appeal the determination to the sponsoring body by serving notice of appeal to the sponsoring body’s legal department or lawful designee.

(3) The sponsoring body shall have 10 days to affirm or reverse any waiver-related appeal. A reversal that results in granting a waiver request shall only be valid if documented in a legally authorized written order or resolution, as applicable, of the sponsoring body. If the sponsoring body does not reverse a program administrator’s determination within 10 days of receiving notice of the appeal, that determination is deemed affirmed.

I. Award agreement. Every award agreement shall, where applicable:

- (1) identify the grantor (sponsoring body) and the grantee;
- (2) identify the funding source and award amount;
- (3) specify the award deliverables, goals, standards and benchmarks with sufficient particularity to verify performance and to eliminate or minimize subjective assessments of performance;
- (5) identify the program administrator;
- (6) identify the administrative, financial, oversight and verification standards and processes applicable to the award;
- (7) specify tax reporting and payment obligations applicable to the award;
- (9) identify the grantee’s grant administrator or primary contact;
- (10) specify record keeping and reporting requirements;
- (11) specify the amount, form and timing of the grantee’s matching contribution, if any;
- (12) specify limitations on assignment or transfer of award rights, obligations or deliverables;
- (13) describe ownership rights to tangible or intangible property created by the grantee pursuant to the award, including any limitations on the right to voluntarily or involuntarily transfer any property created or purchased with award funds, and reversion rights and triggers, if any;
- (14) identify by citation or codified nomenclature any and all laws, regulations, and published guidance that govern award administration or establish program compliance obligations;
- (15) identify by citation or codified nomenclature the procurement laws, if any, that apply to contracting with award funds;
- (16) specify contracting documentation requirements and processes, including any approval or authorization requirements, and any non-standard contracting limitations;
- (18) consistent with the provisions of these rules, include terms governing default; remedies; termination criteria and processes; recoupment; cure processes and standards; choice of law; remedy limitations (if any); and rehabilitation rights and processes;
- (19) include pertinent disclaimers and notices concerning compliance obligations, including tax payments, prevailing wage laws and preferences;

- (20) identify key deadlines;
- (23) specify end user or customer service terms or conditions applicable to the award, including price or discount agreements, service level commitments, co-share or cooperation requirements;
- (24) incorporate the terms and conditions of the NOFO;
- (25) incorporate all statements and representations in the application as actionable representations and warranties;
- (26) include any other covenants or conditions required by the funding source or pertinent to the requirements of a particular program.
- (27) specify a process for the grantee to request modifications or accommodations responsive to unexpected or changed circumstances during project performance.

J. Disqualification and debarment. A sponsoring body shall not make an award, or consider an application for an award, made by any person who, within the preceding five years, violated any federal, state or local law or rule governing theft, fraud, misrepresentation, trade practices, undue influence, business ethics, lobbying or political contributions.

(1) Subject to New Mexico laws governing *res judicata*, a sponsoring body may treat a final judgment, order or similar legal instrument against a person as conclusive or prima facie evidence of a disqualifying violation.

(2) A sponsoring body may establish that a person has committed a disqualifying violation after conducting a duly noticed hearing with sufficient procedural safeguards to provide due process.

(3) Unless a disqualification or debarment pursuant to the challenges and disputes section of these rules challenge a disqualification or debarment pursuant to the challenges and disputes section of these rules.

K. Grant program coordination and collaboration. Where a funding source or controlling law requires or contemplates coordination between DoIT, OBAE and the Council, these entities shall collaborate on the development, award and administration of a program subject to a specific or generally applicable memorandum of understanding (MOU). A MOU may incorporate a responsibility matrix that may be customized for a particular program. These rules do not preclude subject entities from cooperating in the development or administration of a grant program in the absence of a specific legal or program directive to do so.

L. Award modification. A sponsoring body may increase an award for good cause and as necessary to accomplish the project objectives. A modified award shall be published in the same manner as publication of the initial award. As used here, good cause refers to an unexpected and unforeseeable change in economic circumstances beyond the control of the awardee that would prevent completion of the project if the award is not modified.

[1.12.21.8 NMAC - N, 04/01/2023]

1.12.21.9 MERIT BASED GRANT PROGRAMS: These additional rules apply to a Merit Based Grant Program.

A. Merit requirement. Unless the rules applicable to an assistance grant program apply, a grant program shall be merit based.

B. General Merit Standards. A merit based grant program shall be designed and conducted in a manner that encourages participation by applicants who are reasonably likely to accomplish the program purpose, who have the ability to satisfy award criteria, who have interests and capabilities aligned with the intended beneficiaries of the program and who have the interest and ability to sustain the program purpose;

(2) shall encourage contracting with state, local, minority, native american and woman owned enterprises;

(3) unless specified by a funding source, or good cause exists, shall not use eligibility or program specifications that favor a particular applicant. In this context, good cause means there is a compelling public interest that justifies favoring a particular applicant, but the program does not qualify to be established as an assistance grant program;

(4) shall, if lawful and reasonably practicable, be designed in a way that supports direct or indirect participation by local and small businesses;

(5) shall include a process that allows the sponsoring body to waive or defer a matching contribution upon a showing of good cause and where sufficient safeguards can be implemented to facilitate successful completion of the project.

(a) As used in this rule, safeguards may include, but are not limited to, financial guarantees by the grantee or third party, bond programs or bond program initiatives, enhanced contractor qualifications, or enhanced project oversight including increased reporting frequency.

(b) As used in this rule, good cause exists when an applicant submits a waiver request with an application articulating facts which show a legal or practical obstacle to appropriating or generating

sufficient funding for the matching requirement using all reasonably available funding mechanisms. Obstacles to funding may include, but are not limited to, challenging socio-economic conditions within the proposed service area or community, poor subscriber revenue projections, limited investment opportunity or return expectations, or infeasibility of generating matching funds through tax or bond initiatives. A demonstration of a current lack of available funding, without more, will not establish good cause.

(c) A waiver request shall be submitted with an application, using a form or format specified by the sponsoring body, and shall include both the justification for the request and any safeguards the applicant is willing to implement to facilitate project completion.

(6) may include incentives for an application that maximizes or leverages alternative and supplemental funding sources for a program. Any available incentive shall be identified in the program NOFO.

(7) shall be designed and administered in a manner that maximizes transparency without sacrificing confidentiality or competitive processes.

C. **Application period.** Unless the program administrator finds good cause to shorten the application period, that period shall be no less than 30 days.

(1) For purposes of this rule, good cause includes, but is not limited to, any exigent circumstances relating to funding conditions, business need, cost savings, business conditions (including material, equipment and labor supply issues), program objectives or needs.

(2) A NOFO shall identify the good cause that justifies any application period less than 60 days.

(3) If allowed by the NOFO, a program administrator may accept, evaluate and award applications submitted earlier than the filing deadline.

D. **NOFO.** A merit based program shall be conducted pursuant to a NOFO, which shall:

(1) identify, with reasonable particularity, the purpose, scope, eligible entities, and eligible projects;

(2) be drafted or reviewed by a subject matter expert experienced with the type of project(s) eligible for funding, and in NOFO drafting;

(3) specify, with reasonable particularity, application requirements, including deadline, supporting documentation, eligibility criteria and submission requirements;

(4) specify the total funding available under the program and the maximum funding available for a single award;

(5) be timely published in a manner that is reasonably calculated to provide notice to potential applicants. At a minimum, every NOFO shall be published through a NOFO list service operated by the sponsoring body, on a designated location on the webpage of the sponsoring body and through each publication method required by other law;

(6) accept and consider applications from non-public entities to the extent allowable by law and the funding source;

(7) identify the program administrator;

(8) identify factor(s), if any, other than an application score, that may have bearing on application evaluation and selection;

(9) provide a streamlined mechanism, such as a frequently asked questions forum, for requesting and providing supplemental or clarifying information that may impact the award determination;

(10) specify match requirements, including match percentage and contribution timing; and

(11) if a match waiver is allowed under a program, specific standards for approving, and the process for requesting, a waiver.

E. **Award agreement.** To the extent permitted by program exigencies, a sponsoring body shall publish a template award agreement with the NOFO.

F. **Application.** Every merit based program shall require the submission of an application for evaluation and scoring. An application shall:

(1) seek the necessary information to enable a comprehensive scoring and evaluation of an applicant's potential to most effectively achieve program objectives and meet policy and compliance requirements.

(2) avoid, to the extent practical, requests for information that is likely to be considered confidential under state or federal law, and provide a process consistent with these rules for an applicant to request confidential treatment of required application material or information;

(3) be published with the NOFO;

(4) only be accepted in a specified digital format, unless a program administrator finds good cause to allow a specific applicant to submit a paper application;

(5) not request information about an applicant's status as a minority or small business enterprise unless pertinent to a scoring or award criterion;

(6) request the identification and qualification of a fiscal agent if required;
(7) require specific and detailed descriptions of the proposed service area and project deliverables.

(8) limit application submission requirements and processes to only those reasonably necessary to ensure a full and fair evaluation and avoid requirements or processes that are likely to be unduly burdensome to a potential applicant unless strictly necessary to obtain evaluative information.

(9) specify how an applicant can request pre-submission clarification of application requirements or processes.

G. Application pre-screening. The program administrator shall pre-screen each application to determine if it provides all requested information and supporting materials.

(1) If an application submitted in good faith is incomplete, the program administrator shall notify the applicant of the deficiency and allow the applicant an opportunity to cure the deficiency unless allowing that opportunity would be contrary to a material program objective.

(2) A program administrator may reject any application that remains incomplete after expiration of the specified cure period;

(3) A program administrator shall accept and proceed with scoring and evaluation of every materially complete application.

H. Scoring and evaluation. Every merit based program application shall be evaluated pursuant to a published scoring and evaluation guide.

(1) The scoring guide shall identify key selection criteria; provide a methodical, structured approach to comprehensively assess an applicant's potential to satisfy program and award requirements; and shall ensure all applications receive a consistent standard of evaluation and scoring.

(2) Each application shall be scored by multiple reviewers, as specified in the NOFO.

(a) A program may use multiple panels of reviewers of functionally comparable size.

(b) If all applications are not evaluated and scored by a single review panel, the program administrator or designee(s) shall conduct a final review which shall evaluate all application scores, conduct any application due diligence and make final award recommendations or decisions.

(3) If specified in the NOFO, a sponsoring agency may consider non-scored criteria in the award selection process, including, but not limited to:

(a) Geographic diversity: distributing awards to qualifying service areas across a State.

(b) Organizational diversity: distributing awards to a variety of qualifying entities.

(c) Synergy with State strategic priorities: consideration of other programs across the State aimed to foster economic and social development, and how broadband can advance those objectives and plans.

I. Reviewer qualification, selection and compensation. Each reviewer shall either be a subject matter expert specific to the program or specifically trained to evaluate and score program applications.

(1) The program administrator shall select and appoint the reviewers and shall provide or arrange for any required reviewer training.

(2) Subject to the terms of the funding source, and to all applicable procurement and personnel laws and policies, the sponsoring body shall determine whether reviewers will be contracted, employed or volunteers.

(3) Prior to selection, every prospective reviewer shall be required to disclose any facts and circumstances likely to create an actual or perceived financial conflict of interest.

(a) The program administrator shall determine whether a reviewer has a disqualifying financial conflict.

(b) In determining whether a reviewer has a disqualifying conflict, the program administrator shall evaluate whether the reviewer, or any entity affiliated with the reviewer, has a direct or indirect financial interest that may be impacted favorably or adversely by the reviewer's evaluation, score or recommendation.

J. Public comment. Unless good cause exists to eliminate a public comment period, or to shorten the allowed time for submitting comments, the sponsoring body shall publish a draft NOFO, and allow the public to comment on that draft and the proposed service area, for at least 10 days.

(1) The publication shall specify how, and by when, public comments may be submitted, any material limitations on comments, and the period of time allowed for the sponsoring body to review comments after expiration of the submission period.

(2) The sponsoring body shall accept and consider every timely submitted public comment before officially publishing a program NOFO and may revise the program documents in response to any comment before that publication. The sponsoring body may, but is not required to, provide responses to comments or offer an additional public comment period to address revisions made in response to prior public comments.

(3) A person who fails to offer comment during a public comment period waives any objection to the form of the published NOFO, and to the proposed service area, but shall not be barred from challenging the legal sufficiency of any NOFO terms or provisions.

(4) Any person, other than an employee or agent of the sponsoring body, shall be allowed to submit public comments.

K. Confidential information. A program administrator shall provide a process for an applicant to request confidential treatment of information required for an application.

(1) Subject to any program exigencies beyond the control of the sponsoring body, the confidentiality request process shall be prominently specified in the application form or on any web-based application portal.

(2) A request to treat application information as confidential shall be submitted as specified by the program administrator and supported by a declaration that provides sufficient factual information and legal authority to support the confidentiality request. A declaration form is available on DoIT's website.

(3) The program administrator shall refer each confidentiality request for a legal review by the sponsoring body's legal counsel or that person's designee.

(4) If the program administrator notifies the applicant that information will not be held confidential, the applicant shall be allowed at least five days from the date of the notice to appeal that determination pursuant to these rules. The information shall be treated confidentially pending the resolution of the appeal and any ensuing judicial review. If a determination that information in an application is not confidential becomes final the applicant may withdraw the application, or proceed with the application process, in which case the application will be a public record.

(5) An applicant who requests and receives confidential treatment of information is solely responsible for opposing any public record request, discovery request or subpoena for the information in any administrative or judicial forum. As soon as practical after receiving a request for confidential information, a program administrator shall attempt to notify the owner of the information of the request. However, neither the program administrator nor the sponsoring body shall be responsible for ensuring the applicant has sufficient time, means or opportunity to oppose the request, nor shall either be liable for any consequences resulting from the applicant's inability or failure to timely challenge the request, or for the administrative or judicial denial of any objection to disclosure.

[1.12.21.9 NMAC - N, 04/01/2023]

1.12.21.10 ASSISTANCE GRANTS: These additional rules apply to assistance grant programs.

A. Authorization. An assistance grant is authorized if the:

- (1) total available program funding does not exceed \$2,500,000,
- (2) funding source specifies the grantee or subrecipient;
- (3) funding source requires program funds to be fully expended in fewer than 18 months;
- (4) sponsoring body determines that the grantee or subrecipient is the only person who can satisfy program requirements specified by a funding source in a timely, correct and cost-effective manner;
- (5) delay inherent in the merit-based program would likely create or exacerbate a threat to life, health, physical security, economic security, cyber security or educational development of state residents or to the State, or would likely delay meaningful mitigation of such an existing threat; or
- (6) grantee or subrecipient is a governmental unit or tribal government and the funding source does not expressly require a competitive or merit based process.

B. Justification Order. An assistance grant shall be authorized by an order or resolution of the sponsoring body, supported by findings and conclusions justifying an assistance grant, and published at least 21 days before the award.

C. Grant proposal. An assistance grant shall be based on a grant proposal presented by the grantee or subrecipient that, at a minimum, includes:

- (1) a detailed description of the proposed project, how the project would accomplish a purpose specified in, and satisfy conditions of, the funding source, the project timeline and the source and availability of other funds required to complete the project;
- (2) the identity, financial and performance qualifications of each grantee, vendor or contractor who will be directly or indirectly receive award funds, including qualifications of the project manager and all key grantee, vendor and contractor personnel;

funds;

- (3) the form and substance of each contract the grantee proposes to procure with the award
- (4) the identify and qualifications of the grantee's fiscal agent, if required;
- (5) sufficient information to establish that the proposal meets an exception to the merit-based program; and
- (6) any other information requested by the sponsoring body.

D. Match requirement. Unless a funding source prohibits requiring a match, or specifies a match requirement, a sponsoring body may specify match, and match waiver, requirements. Match and match waiver requirements shall be specified in the justification order and included in the award agreement.

E. Contracting. To the largest extent possible, the sponsoring body will encourage the funding program participation by New Mexico-based organizations, organizations located (and hiring from) within the proposed project footprint, woman and minority owned organizations, veteran owned businesses and tribally-owned/ based organizations and businesses.

[1.12.21.10 NMAC - N, 04/01/2023]

1.12.21.13 CHALLENGES AND DISPUTES: These rules apply when a person seeks to challenge any action or inaction authorized, taken, required or governed by these rules, by a funding source or by any state or federal law that governs a program and is not, by law or agreement, within the exclusive subject matter jurisdiction of another dispute resolution process or forum.

A. Roles. Any challenge brought pursuant to these rules shall be determined by the secretary or the secretary's designee. If a person challenges an action taken directly by the secretary, or an action allegedly owed directly by the secretary, the secretary shall be recused and the OBAE director shall determine the matter.

(1) The secretary or director may appoint a hearing officer or special master to take evidence, conduct proceedings, including hearings, and make recommended findings, conclusions and decisions.

(2) An appointed hearing officer or special master may be a council member, employee of DoIT, or contractor.

B. Parties. The only parties to a challenge brought pursuant to these rules shall be the person who submits the challenge, who shall be referred to as a "petitioner", and the sponsoring body whose action or inaction is the subject of the challenge. These rules do not establish a forum or provide a process for resolving disputes between private parties.

C. Initiation. A challenge shall be initiated by submitting a complete challenge form to the DoIT law clerk, or that person's designee. The challenge form, including the law clerk's contact e-mail, is available on DoIT's website. A person who does not have access to e-mail may contact DoIT's law clerk by phone to arrange for an alternative filing method. A person who submits a challenge shall be referred to as the "Petitioner".

D. Time. Unless a sponsoring body specifies a different time limit, a person shall have no more than 21 days from when that person received actual or constructive notice of the act, or failure to act, that is the subject of a challenge to submit the challenge form. For good cause, upon request or sua sponte, and when doing so would not interfere with program objectives or funding source directions, a sponsoring body may extend this time limit.

E. Standing. Only a person who is aggrieved by the action or inaction that is the subject of a challenge has standing to make the challenge. For purposes of this requirement, a person is aggrieved if the action or inaction could directly and immediately have an adverse impact on a property interest of the person.

F. Real party in interest. A challenge shall only be made by a real party in interest, and the petitioner's interest must be apparent from the information in the challenge form.

G. Representation. An individual petitioner may, but is not required to, be represented by legal counsel in connection with a challenge. A petitioner who is a corporate entity shall be represented by legal counsel of its choosing, and at its expense, in connection with a challenge.

H. Procedures. Within ten days of receiving a challenge, the secretary shall issue a process order to govern the ensuing proceedings through decision. The time limits, processes and rules of evidence that govern a challenge shall be specified by the secretary through a general order, through the process order or through a combination of such orders.

(1) The procedures and rules of evidence that apply to a particular challenge shall satisfy the minimum procedural due process requirements pertaining to the right or interest that is at issue.

(2) Time limits and deadlines shall be commensurate with the exigencies of a particular challenge.

(3) A general order or process order may adopt by reference any established rule of procedure or evidence followed by any other New Mexico agency, state court or New Mexico federal court.

(4) For good cause, on motion or sua sponte, a hearing officer may waive, amend or supplement any provision in the applicable process order, but not of a general order.

(5) Every general order shall become effective when posted on DoIT's website.

(6) A process order shall provide a link to any general order applicable to a proceeding.

I. Decision. The secretary or director, as applicable, shall issue a final decision and order within the time specified in the process order.

(1) A decision and order shall include findings of fact, statements of law and conclusions sufficient to support judicial review.

(2) Findings of fact shall be supported by evidence of record, or administratively noticed. Unless due process requirements mandate otherwise, a finding of fact may be based on hearsay evidence that is admissible under the rules of evidence that apply in New Mexico state courts, or that is otherwise deemed reliable.

(3) The secretary or director, as applicable, shall not reject a finding of fact proposed by a hearing officer without reviewing all evidence in the record of the proceedings.

(4) A decision and order shall be deemed final upon service of the parties to the proceeding.

(5) If the secretary or director, as applicable, fails to timely render a decision and order, the challenge shall be deemed rejected as of the date the decision and order was due.

J. Service. Service, when required, shall be accomplished by e-mail, if the required recipient has provided DoIT with an e-mail address, or otherwise by regular, first class, mail.

(1) DoIT's law clerk shall be responsible for completing service when service is required by DoIT, the secretary, the director, a hearing officer or a special master.

(2) The process order shall be served on the petitioner and any other party to the proceeding.

(3) A party to a proceeding shall contemporaneously serve each other party to a proceeding a copy of any correspondence, pleading or evidence submitted to DoIT, the secretary, the director, the hearing officer or the special master in connection with a proceeding governed by a process order.

(4) A party to a proceeding is not required to prepare or file certificates of service. Every party to a proceeding shall maintain a contemporaneous service log using the form available on DoIT's website. Within five days of the issuance of a final decision and order, each party shall file with DoIT's law clerk a copy of that party's service log and provide a copy of same to every other party. The service log(s) shall be considered part of the record of the proceeding.

K. Records. DoIT's law clerk is the custodian of all filings and records pertaining to a proceeding.

(1) All filings shall be submitted to DoIT's law clerk.

(2) DoIT's law clerk shall be copied on any correspondence pertaining to a proceeding submitted to the secretary, the director, a hearing officer or a special master.

(3) Failure to copy or serve DoIT's law clerk when required shall result in the exclusion of the omitted material from consideration and from the record of the proceedings.

L. Intervention. Any person who has a property interest that may be adversely impacted by the decision on a challenge may apply for leave to intervene in the challenge proceeding. An application to intervene shall be made within 10 days from when the applicant received actual or constructive notice of a challenge.

M. Confidentiality. Information or data submitted to a sponsoring body pursuant to an approved confidentiality request shall not be disclosed to, or used by, any party to a challenge proceeding unless the owner of the confidential information waives confidentiality.

[1.12.21.13 NMAC - N, 04/01/2023]

1.12.21.14 DEFAULT, CURE AND AWARD TERMINATION: A sponsoring body may unilaterally terminate an award only as authorized by, and subject to the requirements of, these rules.

A. Uncured material default. A sponsoring body may terminate an award based on a grantee's uncured failure to comply with or satisfy a material term of an award, including, but not limited to, failure to meet a financial, reporting, budget, performance, service level, pricing or deadline requirement.

B. Notice of default. Before terminating an award, a program administrator shall provide a grantee notice of the default and an opportunity to cure.

(1) Unless exigent circumstances justify a shorter period, a grantee shall be allowed at least 30 days to cure the noticed default.

(2) If a default presents a risk to health, life, or financial welfare of any person or to the state unless cured in fewer than 30 days, and the circumstances creating that exigency were not within the control of the program administrator or sponsoring body, the period allowed to cure a default may be less than 30 days as necessary to mitigate or eliminate the risk.

C. Additional provisions. As required by a funding source, or as necessary to meet funding deadlines or program objectives, an award may include additional termination provisions not in conflict with these rules. These rules do not apply to, or preclude mutual termination of an award.

D. Validity. A termination shall not be effective unless approved by the sponsoring body in an order or resolution, as applicable, supported by findings and conclusions.

E. Effect. Upon termination of an award, ownership and title to all tangible and intangible property purchased or created by the grantee with award funds shall be transferred as directed by the sponsoring body in the termination order or resolution. The grantee shall return all unexpended award funds to the program administrator and all unexpended and unpaid award funds shall revert to the award funding source.

F. Survival. These termination provisions shall survive award close out and apply for so long as the grantee is obligated to comply with any material provision of an award, including for the duration of any warranty, service or price level agreement. A grantee's failure to cure a material default after award closure shall have the same effect as an uncured default prior to award closure.

G. Termination alternatives. These rules do not preclude a sponsoring body from imposing a sanction other than termination, from mandating corrective action, from excusing a default or from modifying an award when termination is not in the best interests of the program.

(1) A sponsoring body shall only excuse a default or modify an award for good cause.

(2) Good cause exists when circumstances beyond the contemplation and control of the grantee and sponsoring body impede or prevent grantee from curing a material default, and the proposed forbearance or modification is consistent with program qualifications, deadlines and objectives, legal mandates and funding commitments.

[1.12.21.14 NMAC - N, 04/01/2023]