



# OHIO LEGISLATIVE SERVICE COMMISSION

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## Bill Analysis

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### **Sub. H.B. 281**

132nd General Assembly  
(As Reported by H. Finance)

**Reps.** Carfagna, Brenner, Hill, LaTourette, Lipps, Seitz, R. Smith, Thompson, Lepore-Hagan, Cera, Green, Rogers, Scherer

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## **BILL SUMMARY**

### **Residential Broadband Expansion Program**

- Requires the Development Services Agency (DSA) to establish the Residential Broadband Expansion (RBE) Program to provide grants to municipal corporations and townships (project sponsors) to help fund projects that provide broadband to any residential area within their boundaries that is without broadband (eligible area).
- Excludes as an eligible area, and thus from the RBE Program, any area that has received, or is designated to receive, any other state or federally funded grants that are designed to encourage broadband deployment.
- Defines terms applicable to an RBE Program project as follows:
  - "Broadband funding gap" – the difference between the amount a broadband provider calculates is necessary to construct the last mile of a specific broadband network and the maximum amount determined to be cost effective for provider investment in that last mile construction.
  - "Last mile" – the last portion of a physical broadband network that connects an eligible area to the broader network used to provide broadband service, including other network infrastructure needed to provide broadband service to end users in the eligible area.
  - "Broadband service" – high-speed Internet access service capable of providing a minimum download speed of 10 megabits per second and a minimum upload speed of 1 megabit per second.

- "Broadband provider" – a video service provider (VSP) or a provider capable of providing broadband service that is a telecommunications service provider, satellite broadcasting service provider, or a wireless service provider but not a governmental or quasi-governmental entity.

### **Broadband funding gap**

- Specifies that the broadband funding gap for each project must be funded in order for a project to proceed.
- Requires one-third of the broadband funding gap to be funded with RBE Program grants awarded by DSA and the remaining two-thirds to be funded with funds from a project sponsor and possibly the county in which the project is located in a proportion agreed to by the project sponsor and county.
- Permits a project sponsor and county to pay its share of the broadband funding gap through general revenue funds or other discretionary funds of, or property tax assessments made by, the municipal corporation, township, or county; contributions; or other grants not from any other state or federal broadband expansion fund.

### **Project sponsor process**

- Requires a project sponsor to:
  - Identify an eligible area within the boundaries of a municipal corporation or township;
  - Develop competitively neutral technical requirements for the project, including that the project be capable of providing broadband service within two years after DSA approval;
  - Determine the availability of sufficient project funds from the project sponsor and county;
  - Issue a request for proposals (RFP) and conduct a competitive sealed proposal process to select a broadband provider.

### **Competitive selection process**

- Requires a project sponsor to include the project requirements in an RFP it issues and to provide notice of the RFP according to municipal and township procedures.

- Specifies that each competitively sealed proposal must be sent to the project sponsor, opened publicly in the presence of a representative of the county auditor, and, to be valid, certified by the representative.
- Requires broadband providers responding to an RFP to include certain information in their proposals such as whether the provider will use wired, wireless, or satellite technology for the project; project download and upload speeds; customer service policies; and the broadband funding gap acceptable to the provider.
- Permits a project sponsor to require proposals to include a performance bond, letter of credit, or other financial assurance to assure construction of the project's broadband infrastructure.
- Permits, during the RFP process, discussions with eligible broadband providers to ensure full understanding of, and responsiveness to, project requirements and includes provisions to ensure fair and equal treatment of providers and prohibit disclosure of proposal information to competing providers.
- Specifies when proposals, and related documents submitted with them, may or may not be made available for public inspection and copying.

### **Project agreement requirements**

- Permits a project sponsor to enter into an agreement with the selected broadband provider that specifies the following:
  - That the provider must construct and install last mile broadband infrastructure to the specified eligible area;
  - That, if any portion of the project sponsor's share of project funding will be from VSP fees, the agreement must include a description of the payment arrangement;
  - That the project sponsor may negotiate and agree to alternate payment plans with the provider;
  - That, unless alternate payment plans are otherwise negotiated, the project sponsor's legislative authority assumes all financial responsibility for project costs incurred by the provider prior to completion of the project or the award of any RBE grant funds.
- Specifies that the agreement is subject to the approval of the project sponsor's legislative authority and contingent upon the distribution of approved broadband funding gap funds.

- Prohibits an agreement from regulating the rates, terms, and conditions of broadband service, requiring a pricing commitment, or requiring open access to the network.
- After terms of an agreement are established, requires a project sponsor to develop a project plan that includes a description of the eligible area, the amount of the broadband funding gap, and copies of the agreement with the broadband provider, the RBE DSA application, and the written proposal requesting county funds.

### **Review by legislative authority**

- Requires the project sponsor's legislative authority to review the project agreement and plan, approve or reject them within 90 days, and if approving them, adopt an ordinance or resolution authorizing the project sponsor to enter into the agreement and to submit an application to DSA and a fund request to the appropriate county.

### **Request for county funds**

- Upon approval of the legislative authority, requires the project sponsor to submit a request for county funds that is equal to the county's share of the project's broadband funding gap amount to the board of county commissioners of the county in which the project is located.
- Requires the board of county commissioners to approve or reject the request for funds within 90 days of receiving the request and, if approving the request, to do so by adopting a resolution or a memorandum of understanding that authorizes the distribution of the funds to the project sponsor.

### **Challenges**

- Allows a broadband provider to challenge the RFP for an RBE project in writing within five days of the RFP notice and requires the challenge to demonstrate that the RFP will not provide broadband service or serve an eligible area.
- Specifies that the project sponsor's legislative authority may (1) withdraw the RFP and issue a new RFP or (2) accept the current RFP and proceed with the process to select a broadband provider for the project.
- Allows a broadband provider to challenge the selection of a provider for a project in writing before the end of the legislative authority's 90-day project approval period and requires the challenge to demonstrate that it will not provide the broadband service described in the proposal or serve an eligible area.

- Specifies that the project sponsor's legislative authority may (1) reject the challenge, (2) reject the proposal and issue a new RFP or allow the broadband providers to amend their proposals and resubmit them, or (3) select a different provider with a competing proposal to the one challenged.

### **DSA application process**

- Requires the Director of Development Services to accept applications from project sponsors each fiscal year, review each application within 60 days, and fund applications on a first-come, first-served basis until all program funds for the fiscal year are awarded.
- Permits a project sponsor to complete and refile its application upon receiving notice from the Director that it is incomplete.
- Permits a project sponsor to refile an application left pending (and therefore considered denied) at the end of the fiscal year provided that the application is still current or has been updated.

### **DSA grant funds**

- Caps the cumulative total of all grants awarded for a biennium at \$2 million.
- Requires the Director of the Office of Budget and Management and the Director of Development Services to identify \$2 million within the DSA budget and transfer it to the Ohio Broadband Development Grant Fund created under the bill and makes an appropriation in that amount for FY 2019.

### **Broadband infrastructure ownership**

- Specifies that a broadband provider selected to provide last mile service under an RBE Program is the sole owner of the infrastructure installed under the Program and is solely responsible for ongoing maintenance and upgrades to the infrastructure.

### **Rules and annual report**

- Requires the Director of Development Services to adopt rules for the RBE Program, including rules for an application form and application procedures.
- Permits the Director to adopt rules (1) regarding what a program application must include and (2) for determining under what circumstances a project may be partially funded or funded on a basis other than first come, first served.



- Requires DSA to include certain RBE Program information in its annual report required under current law of all state departments.

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## CONTENT AND OPERATION

### Broadband expansion overview

The bill provides a process through which "project sponsors," defined as municipal corporations and townships applying for funding under the bill, may obtain grants for projects to expand broadband service to a residential area within their borders that is without access to broadband service ("eligible area"). However, the bill's funding cannot be used to expand broadband service in any area that has received, or is designated to receive, funds from any other state or federally funded broadband



deployment grant program.<sup>1</sup> Under the bill, responsibility for funding a project is shared between broadband providers and project sponsors. A "broadband provider" is one of the following:

- A video service provider (VSP) authorized to provide video programming over wires or cables located at least in part in public rights-of-way, including Internet protocol or any other technology, under Ohio's Video Service Authorization (VSA) law;
- A provider that is capable of providing broadband service and is a telecommunications service provider, satellite broadcasting service provider, or a wireless service provider but is not a governmental or quasi-governmental entity.<sup>2</sup>

The project sponsor must select a broadband provider through a competitive sealed proposal process and, with the selected provider, determine the cost of the project and how much of that amount the provider is willing to invest. The cost difference between the provider's proposed investment and the total cost to complete the project is what the bill seeks to help fund.<sup>3</sup>

Under current law, "telecommunications service" is the offering of telecommunications (which is the transmission of information of the user's choosing without change in the form or content of the information as sent and received) for a fee directly to the public regardless of the facilities used. "Satellite broadcasting service" is the distribution or broadcasting of programming or services by satellite directly to the subscriber's receiving equipment without the use of ground equipment, except the subscriber's receiving equipment or equipment used in the uplink process to the satellite.<sup>4</sup> A "wireless service provider" is a facilities-based provider of wireless service to one or more end users in Ohio. "Wireless service" is a federally licensed commercial mobile service as defined in federal law and commercial mobile radio service limited to mobile telephone, mobile cellular telephone, paging, personal communications services, and specialized mobile radio service provided by a common carrier in Ohio, excluding fixed wireless service.<sup>5</sup>

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<sup>1</sup> R.C. 122.09(D) and (F).

<sup>2</sup> R.C. 122.09(B); R.C. 1332.21, not in the bill.

<sup>3</sup> R.C. 122.09(A) and 122.096(A).

<sup>4</sup> R.C. 122.09(B)(1)(b)(i) and (ii), (G) and (H); R.C. 5739.01 and 47 United States Code 153, not in the bill.

<sup>5</sup> R.C. 122.09(B)(1)(b)(iii); R.C. 4927.01, not in the bill.



## Residential Broadband Expansion Program

The bill requires the Development Services Agency (DSA) to establish a Residential Broadband Expansion (RBE) Program and award grants to assist with the expansion of broadband service to residential areas within municipal corporations or townships where broadband service is not available.<sup>6</sup> Municipal corporations and townships, as projects sponsors, may expand broadband service to eligible areas of their jurisdictions by applying for, and participating in, the RBE Program. The grants are to fund projects to construct and install broadband service at the speed standards set by the bill.<sup>7</sup>

Under the bill, "broadband service" is high-speed Internet access service capable of providing a minimum download speed of 10 megabits per second and a minimum upload speed of 1 megabit per second.<sup>8</sup>

### Broadband funding gap

DSA grant money distributed through the RBE Program is to be used toward meeting the project's "broadband funding gap," which the bill defines as the difference between the total amount of money a broadband provider calculates is necessary to construct the last mile of a specific broadband network and the total amount of money that the provider has determined is the maximum amount of money that is cost effective for the provider to invest in last mile construction for that network. "Last mile" refers to the last portion of a physical broadband network that connects an eligible area to the broader network used to provide broadband service, including other network infrastructure needed within the eligible area to provide broadband service to end users in the eligible area.<sup>9</sup>

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<sup>6</sup> R.C. 122.091.

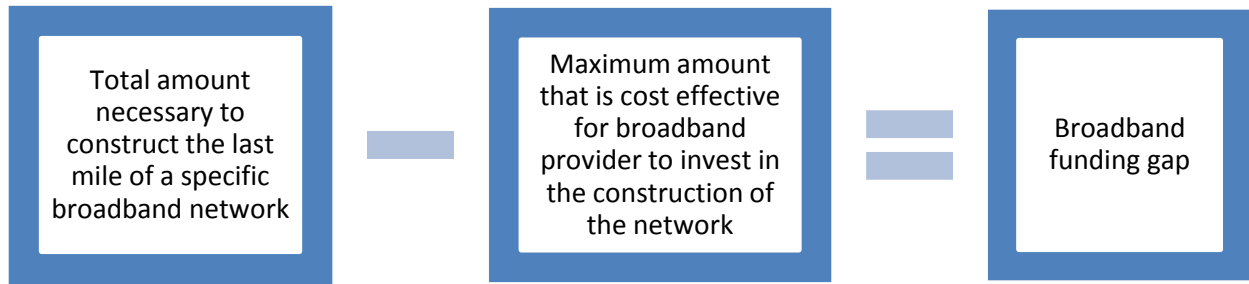
<sup>7</sup> R.C. 122.092 and 122.097(A)(3).

<sup>8</sup> R.C. 122.09(C).

<sup>9</sup> R.C. 122.09(A) and (E).

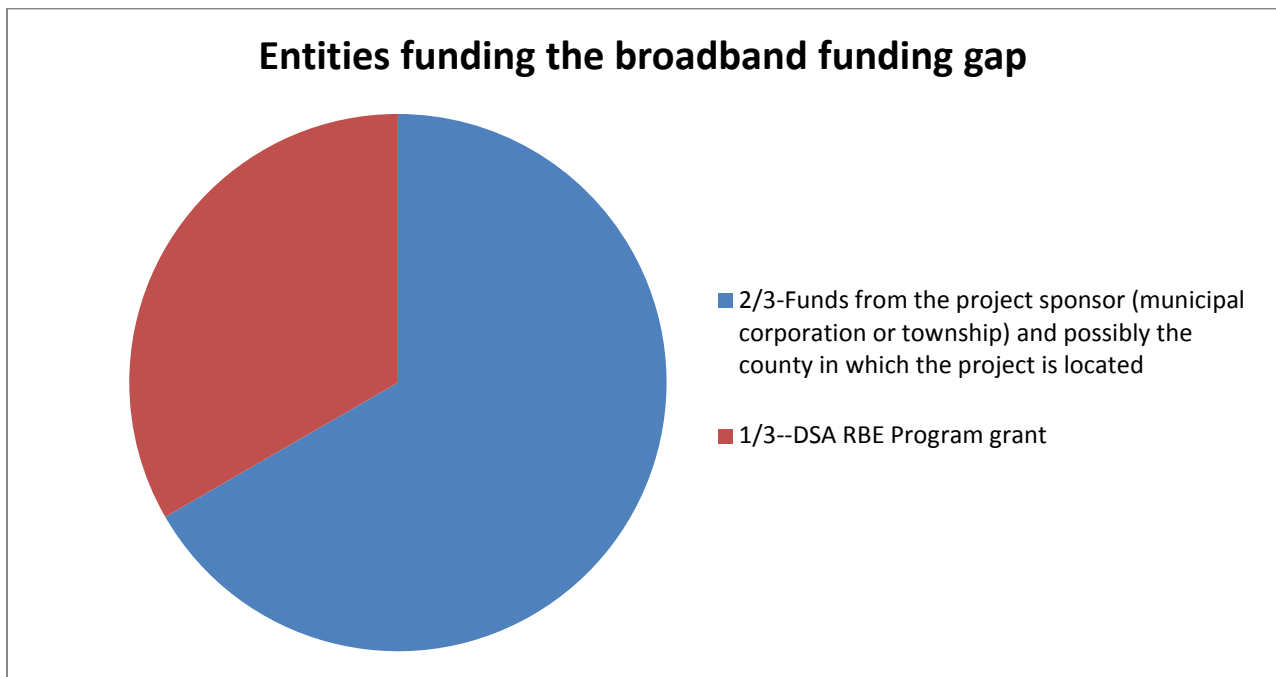






**Funding of broadband funding gap**

No residential broadband expansion project may proceed unless funding equal to the amount of the broadband funding gap has been approved. The bill requires the broadband funding gap to be funded as shown in the pie chart below:



One-third of the project's broadband funding gap must come from DSA RBE grants. The remaining two-thirds share of the broadband funding gap that is not paid by DSA grant must be funded by the project sponsor and possibly the county in which the project is located.

The bill requires the project sponsor and county share to be in proportions proposed by the project sponsor and agreed to by the legislative authority of the project sponsor and the board of county commissioners.<sup>10</sup> However, if a project sponsor funds

<sup>10</sup> R.C. 122.096(A)(2)(a).

the remaining two-thirds share of the project's broadband funding gap in its entirety, the board of county commissioners is not required to agree to the project funding or adopt the resolution or memorandum of understanding required to approve county funding for the project (discussed below under "**Request for county funds**").<sup>11</sup>

Under the bill, a project sponsor and county may fund their share of the broadband funding gap from the following sources in any combination:

- General revenue funds and other discretionary funds of the municipal corporation, township, or county;
- Contributions from individuals, organizations, or companies;
- Property tax assessments;
- Other grant funds.

The amount the project sponsor's legislative authority and the board of county commissioners agree to pay for the two-thirds portion of the broadband funding gap cannot be funded out of funds from any broadband expansion grant from the Connect America Fund or any other state or federal broadband expansion funds.<sup>12</sup> The Connect America Fund is a Federal Communications Commission program to expand access to voice and broadband services where they are not available. The program provides funding to local telephone companies to subsidize the cost of providing the broadband services.<sup>13</sup>

#### **Funding from special assessments**

The bill permits municipal corporations, townships, and counties to levy special assessments if a broadband expansion project agreement is signed and approved under the bill. Under the bill, a special assessment may be levied upon residential property within the municipal corporation, township, or county to provide the project sponsor or county share of funding for the project. Assessments may only be levied on the property that is within the eligible area and is the subject of a project.<sup>14</sup>

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<sup>11</sup> R.C. 122.096(A)(2)(b) and 122.0916.

<sup>12</sup> R.C. 122.096(B)(2).

<sup>13</sup> "Connect America Fund Phase II FAQs," Federal Communications Commission, available at: <https://www.fcc.gov/consumers/guides/connect-america-fund-phase-ii-faqs> (last visited on January 23, 2018).

<sup>14</sup> R.C. 122.096(B)(1)(d), 303.251, 505.881, and 727.01.



Before adopting the resolution for such an assessment, the township or county must send written notice of the assessment to the affected property owner stating the estimated assessment. The bill provides a procedure for a property owner to file a written objection with the board of township trustees or the board of county commissioners as appropriate within two weeks after the assessment notice was mailed. The board must review the written objection and may revise the estimated assessment before adopting the resolution authorizing it. The property owner may go to court to appeal the final assessment for the property levied in the resolution.<sup>15</sup>

County and township assessments must be at a rate that will produce a total assessment that is not more than the county's or project sponsor's share of the project funding. The board must certify the amounts to be levied upon each affected property to the county auditor, who shall enter the amounts on the tax duplicate for collection by the county treasurer in the same manner as the collection of taxes on real property. The assessments, when collected from property owners, must be paid into a special fund in the county treasury created for funding a residential broadband expansion project located in the township or county. The money from the fund may only be used for the purposes for which the assessments were levied.<sup>16</sup>

Assessments to property in a municipal corporation that are permitted under the bill are likely subject to current law provisions such as those that provide for notices of estimated assessments to be sent to affected property owners, procedures for a property owner to object to an assessment, and for hearings regarding the objection.<sup>17</sup>

The bill permits the taxing authority of the municipal corporation, township, or county to issue securities in anticipation of its levy or collection of special assessments to pay the costs of residential broadband expansion projects under the bill.<sup>18</sup>

### **Funding from VSP fees**

The bill specifies that if the broadband provider selected for a residential broadband expansion project is a VSP that collects and remits VSP fees to the project sponsor's legislative authority, the project sponsor may enter into an arrangement with the VSP to designate the VSP fees for payment of some or all of the project sponsor share of the broadband funding gap. The arrangement must be made with the mutual

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<sup>15</sup> R.C. 303.251(A) and 505.881(A).

<sup>16</sup> R.C. 303.251(B) and (C) and 505.881(C) and (D).

<sup>17</sup> R.C. 727.13, 727.15, 727.16, 727.17, 727.30, and 727.301, not in the bill.

<sup>18</sup> R.C. 133.13.



consent of the project sponsor and VSP and with the consent of the project sponsor's legislative authority.<sup>19</sup> (See "**Project agreement requirements**" below.)

The VSA law permits the quarterly collection of fees from VSPs for payment to each municipal corporation or township in which the VSP offers video service. VSPs may collect the fee from subscribers that have a service address within the municipal corporation or township.<sup>20</sup>

### **Project sponsor process**

The bill requires a project sponsor to complete a multi-step process before submitting an application for DSA RBE Program grant funds. First, the project sponsor must:

- Identify the eligible area of the project for which the project sponsor will apply for matching funds;
- Develop competitively neutral technical requirements for the project, including the requirement that the project be capable of providing broadband service within two years from the date that DSA approves the project application;
- Conduct a competitive sealed proposal process to select a broadband provider capable of providing broadband service to the eligible area and willing to enter into an agreement with the project sponsor to construct and install the necessary broadband infrastructure for the project;
- Determine whether the project sponsor has available sufficient project funds to fund the project sponsor share of the broadband funding gap for the project;
- Determine the availability of county funds for the project.<sup>21</sup>

### **Competitive selection process**

The bill permits a project sponsor to award funding for a residential broadband expansion project to an eligible broadband provider following a competitive sealed bid

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<sup>19</sup> R.C. 122.096(C).

<sup>20</sup> R.C. 1332.32, not in the bill.

<sup>21</sup> R.C. 122.097.



proposal process under which a project sponsor makes a request for proposals (RFP). (See **COMMENT 1**.)

A sealed copy of each competitive sealed proposal must be filed with the project sponsor prior to the time specified in the RFP notice for opening proposals. All proposals must be opened publicly in the project sponsor's office at the time specified in the notice and in the presence of a representative of the county auditor. The auditor's representative must certify the opening of each proposal, and the proposal must be certified to be considered valid.<sup>22</sup>

### **RFP requirements**

The RFP must specify the project requirements set by the project sponsor under the bill and proposals are required to meet those requirements. The project sponsor must provide notice of the RFP in accordance with procedures adopted by the municipal corporation or township, as applicable.<sup>23</sup>

### **Requirements for sealed proposals**

Under the bill, each broadband provider responding to an RFP must submit a sealed proposal to the project sponsor. The proposal must include the following:

- A description of, or documentation demonstrating, the provider's managerial and technical expertise and experience with broadband service projects;
- Whether the provider plans to use wired, wireless, or satellite technology to complete the project;
- A description of the scalability of the project;
- The megabit-per-second broadband download and upload speeds planned for the project;
- A description of the provider's customer service capabilities, including any locally based call centers or customer service offices;
- A copy of the provider's general customer service policies, including any policy to credit customers for service outages or the provider's failure to keep scheduled appointments for service;

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<sup>22</sup> R.C. 122.098(A) and (G).

<sup>23</sup> R.C. 122.098(B) to (D).



- An assurance that the provider will provide broadband service to all of the residences listed in its proposal;
- The length of time that the provider has been operating in Ohio;
- The broadband funding gap amount that the provider will accept to complete the project;
- Proof that the provider has the financial stability to complete the project (a provider may meet the proof requirement by submitting with its proposal publicly available financial statements).<sup>24</sup>

### **Financial assurance**

The bill permits a project sponsor to require that all proposals submitted in response to an RFP be accompanied by a performance bond, letter of credit, or other financial assurance in order to assure construction of the project's broadband infrastructure. The bond, letter of credit, or assurance must be acceptable to the legislative authority of the project sponsor. The bill requires the bond, letter or credit, or assurance to be in the sum, and with the sureties, that the legislative authority prescribes and to be made payable to the municipality<sup>25</sup> or township, as applicable.

The bond, letter of credit, or assurance may include the condition that the provider,<sup>26</sup> if selected, will faithfully execute the terms of the agreement with the project sponsor and complete the project. Under the bill, the bond, letter of credit, or assurance is no longer required after project construction is complete.<sup>27</sup>

### **Broadband provider selection**

Next, upon receiving the proposals, the project sponsor must analyze them, select the proposal that best meets the RFP's requirements, and award the project to the broadband provider that submitted that proposal. The bill permits the project sponsor when analyzing the proposals received to consider the criteria for the RFP, in addition

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<sup>24</sup> R.C. 122.099.

<sup>25</sup> A technical amendment may be needed to change the word "municipality" to "municipal corporation" in line 315 of the bill.

<sup>26</sup> A technical amendment may be needed to add the word "broadband" before "provider" in line 317 and before "providers" in line 447 of the bill.

<sup>27</sup> R.C. 122.0910.



to the project requirements. The bill also requires the project sponsor to include in its records for a selected proposal the basis on which the project sponsor made the award.<sup>28</sup>

### **RFP discussions**

The bill permits discussions with eligible broadband providers who submit proposals that are "reasonably susceptible of being selected for an award" if such discussions are provided for in the RFP or in the procedure adopted by the project sponsor's municipal corporation or township. (See **COMMENT 1.**) The purpose of the discussions is to ensure full understanding of, and responsiveness to, project requirements. Presumably, the discussions would be conducted with the project sponsor. Under the bill, providers must be accorded fair and equal treatment for any opportunity for discussion about the clarification, correction, or revision of proposals. The bill prohibits disclosure of any information derived from proposals submitted by competing providers when discussions are conducted.<sup>29</sup> In addition, proposals received during the RFP process must be opened so as to avoid disclosure of contents to competing providers.<sup>30</sup>

### **Public inspection and copying**

To ensure fair and impartial evaluation, the bill prohibits the public inspection and copying of project proposals, and related documents submitted with them, under the Public Records Law while the project sponsor is reviewing them. The bill also prohibits public inspection and copying of proposals and related documents of a provider not selected by the project sponsor.<sup>31</sup>

After a broadband provider is selected for a project, the project sponsor must allow the provider three business days to notify the project sponsor of any information in the provider's proposal and related documents that the provider considers to be proprietary or a trade secret. Once notified, the project sponsor must redact or otherwise remove that information from the proposal and documents. After the three-day period, the proposal and documents must be available for public inspection and copying under the Public Records Law.<sup>32</sup>

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<sup>28</sup> R.C. 122.098(H).

<sup>29</sup> R.C. 122.098(F).

<sup>30</sup> R.C. 122.098(E)(1).

<sup>31</sup> R.C. 122.098(E)(1) and (4).

<sup>32</sup> R.C. 122.098(E)(2) and (3).

## Project agreement requirements

Next, after selecting a broadband provider for its project, the project sponsor and the provider may enter into an agreement. A project agreement is subject to the approval of the legislative authority of the project sponsor and is contingent upon the distribution of broadband funding gap funds from the sources approved for the project (see "**Funding of broadband funding gap**" above). However, the agreement is prohibited from regulating the rates, terms, and conditions of broadband service, requiring a pricing commitment, or requiring open access to the network.<sup>33</sup> (See **COMMENT 2.**)

In addition, an agreement must specify the following:

- That the provider must construct and install last mile broadband infrastructure to a specified eligible area of the municipal corporation or township, as applicable;
- That if any portion of the project sponsor's share of the project payment will be<sup>34</sup> from VSP fees, the project agreement must include a description of the payment arrangement established with the project sponsor and provider;
- That, upon completion of the project, the project sponsor must remit to the provider the broadband funding gap payment that applies to the eligible area under the project;
- That the project sponsor may negotiate and agree to alternate payment terms with a provider and that such negotiations must be done with the consent of the project sponsor's legislative authority.<sup>35</sup>

## Financial responsibility for project

The bill specifies that under any alternate payment terms, unless otherwise negotiated, the project sponsor's legislative authority assumes all financial responsibility for any project costs incurred by the provider prior to completion of the project or the award of any RBE Program grant funds.<sup>36</sup> (See **COMMENT 3.**)

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<sup>33</sup> R.C. 122.0912.

<sup>34</sup> A technical amendment may be needed to change the words "will be" to "are" in line 334 of the bill.

<sup>35</sup> R.C. 122.0911(A) to (D).

<sup>36</sup> R.C. 122.0911(D).





## **Project plan requirements**

Following the establishment of agreement terms, the project sponsor must develop a project plan as the next step of the process. Minimum requirements for the project plan include:

- A specific description of the eligible area to receive broadband service under the project;
- The total amount of the broadband funding gap, including the amount of funds to be provided by the project sponsor, the state, and the county in which the project is located;
- A copy of the agreement with the broadband provider for the project;
- A copy of the RBE Program application to be submitted to DSA;
- A written proposal requesting county funds from the county in which the project is located.<sup>37</sup>

## **Review by legislative authority**

Under the bill, before a residential broadband expansion project may begin, the legislative authority must review the project agreement and project plan. The legislative authority must then, within 90 days of receiving them, approve or reject them. To approve the agreement and plan, the legislative authority must adopt an ordinance or resolution that authorizes the project sponsor to do the following:

- Enter into the project agreement with the broadband provider;
- Submit the RBE Program application to DSA;
- Submit the proposal requesting any county funds for the project to the appropriate county.<sup>38</sup>

## **Request for county funds**

Under the next step of the process, the project sponsor, if it wants county funds for the project, must submit a proposal requesting those funds to the board of county commissioners of the county in which the project is located. The amount requested must be for the amount equal to the county's share of the project's broadband funding

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<sup>37</sup> R.C. 122.0913.

<sup>38</sup> R.C. 122.0914.



gap. The bill requires this to occur after the project sponsor's legislative authority approves the project agreement and plan and authorizes the next steps as described above. Within 90 days of receiving the request, the board must approve or reject the request for county funds. The board must adopt a resolution or a memorandum of understanding authorizing the distribution of the funds to the project sponsor if the board decides to approve the funding request.<sup>39</sup>

## **Challenges**

The bill allows a broadband provider to challenge the process for selecting a provider for a broadband expansion project at two points in the selection process – upon issuance of an RFP and after a provider has been selected.

### **Challenging the RFP**

Under the bill, a broadband service<sup>40</sup> provider in or proximate to the proposed project may submit a challenge to an RFP. The challenge must be made within five business days of the RFP notice and must be submitted in writing. It must provide sufficient evidence to demonstrate that the RFP is not appropriate because it will not provide broadband service or will not serve an eligible area.<sup>41</sup> (See **COMMENT 4**.)

After reviewing a challenge to an RFP, the project sponsor's legislative authority may either (1) withdraw the RFP and issue a new one or (2) accept the current RFP and proceed with the selection process. The legislative authority's action must be by majority vote.<sup>42</sup>

### **Challenging the proposal selection**

Under the bill, a broadband provider whose proposal was<sup>43</sup> not selected for a project may challenge the selection of the provider. The challenge must be made in writing to the project sponsor's legislative authority before the end of the 90-day period for the legislative authority to decide whether to approve or reject a project agreement

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<sup>39</sup> R.C. 122.096(A)(2)(b), 122.0915, and 122.0916.

<sup>40</sup> A technical amendment may be needed to delete the word "service" before "provider" in line 413 of the bill because the bill defines, and generally uses only, "broadband provider" and not "broadband service provider."

<sup>41</sup> R.C. 122.0917.

<sup>42</sup> R.C. 122.0918.

<sup>43</sup> A technical amendment may be needed to change the word "was" to "is" in lines 429, 434, 525, and 566 of the bill.



and project plan (see "**Review by legislative authority**"). A copy of the challenge must be provided to the provider that was awarded the project.

A challenge must<sup>44</sup> provide sufficient evidence to demonstrate that the selection is not appropriate because the proposal will not provide the broadband service described in the proposal or serve an eligible area.<sup>45</sup>

After reviewing a challenge to a proposal selection, the project sponsor's legislative authority may, upon majority vote, (1) reject the challenge, (2) reject the selected proposal and issue a new RFP or allow the providers that responded to the RFP to amend their proposals and resubmit them, or (3) select a different provider that submitted a competing proposal to the challenged proposal.<sup>46</sup>

### **DSA application process**

Each fiscal year, the Director of Development Services must accept project sponsors' applications for RBE Program funding. To apply for a grant, a project sponsor must submit an application to the Director on a form that the Director prescribes. The Director must review applications in the order that they are received and approve each application within 60 days after receiving it. Any applications pending at the end of the fiscal year are considered denied. However, a project sponsor may refile the application in a subsequent fiscal year provided that all information is still current or has been updated.<sup>47</sup>

If an application is incomplete, the Director must notify the project sponsor and list what information is incomplete in the notification. The notification must also describe the procedure for refiling a completed application. If an application is completed and refiled by 30 days after the date of the notification, the Director must review the application as described above. Under the bill, if a project sponsor fails to complete and refile an incomplete application, the Director must deny the application.<sup>48</sup>

### **Application requirements**

Each RBE Program application, at a minimum, must include the following information:

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<sup>44</sup> A technical amendment may be needed to change the word "must" to "shall" in line 435 of the bill.

<sup>45</sup> R.C. 122.0920.

<sup>46</sup> R.C. 122.0921.

<sup>47</sup> R.C. 122.093(B) and 122.094(A).

<sup>48</sup> R.C. 122.094(B).

- The location and description of the residential broadband expansion project;
- The project sponsor's determination that the location of the project qualifies as an eligible area;
- The amount of the broadband funding gap and the amount of state funds requested;
- A copy of the ordinance or resolution enacted or adopted by the legislative authority of the project sponsor;
- If county funds are used to meet a share of the broadband funding gap, a copy of the resolution or memorandum of understanding by the board of county commissioners of the county in which the project is located;
- A copy of the agreement (or a written acknowledgment of the agreement) between the project sponsor and a broadband provider that confirms the provider's commitment to construct the broadband infrastructure in the eligible area of the project in exchange for payment of the total broadband funding gap upon completion of the project;
- Any other information, prescribed by rule, that the Director determines is necessary.<sup>49</sup>

### **DSA grant funds**

The bill requires DSA to fund applications for residential broadband expansion projects on a first-come, first-served basis until program funds for the fiscal year are no longer available. The amount of funding each project receives under the bill is equal to one-third of the total cost of the broadband funding gap for that project, except as provided in DSA rules adopted by the Director (see "**RBE program rules**" below). Under the bill, the cumulative total of the grants awarded for a biennium may not exceed \$2 million.<sup>50</sup>

### **Ohio Broadband Development Grant Fund**

The bill requires the Director of the Office of Budget and Management, in consultation with the Director of Development Services, to identify \$2 million within the DSA budget on July 1, 2018 (or as soon as possible after that date) and transfer that

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<sup>49</sup> R.C. 122.095.

<sup>50</sup> R.C. 122.093(A).



amount to the Ohio Broadband Development Grant Fund created by the bill. The bill makes an appropriation in that amount for FY 2019.<sup>51</sup>

### **Broadband infrastructure ownership**

The bill specifies that a broadband provider selected to provide last mile service under an RBE Program is the sole owner of the infrastructure installed pursuant to the Program. The provider is solely responsible for ongoing maintenance and upgrades to the infrastructure.<sup>52</sup>

### **RBE Program rules**

The Director of Development Services must adopt rules for the RBE Program established under the bill. The rules must establish an application form and application procedures for the Program and may include (1) other requirements for the application in addition to those specified in the bill and (2) procedures for and circumstances under which partial funding of applications or funding applications on a basis other than first come, first served is permitted.<sup>53</sup>

### **DSA annual report**

The bill requires DSA to include information related to the RBE Program in its annual report of transactions and proceedings required of all state departments under current law. The number of program applications received, the number of applications that received funding, the amount of broadband infrastructure constructed in eligible areas, and the number of residences receiving broadband service for the first time under the program for that year must be included in the report.<sup>54</sup>

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## **COMMENT**

1. The bill, in R.C. 122.098(A) and (F) (lines 211 and 247), refers to "eligible" broadband providers. The bill defines "broadband provider" and uses that term and the term "provider" many times. However, the bill does not define what is an "eligible" broadband provider nor does it describe when a provider is considered "eligible" under the bill's provisions.

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<sup>51</sup> Section 3.

<sup>52</sup> R.C. 122.0923.

<sup>53</sup> R.C. 122.0929.

<sup>54</sup> R.C. 122.0927.



2. The bill prohibits a project agreement from "regulating the rates, terms, and conditions of broadband service." This provision appears in R.C. 122.0912 (lines 360 to 362), but it is unclear whether the bill limits this prohibition to broadband service for an RBE project or if its application is more broad. The same section prohibits "requiring a pricing commitment," but the bill does not expressly state that the prohibition applies to requiring a pricing commitment from a broadband provider. Also, the section prohibits "requiring open access to the network," but does not specify to what network. It is not clear whether this refers to the project's broadband network or its last mile infrastructure, or has a broader application.

3. In R.C. 122.0911(D) (lines 346 to 352), the bill requires the project sponsor's legislative authority under alternate payment terms (unless otherwise negotiated) to assume all financial responsibility for any projects incurred by the broadband provider prior to completion of the project or the award of state funds by DSA under the RBE program. But, it is unclear for what project costs the legislative authority will assume responsibility. The term "project costs" is not defined.

4. The challenge process described in R.C. 122.0917 (lines 411 to 418) specifies that a challenge to an RFP be made in writing. However, unlike the challenge to a selection of a broadband provider which must be submitted to the project sponsor's legislative authority, this challenge does not specify to whom the challenge must be sent. It is not clear whether the challenge should be sent to the project sponsor's legislative authority or to the project sponsor. Because the legislative authority must respond to the challenge, one might infer that the challenge should be submitted to the legislative authority, but the bill does not require this.

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## HISTORY

ACTION	DATE
Introduced	06-20-17
Reported, H. Finance	01-23-18

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