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May 23, 2022

SENT VIA ELECTRONIC MAIL TO XXXX

Mark Vasconi  
Washington State Broadband Office  
1011 Plum Street SE  
Olympia, Washington 98504-2525

RE: Washington State Broadband Office Funding Program Comments

Director Vaconi:

Thank you for this opportunity to provide comments on the upcoming funding opportunities your office is preparing to announce.

Despite private companies investing tens of millions of dollars in the past several decades building broadband access, the locations that still lack connectivity exist because building access to them is expensive. In the past three years, both the State of Washington and the federal government have invested heavily in broadband infrastructure for the express purpose of serving unserved and underserved locations. The establishment of the Washington State Broadband Office in 2019 was widely supported by the communications industry as a foundation upon which Washington State could make targeted and meaningful investments in closing the digital divide once and for all. At the time of its creation, no one could have predicted the amount of funding that the office would be responsible for overseeing. As a steward of the greatest investment in broadband infrastructure ever, the Broadband Office must be a cautious steward of these precious funds maximizing the number of Washingtonians who benefit from it. The legislature contemplated many different solutions to creating more broadband accessibility and intentionally did not limit the office to any single approach. Ensuring that the process is transparent, engages stakeholders, provides clear scoring criteria, includes a challenge process based upon both empirical data and fact, and is efficient will make the difference in ensuring that broadband accessibility is ubiquitously available.

### **Multiparty Applications**

In 2019 SB 5511, the Broadband Office was directed to encourage public-private partnerships for the express purpose of increasing deployment and adoption of broadband services. The appropriation for the Broadband Office operations through 2021 Substitute House Bill 1080 (Section 1086) and 2022 Substitute Senate Bill 5651(Section 1029) directed the Broadband Office to award grants to local governments, tribes, nonprofit organizations, and public-private partnerships. Interestingly enough, the Legislature affirmed its interest in funding private entity projects while contradicting itself in 2022 Supplemental Capital Budget Section 1043 (1)(b)(iii).

When the Legislature awarded funding targeted for Whidbey Telecom's Point Roberts rural broadband project, it opened the door to the question as to whether the Broadband Office can serve as a public agency partner for an individual project. Understanding that public funds must be administered by a

public agency, consider an approach where the Broadband Office is a public entity partner with private providers. This approach reduces the administrative burden transferred to the local governments or tribes while enhancing the Broadband Offices' oversight to projects funded through its grant programs.

#### **"Applicant Control"**

The question of applicant control was created in the appropriation for the Broadband Office. The Legislature directed grants to be award to projects under the applicant's control for a minimum of 25 years with a commitment to use the infrastructure for providing broadband connectivity. These obligations were also affirmed in the 2022 amendment to the Broadband Office operations in House Bill 1723. However, as a practical matter, this is a non-issue in all possible projects. Where these public-private partnerships are formed, the issue of applicant control is addressed because the co-applicant or sub-applicant is the owner/operator of the network.

#### **Private Investment Obligations**

To the degree that a private entity is providing funding match for a project, the Broadband Office does not have the authority to place obligations upon that investment. Specifically, state and federal procurement obligations cannot be mandated on privately invested funds.

Ziply Fiber appreciates this opportunity to comment on the anticipated notice of funding opportunity and would like the opportunity to comment once the Broadband Office proposal is available for review.

Sincerely,

A handwritten signature in black ink, appearing to read 'JEpley', with a stylized flourish at the end.

Jessica Epley  
VP - Regulatory & External Affairs

May 31, 2022

**By Electronic Mail to** [wsbo@commerce.wa.gov](mailto:wsbo@commerce.wa.gov)

Mark Vasconi  
Washington State Broadband Office  
1011 Plum Street SE  
Olympia, WA 98504-2525

**RE: Spring 2022 Infrastructure Acceleration Grants NOFO**

Dear Director Vasconi:

Comcast appreciates the opportunity to comment on the forthcoming Notice of Funding Opportunity (NOFO) for Spring 2022 Infrastructure Acceleration Grants.

Comcast shares the Washington State Broadband Office's (WSBO's) goal of universal access to high-speed broadband and is actively coordinating with local government partners to participate in this next round of infrastructure funding. We offer these comments in support of an NOFO designed to attract a wide range of qualified applicants. To that end, we respectfully request that the WSBO refrain from adopting unnecessary and counterproductive requirements that may discourage participation and undermine the State's broadband goals. Specifically, Comcast urges the WSBO (1) not to impose harmful open access mandates for funded network infrastructure, (2) to clarify that cable franchise agreements can satisfy the 25-year site control requirement, and (3) to increase the points accorded to applications with ISP funding contributions.

**ARPA Capital Projects Fund**

It is our understanding that the Spring 2022 Infrastructure Acceleration Grants will distribute federal funding from the American Rescue Plan Act (ARPA) Capital Projects Fund, which appropriated \$10 billion for "States, territories, and Tribal governments to carry out critical capital projects directly enabling work, education, and health monitoring, including remote options," in response to the COVID-19 public health emergency.<sup>1</sup> Among other guidance, the U.S. Treasury has designated broadband infrastructure projects as presumptively eligible for Capital Projects Fund grants and "encourage[d] Recipients to focus on projects that will achieve last-mile connections."<sup>2</sup> That goal is consistent with directives under state law that the WSBO

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<sup>1</sup> 42 U.S.C. § 804(a).

<sup>2</sup> U.S. Department of the Treasury, *Guidance for the Coronavirus Capital Projects Fund for States, Territories & Freely Associated States* at 3 (Sept. 2021), <https://home.treasury.gov/system/files/136/Capital-Projects-Fund-Guidance-States-Territories-and-Freely-Associated-States.pdf>. Treasury has also provided guidance that "[r]ecipients are encouraged to prioritize projects that are designed to provide service to households and businesses not currently served by a wireline connection that reliably delivers at least 100 Mbps of download speed and 20 Mbps of upload speed." *Id.* at 4.

“encourage, foster, develop, and improve affordable, quality broadband within the state,” and “[i]mprove broadband accessibility for unserved communities and populations.”<sup>3</sup>

With a longstanding presence in Washington State and a deep commitment to the communities we serve, Comcast stands ready to partner with local governments and other eligible entities to leverage these and other funding opportunities to help close the remaining digital divide. Comcast has the technology, expertise, and operational resources to rapidly deploy and extend advanced high-speed broadband networks, provided that any conditions on funding are reasonable and applied equitably.

## **Open Access**

Nothing in the relevant provisions of ARPA, Treasury guidance, or state law requires funded broadband networks to be “open access” – or even defines that concept with any specificity. Consequently, any requirement or preference for applicants to commit to offering service and/or network facilities on an open access basis would introduce significant uncertainty and may disqualify otherwise-willing participants or lead others not to apply for Infrastructure Acceleration Grants at all. That would be a missed opportunity for Washington residents and directly at odds with state and federal policy goals of ensuring that this funding results in new last-mile connections.

The WSBO need look no further than its experience with the Round One grants that it announced in October 2021 for examples of the risks and unintended consequences resulting from open access obligations. There, a mandatory Network Access Policy stated that “[a]fter three years the network must be open access for the remainder of the useful life of the project constructed.”<sup>4</sup> The Round One NOFO explained only that “[o]pen access means access to broadband services and infrastructure on transparent terms that are offered at fair market price and do not discriminate among users of the network.”<sup>5</sup> Comcast could not certify to these conditions in light of numerous ambiguities regarding what constitutes “open access to broadband services and infrastructure,” how “fair market” pricing would be determined, what terms and conditions of interconnection would apply, whether there would be wholesale access obligations, how network management and security concerns would be handled, and other key considerations. Consequently, Comcast’s applications for the Nine Mile Falls project in Spokane County and the Battle Ground project in Clark County were disqualified from further consideration. Such concerns are not unique to Comcast, and it is our understanding that the WSBO has yet to enter into final agreements with several Round One applicants due in part to these unresolved questions, delaying the benefits of network deployment for residents of these communities.

In Comcast’s experience, open access has never been a viable business model for broadband deployment in the United States and is unlikely to be for the foreseeable future. Open access

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<sup>3</sup> RCW 43.330.532(2), (2)(c).

<sup>4</sup> Washington State Broadband Office, *Notice of Funding Opportunity for Infrastructure Acceleration Grants - Round One* at 3 (Oct. 4, 2021), <https://www.commerce.wa.gov/wp-content/uploads/2021/10/SBO-NOFO-Infrastructure-Round1Final.pdf>.

<sup>5</sup> *Id.*

requirements have historically been used to bring retail-level competition to countries with government-owned monopoly telecommunications networks.<sup>6</sup> Studies of open-access regulations in the European Union and elsewhere, however, have concluded that such requirements reduce overall network investment and broadband deployment.<sup>7</sup> As a result of regulatory policies promoting facilities-based competition, the United States can point to higher broadband speeds, more rapid infrastructure deployment, and higher levels of investment in its broadband networks than in other countries where Internet service providers (ISPs) more frequently rely on open access to shared infrastructure.<sup>8</sup>

Claims that open access models greatly increase competition and choice are misleading. As a recent report commissioned by The Pew Charitable Trusts observed, “[t]here is not one example in this country of a large telco or cable company agreeing to operate competitively on somebody else’s network to serve residential customers.”<sup>9</sup> Among other reasons for this situation, an open access model removes incentives for last-mile providers to innovate, invest in technology upgrades, and differentiate their services based on performance.<sup>10</sup> This in part reflects the fact that retail ISPs are necessarily limited in the services they can offer by the capabilities of the underlying network. In fact, experience has shown that open access networks typically result in a handful of retail ISPs differentiating themselves largely through branding and marketing campaigns rather than speeds or service quality.<sup>11</sup> An open-access regime is especially

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<sup>6</sup> See Doug Dawson, *The Rural Broadband Industry* at 12-13 (Sept. 1, 2021), [https://www.pewtrusts.org/-/media/assets/2021/09/white\\_paper\\_rural\\_broadband\\_industry\\_final.pdf](https://www.pewtrusts.org/-/media/assets/2021/09/white_paper_rural_broadband_industry_final.pdf).

<sup>7</sup> See Wolfgang Briglauer et al., *Speeding Up the Internet: Regulation and Investment in the European Fiber Optic Infrastructure*, 62 INT’L J. INDUS. ORG. 613 t.3 (2018) (finding that fiber access regulation significantly reduces the number of homes passed by the incumbent operator’s fiber network); GSMA, *Wholesale Open Access Networks* (July 2017), [https://www.gsma.com/spectrum/wp-content/uploads/2017/07/GSMA\\_SWN-8-pager\\_R3\\_Web\\_Singles.pdf](https://www.gsma.com/spectrum/wp-content/uploads/2017/07/GSMA_SWN-8-pager_R3_Web_Singles.pdf) (explaining that “government mandated wholesale networks have been much slower to expand coverage, perform upgrades and to embrace new technologies such as 3G and 4G, and they can be expected to prompt less innovation than network competition”).

<sup>8</sup> See Christopher S. Yoo, *U.S. vs. European Broadband Deployment: What do the Data Say?*, Faculty Scholarship at Penn Law (June 3, 2014), [https://scholarship.law.upenn.edu/faculty\\_scholarship/1453](https://scholarship.law.upenn.edu/faculty_scholarship/1453) (finding that from 2007 to 2012 – a critical period for broadband network buildout – the average electronic communications sector investment per household in the United States was nearly double the amount spent in Europe); USTelecom, *No Contest: U.S. Leads Europe in Broadband Deployment, Adoption, Investment and Competition* at 13 (April 2021), <https://www.ustelecom.org/no-contest-u-s-leads-europe-in-broadband-deployment> (finding that from 2012 to 2018 the average annual ISP investment per household was \$708 in the U.S. and \$230 in the EU).

<sup>9</sup> Dawson, *supra* note 6, at 13.

<sup>10</sup> In response to the COVID-19 pandemic, for example, Comcast undertook rapid network augmentations and invested in software development, artificial intelligence, and machine learning to deliver its customers a faster, more reliable experience despite significant increases in network usage. See Tony Werner, *Cresting the Wave: The Factors that Powered our Network Through the COVID-19 Surge* (June 15, 2020), <https://corporate.comcast.com/press/releases/cresting-the-wave-how-our-network-thrived-what-comes-next>.

<sup>11</sup> Even open access networks that have been touted as success stories are not as inexpensive or good for consumers as they might appear. In Ammon, Idaho, for example, customers must pay between \$3,200-\$3,600 for installation (which can be paid upfront or financed with interest over 15 years) in addition to a city utility fee of \$16.50 per month and between \$10-\$25 per month for a service plan from their chosen ISP. See City of Ammon Fiber Optics, FAQs, <https://www.ammonfiber.com/faq.html>. Together, these additional charges make the total cost comparable to private broadband service. And as the Pew report notes, “[t]his model would not work in most communities because

inappropriate in low-density, high-cost, and rural areas that do not support a multiplicity of providers and are economically challenging for even a single ISP to serve. In many cases, there may be no real demand or business case for government entities or commercial ISPs to lease wholesale elements, and deployment funding conditioned on open access may result in wasteful construction of “fiber to nowhere” when there is no bona fide interest in use of the network.

In practical terms, a preference or requirement for open access would have marginal, if any, benefit to competition and choice, while at the same time strongly discouraging ISPs with a national or regional presence from seeking Spring 2022 Infrastructure Acceleration Grants. For all of these reasons, the forthcoming NOFO should decline to require or award additional points for open access commitments.

### **Project Site Control**

Under state law, broadband infrastructure grant recipients must “[d]emonstrate that the project site is under the applicant’s control for a minimum of 25 years, either through ownership or a long-term lease.”<sup>12</sup> This provision is best read as a straightforward requirement that applicants show a long-term legal authorization to use any land or rights-of-way required for infrastructure deployment so that potential access limitations or disputes over property rights do not delay or cut short the public benefits of funded networks. For example, an eligible entity and industry partner such as Comcast should be able to meet these statutory requirements through a franchise agreement authorizing “the construction of a cable system over public rights-of-way,”<sup>13</sup> which may be renewed as often as necessary.

Other interpretations – such as that applicants must actually purchase or lease all property that may be required for network deployment – would needlessly add confusion and create barriers to participation. Comcast notes in that regard that requiring local governments to set aside and manage land exclusively for broadband deployment or to secure new property rights simply to be eligible for infrastructure grants would impose significant burdens on both the public and private sectors and discourage qualified applicants from seeking this funding.

### **ISP Funding Contributions**

Finally, we understand from recent presentations that the WSBO is considering a scoring system that would award five points (out of 100) to applications where the partnering ISP contributes at least 10 percent of the total project cost. Comcast agrees that applications offering such ISP contributions should be prioritized but respectfully submits that this factor should be accorded more weight in the review process. To stretch this federal funding as far as possible and leverage additional investment by private providers, the WSBO should consider increasing the score for matching funds to 15 points, consistent with several other criteria that it has proposed.

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it would exclude low-income homes, most renters, and any other home unwilling or unable to pay the upfront fee.” Dawson, *supra* note 6, at 14.

<sup>12</sup> Substitute Senate Bill 5651, Chapter 296, Laws of 2022, § 1041(1)(d)(i).

<sup>13</sup> 47 U.S.C. § 541(a)(2).

Thank you for your consideration of these comments, and please do not hesitate to contact me if you would like further information.

Sincerely,

/s/ Rhonda Weaver\_\_\_\_\_

Rhonda Weaver  
Vice President, State Government Affairs  
Comcast NBCUniversal



302 N. Mill Street  
Colfax, WA 99111

T/ 509-879-7998  
F/ 509-397-4758

[www.petrichorbroadband.com](http://www.petrichorbroadband.com)

Mr. Mark Vasconi, Director  
Washington State Broadband Office  
1011 Plum Street ES  
Olympia, WA 98504-2525

Dear Mr. Vasconi,

Petrichor Broadband, LLC was pleased to hear in the May 17, Washington State Broadband Office (WSBO) listening session that all grant applications would require "open access" network configuration in the award contract requirements. We believe this is good public policy. Petrichor did not attend the May 18 listening session tailored to ISP's interested in public private partnerships in future grant applications. It has been brought to our attention by representatives from Comcast and Charter Communications that in the May 18 meeting the "open access" requirement was opened to the group for a comment period ending May 31. Many communities and Broadband Action Teams (BATs) have reached out to us as companies are asking for letters of support to allow closed systems. These communities are tired of experiencing the effects of monopolistic companies and are asking for consumer choice, possible only with open access systems. Petrichor does not support a closed network approach, and we believe that public money should not be used to create and perpetuate more monopoly markets than currently exist. History has repeatably shown, even with subsidy, the telecommunications industry has not updated their facilities or served the high-cost customer. Since 2000, the FCC has subsidized the industry \$85 billion dollars through the Universal Service Fund to upgrade networks and serve high-cost customers. We have created a fund that grows high-cost companies that do not serve high-cost customers. We are now in an unprecedented moment in time with resources to solve the problem. This is not the time to perpetuate failed policies.

Funding policies of the past have not fixed the problem. Congress was willing to change things up and place the funding through the NTIA to flow to states in the most recent legislation. Guidance in this legislation states:

*Under the ARPA, recipient governments may use SLFRF funds to make "necessary investments in . . . broadband infrastructure." In the Supplementary Information to the interim final rule, Treasury interpreted necessary investments in infrastructure as investments "designed to provide an adequate minimum level of service and [that] are unlikely to be made using private sources of funds." Treasury explained that, with respect to broadband specifically, such necessary investments include projects that "establish [ ] or improve [ ] broadband service to underserved populations to reach an adequate level to permit a household to work or attend school, and that are unlikely to be met with private sources of funds."*

*Treasury continues to encourage recipients to prioritize support for broadband networks owned, operated by, or affiliated with local governments, nonprofits, and cooperatives.*





302 N. Mill Street  
Colfax, WA 99111

T/ 509-879-7998  
F/ 509-397-4758

[www.petrichorbroadband.com](http://www.petrichorbroadband.com)

<https://www.gfoa.org/treasury-issues-final-rule-for-arpa-state-and-local>

Today we have a chance to create networks and public private partnerships that will bring broadband service to unserved constituents of Washington State. The open access model creates a reoccurring revenue for public entities which can be further invested to serve more customers after the grant dollars have been expended. In the conversations Petrichor has had with communities this week that have been contacted by companies who support closed networks, these companies' interests are in building out towns and larger density areas next to where their facilities currently exist. Petrichor works in these areas also. In all areas of Washington State, Petrichor has been able to bring multiple providers into markets. In small communities it is common to have multiple providers offering 1 gig service for under \$75 per month. This is pricing comparable or better than most urban areas. There may be an area of Washington State where a closed system is justified to serve a few constituents in a remote area. Petrichor believes this should be the rare exception not an open policy to cover unserved markets in general.

Petrichor respectfully requests that the Washington State Broadband Office uphold the open access requirement as described in the May 17 meeting in future guidelines.

Sincerely,

Petrichor Executive Council  
Mark Wilson, Port of Kalama  
Randy Hayden, Port of Pasco  
Kristine Meyer, Port of Whitman  
Rob Fix, Port of Bellingham  
Sara Young, Port of Skagit  
Randy Mueller, Port of Ridgefield



The Washington Independent Telecommunications Association (“WITA”) welcomes the opportunity to comment on the forthcoming Notice of Funding Opportunity (“NOFO”) for the Spring 2022 Infrastructure Acceleration Grants. WITA’s members support the goal of providing high-speed broadband to rural Washington and have proven their commitment by bringing broadband to some of the most remote, high cost areas of Washington.

WITA’s primary concern is the lack of clarity and the lack of information concerning the operation of the grants and the ranking of applications. It is difficult to comment in what is essentially an information vacuum. While we appreciate the listening sessions that were held recently we were left with many more questions than answers.

WITA encourages the Washington State Broadband Office (“WSBO”) to provide as much specific guidance as possible as soon as possible. In particular, it would be helpful if there is detailed information on the way in which grant applications will be ranked. Along these lines, how does WSBO propose to proceed if several applications are tied or are very close in points ranking? Will there be additional criteria that will be applied? For example, at some point will geographic location, amount of match, or whether or not an applicant has previously received a grant be taken into account? WITA wants to put together as strong an application as possible to ensure that the people we serve, and the people we hope to serve, get robust broadband as quickly as possible. At this point we do not have sufficient information to determine what comprises a strong application.

WITA is concerned about the thought that these networks would need to be “open access.” It is very difficult to understand what that term means in practical operation. It also imposes unnecessary operational complexity in the delivery of broadband Internet access service in rural Washington. For example, is “open access” lit fiber or unlit fiber? Does it apply only to that part of the system which is built with grant dollars or to the entire system? While this topic has been discussed there is nothing in writing to ensure that we all agree on the definition of “open access.”

WITA supports the comments made by Comcast regarding open access. In particular, WITA has the same concern as Comcast’s closing comment that a preference or requirement for open access would have marginal, if any, benefit to competition and choice will, at the same time, discourage ISPs from seeking Spring 2022 Infrastructure Acceleration Grants. In many cases areas do not have access to high speed broadband because the cost to provide that service has been too high. Forcing competition in these areas does not bode well for any company’s ability to maintain a system once built. WITA joins Comcast in underscoring that open access is not required by either federal or state law.

One of the confusing issues that has come out of the Round One grants is what is meant by site control. WITA recognizes that it is a requirement under current state law that broadband infrastructure grant recipient “[d]emonstrate that the project site is under the applicant’s control for a minimum of twenty-five years, either through ownership or a long-term lease.” WITA’s members have the statutory right to be in the public right of way. See, RCW 80.36.040. When a WITA member partners with an eligible entity, this statutory right should be viewed as meeting the requirement for project control since it is a

legal authorization to use rights of way without a temporal limitation. If a WITA member has a franchise or expresses a willingness to obtain a franchise to use a public right of way for a project site, that should be viewed as sufficient commitment to meet the requirement.

Another issue with Round One grants is the surprising limitation that the match must be provided before any draw down of the grant is allowed. A much better approach would be to do a ten percent hold back on distributions until the match is provided. This requirement is also a deterrent to applicants who want to provide services in unserved areas but cannot afford the hundreds of thousands or even millions of dollars in up-front costs.

We had hoped that the Round One contract would answer some of these questions. The lack of a contract is also making it more difficult for entities to determine if they are willing to participate in Round Two.

WITA's members are among the leaders in providing broadband Internet access in rural Washington. WITA's members have the experience and expertise in the construction, operation and management of broadband infrastructure to provide successful long-term service in rural Washington. WITA's concern is that when WITA members seek to partner with an eligible entity,<sup>1</sup> they need more information to be able to shape the responses to best meet the needs of Washington citizens. To this end, WITA recommends that the WSBO take the time to issue a draft NOFO for public comment rather than move forward on comments such as these that are based on insufficient information. By allowing public comment, the process is more transparent and will produce a better product.

Thank you for the opportunity to comment. Respectfully submitted this 31<sup>st</sup> day of May, 2022.

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Betty S. Buckley  
Executive Director  
Washington Independent Telecommunications Association

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<sup>1</sup> At this juncture WITA will not comment on what seems to be the misguided limitation of eligible entities to governmental entities, Tribes and non-profits. For-profit companies have had great experience in providing broadband service in rural areas. WITA recognizes this issue is beyond WSBO's provenance.

May 27, 2022

Mark Vasconi, Director  
Washington State Broadband Office  
PO Box 42525  
Olympia, WA 98504-2525

**RE: WPUDA Comments on Spring 2022 Infrastructure Acceleration Grant cycle NOFO**

Dear Mr. Vasconi:

Thank you for the opportunity to participate in listening sessions and to provide comment regarding the upcoming Notice of Funding Opportunity (NOFO) for the Washington State Broadband Office (WSBO) Spring 2022 round of Infrastructure Acceleration Grants. The Washington Public Utility Districts Association (WPUDA) represents 27 public utility districts and one joint operating agency, Energy Northwest, in Washington State. Fifteen of our member PUDs currently provide wholesale telecommunications services to communities in Washington. In the 2021 legislative session, PUDs were granted additional authority to provide retail broadband services to customers.

In the Fall 2021 round of Infrastructure Acceleration Grants, seven of the eight PUDs who applied for grants were denied funding. WPUDA has held discussions with these PUDs, regarding their experiences with the grant application process, and would like to provide comment on the proposed NOFO modifications which were discussed by WSBO staff during the May 17 and 18 listening sessions.

We appreciate the efforts of the WSBO to increase transparency and clarity in the application process and scoring criteria for the next round of funding. The proposed addition of time for mitigation of challenges received from incumbent providers is a good step to promote collaboration and support efforts to provide service to unserved and underserved communities, while still respecting the investments of existing service providers.

The primary area of concern remaining for PUDs lies with the process for addressing challenges to applications by incumbent service providers. WPUDA requests that the WSBO consider the following updates to the challenge process, for the upcoming funding cycle:

- Clearly defined processes and deadlines for applicants to notify incumbents, for incumbents to challenge an application, and for mitigation of any challenge to an application in order for the application to move forward toward funding.
- Provision of challenge materials to applicant, in order for applicant to respond to challenge and/or modify the application in order to move forward toward funding.
- Requirement for challenger to submit clear evidence of existing service availability at or above the service speeds outlined in the NOFO.
- Challenges based on intention to provide service should require clear evidence of existing plans to build to the project area at the speeds outlined in the NOFO within twenty-four months, as well as a financial commitment to the project (i.e. posting a bond).

- Challengers who fail to show reasonable progress toward providing service to the project area within the twenty-four month deadline should be disqualified from the opportunity to challenge funding applications in future cycles.

Once again, WPUA appreciates the opportunity to provide comment on the implementation of these funding programs. Please feel free to contact me with any questions.

Sincerely,

*George M. Caan*

George Caan, Executive Director  
Washington Public Utility Districts Association

Washington State Broadband Office  
Mark Vasconi, Director  
1011 Plum Street SE  
PO Box 42525  
Olympia, WA 98504-2525  
Email: wsbo@commerce.wa.gov

May 31, 2022

**VIA E-MAIL AND USPS**

RE: Spring 2022 Infrastructure Acceleration Grants NOFO

Dear Mr. Vasconi:

As a broadband service provider in Washington State, Spectrum Pacific West, LLC (“Charter”) would like to highlight its fundamental concerns regarding the Washington State Broadband Office’s (“WSBO”) current requirement that grant recipients of the Infrastructure Acceleration Grants operate an “open-access” network. We support the WSBO’s decision to examine this mandate in the forthcoming Notice of Funding Opportunity, as requiring “open-access” will limit participation in the Spring 2022 Infrastructure Acceleration Grants program, and inhibits or prevents the more rapid deployment of broadband necessary to close the existing digital divide in our state.

Charter would also like to take this opportunity to address budget language relating to the Infrastructure Acceleration Grants, which require grant recipients to maintain site control through ownership or lease for 25 years. We highlight that this requirement is met through cable franchise agreements that authorize long-term, legal access to the right-of-way.

**INTRODUCTION**

Today, existing broadband internet service providers (“ISPs”) in Washington, including Charter, are making significant progress in increasing connectivity to high-speed internet service. Charter now offers standard download speeds of at least *100 to 200 Mbps to 100% of its passed households* that have broadband availability in Washington—in fact, Charter also provides *up to 1 Gbps to the same households*. Charter’s speed offerings are also scalable to exceed the speed goals of the state of Washington under RCW 43.330.536 and to meet future customer needs.

The WSBO can further accelerate deployment by ensuring that its program rules provide the necessary incentives and business certainty to enhance participation in the Infrastructure Acceleration Grants program. By contrast, adoption of informal rules that effectively create roadblocks to broad participation in the program discourage ISPs from taking part and ultimately harms those that the program is designed to help.

Charter agrees that the WSBO should directly address the challenges of expediting broadband deployment to unserved areas across the state. As a facilities-based ISP in Washington and a participant in numerous state and federal grant programs across our 41 state footprint, Charter supports efforts designed to identify and expand broadband deployment to areas of the state lacking connectivity. Given its limited funding, we urge the WSBO to continue to fulfill the program's express purpose of expanding connectivity in unserved areas and refrain from promoting subsidized competition in these same areas where the market has failed to attract even one ISP.

## **OPEN ACCESS BARRIERS**

### **Disincentives**

The current WSBO rule mandates that grant recipients share their network facilities through a so-called "open access" model. As an initial matter, the vaguely-defined "open access" requirement amounts to a significant, and detrimental, change to how broadband networks operate and how high-speed internet is currently provided throughout the state. An "open access" mandate eliminates any incentive for a company like Charter to participate, resulting in diminished opportunities for unserved areas to obtain high-speed broadband connectivity. The past "open access" requirement in earlier WSBO funding opportunities has limited participation.

Operating an "open access" network would severely diminish the economic rationale for deploying modern broadband network infrastructure to a new area. In determining whether to build out and enter a specific market, businesses typically engage in a cost-benefit analysis. The economic and operational uncertainties created by an "open access" mandate significantly reduces the economic justification for deployment to an unserved area even after accounting for WSBO funding.

Unserved areas generally do not have broadband service because reasonable business cases cannot be made to justify the cost of constructing, operating, maintaining and upgrading networks to areas that are extremely high cost to serve. Irrespective of potential WSBO funding, in markets that fail to attract even one ISP, allowing multiple ISPs to access a network, at wholesale prices, in competition with the entity that risks its private capital investment to deploy the network, would diminish any potential incentives to participate in state broadband buildout grants to enter high cost areas, let alone to be able to sustain a business case long term.

### **Legal Inconsistency**

Moreover, an open access requirement is inconsistent with the Washington Administrative Procedures Act (APA) and case law precedent. The statute governing WSBO does not authorize an "open access" mandate. See generally RCW 43.330.

The WSBO can only operate under the authority given to it by the legislature, and there is nothing that authorizes the WSBO to impose an “open access” requirement. RCW 34.05; Edelman v. State ex rel Pub. Disclosure Comm’n, 152. Wash. 2d 584, 99 P. 3d 386 (2004) and Bostain v. Food Exp., Inc., 159 Wash. 2d 700, 153 P. 3d 846 (2007) (standing for, among other things, the proposition that an agency cannot exceed its statutory authority by creating requirements not otherwise referenced in its legislative grant). See also RCW 43.330.532(2)(open access requirement does not further the explicit purposes of the WSBO).

The “open access” mandate is also inconsistent with the WSBO budget language. Open access networks are not a required criteria for a successful application under the WSBO grant program in statute or agency rules. The legislature set forth numerous requirements for the WSBO grant program but requiring an open access network is not one of them. WSBO should not go beyond its legislative mandate and require open access networks, as doing so causes unnecessary legal uncertainties.

#### Forced Access Model Failure

The downstream effects of discouraging providers from investing in and deploying facilities is not always apparent until consumers are forced to confront its negative consequences. As compared to the policies that promoted a facilities-based competition model in the United States, Europe has experimented for years with forced “open access” mandates. The effects of those shared infrastructure government policies resulted in consumers experiencing years of under-investment in core elements of the network. When the COVID-19 pandemic struck, forcing millions of people to rely on their home broadband connection, European consumers saw slower broadband speeds—online video distributors and other edge providers were forced to degrade the quality of their content in light of the congested networks. By contrast, during COVID, US broadband networks deployed under government policies promoting facilities-based competition, remained operationally robust and capable of handling increased traffic on their infrastructure.

The WSBO should not increase the likelihood of degrading Washingtonians’ internet access or discourage participation from the most robust network providers that are most capable of extending service into unserved areas. Instead of maintaining an ambiguously defined and unworkable “open access” mandate, Charter recommends rejecting the “open access” mandate for the reasons discussed herein.

#### **PROJECT SITE CONTROL**

Two-year budget language relating to the Infrastructure Acceleration Grants program states that grant recipients must maintain site control through ownership or lease for at least 25 years (Substitute Senate Bill 5651, Chapter 296, Laws of 2022, § 1041(1)(d)(i)). The common sense and clear intent of this budget language is to ensure an eligible entity is to maintain legal authorization to the rights of way. Charter is taking this opportunity to highlight that this requirement is clearly met through cable franchise agreements that authorize long-term, legal access to the right-of-way and are renewable.

It is unreasonable to interpret the budget language as requiring ownership of the property on which the infrastructure is located. Such an interpretation is unworkable considering the full scope of broadband



infrastructure across the state. Any such interpretation would have the certain effect of being a disincentive to participate in the program and expansion of services.

Furthermore, any other interpretation of this clause is not only burdensome and overly prescriptive, but could have the negative effect of stifling future innovation and investment in the very communities it is intended to serve. Broadband is not static infrastructure such as a bridge or water main, but is an evolving technology that is subject to future innovation and invention.

### **CHARTER'S INITIATIVES TO CLOSE THE DIGITAL DIVIDE**

In recent years, Charter has advanced deployment in rural areas throughout our 41 state footprint. Indeed, Charter has received tens of millions of dollars from over 45 different state and local grant programs (frequently with Charter investing substantial additional money of its own) over the last few years. However, Charter, and likely other ISPs, would not participate in the Infrastructure Acceleration Grants program if the broadly defined "open access" mandate were maintained. ISPs will invest elsewhere under those circumstances. Moreover, the lack of robust participation in the Infrastructure Acceleration Grants program resulting from an "open access" requirement would potentially deny unserved communities from taking advantage of programs and benefits provided by Charter and other ISPs to address the digital divide.

Charter is committed to supporting the communities we serve and has a history of helping to close the digital divide with a comprehensive approach aimed at broadband access, adoption and affordability. To increase adoption and access to technology, Charter offers philanthropic support to community organizations through Spectrum Digital Education grants, which provide computers, digital education classes, and technology labs for thousands across the country.

Charter was a day one participant in both the Federal Communications Commission's (FCC) Emergency Broadband Benefit program and Affordable Connectivity Program (ACP), which makes quality, high-speed internet service available at a low – or even at no – cost to eligible families in financial need. All Spectrum Internet and legacy plans — including Spectrum Internet Gig — are eligible for ACP credits. All current Spectrum Internet plans have no data caps, no modem fees, and no contracts, and customers can cancel anytime without penalty.

Charter also offers various low income programs to qualifying customers.

- New customers who qualify for an ACP credit are also eligible to subscribe to Spectrum Internet 100 service (100 Mbps/10 Mbps) at the current promotional price of \$29.99; for these ACP customers, there would be no service charge once the ACP credit is applied during the promotional period. Additional information is available at <https://www.spectrum.net/support/internet/affordable-connectivity-program>.
- Spectrum also offers a low-cost broadband service to low-income students and seniors through our Spectrum Internet Assist ("SIA") program. SIA provides high-speed broadband (30Mbps/4Mbps) at a rate of \$17.99 per month (plus \$5 per month for Wi-Fi service) to

qualifying households. SIA is available to qualifying households of which at least one member is a recipient of (1) the National School Lunch Program (NSLP), (2) the Community Eligibility Provision (CEP) of the NSLP, or (3) Supplemental Security Income (for applicants age 65+ only).

Charter's adoption and affordability programs align with the codified purposes of the WSBO to reduce barriers to connectivity. See RCW 43.33.534 (2) (c). It is critical that providers, such as Charter, who meet the full intent of the WSBO's mission, are not discouraged from participating in the Infrastructure Acceleration Grants program. Allowing wide participation of ISPs ensures that the full scope of programming and resources they bring are made available to currently unserved communities.

### **CONCLUSION**

Under RCW 43.330.534(2)(b), the WSBO is to consider funding approaches that will best serve underserved communities. Requiring open access networks runs counter to this purpose because it explicitly discourages the matching of public and private resources. We urge the WSBO to continue exploring ways of encouraging more partnerships with those like Charter who have already heavily invested in Washington, rather than discouraging that investment by requiring open access conditions.

Sincerely,



Stafford Strong  
Senior Manager, Government Affairs  
Charter Communications

cc: Whitney O'Neill, VP Govt. Affairs  
Torry Somers, VP Regulatory Affairs

bcc: T. Danysh

**From:** Todd Brandenburg <[todd@pocketinet.net](mailto:todd@pocketinet.net)>  
**Sent:** Tuesday, May 31, 2022 1:29 PM  
**To:** COM Washington State Broadband Office <[wsbo@commerce.wa.gov](mailto:wsbo@commerce.wa.gov)>  
**Subject:** WA State broadband comments on upcoming NOFO

### External Email

Hello, I'm letting you know that we participated in the listening sessions but there seems to be more questions than answers on the upcoming Spring NOFO. This document needs much needed details in order for possible applicants to comment effectively. We propose that the WSBO issue a NOFO Requirements Document and allow entities to properly comment on the details given a reasonable time to review.

I'd like to highlight several sections below if our observations:

- More details specified in the scoring matrix and rules. This will help you qualify and quantify each application submitted. For example. What happens when an application competes against another for the same points? What is the process to determine which applicant takes precedence over the other one? Are there additional criteria that is evaluated to reach a decision? If so, that needs to be communicated prior to application.
- Minimum speed to area: There is no distinction between terrestrial technology or satellite or mobile that either qualifies or disqualifies an area. "reliable wireline existing service" is mentioned but it is still unclear if this applies to fixed wireless, fiber or other services that are terrestrial based. This needs to be defined in our opinion. If this means terrestrial service that it needs to be addressed as such.
- Points schedule: Addresses lack broadband, unreliable service – 15 points This requirement is too subjective in my opinion. In any application having to prove for unserved or unreliable service by location is a huge task to ask. How will this be confirmed or audited by the State office?
- Wholesale Open Access: This is not mentioned or defined in the presentation. As stated in the Comcast public comments this is not a requirement of the ARPA, Treasury funds nor state law requires this provision. In many rural areas open access requirements does not solve any real problems because the communities are too small to support multiple service providers with high quality broadband Internet services. As a result, there is little to no customer service and incentive to serve the local community. It also does not promote investment by the service provider to offer competitive value-added services. Furthermore, since a third party actually provides operation & maintenance of the fiber network in the case of a fiber outage there is little to nothing that can be done to restore services in a timely manner.
- Public-Private Partnership scoring – 5 points. First off, if the State wants to encourage more funds to spread to rural communities than I would agree with Comcast's statement to up this scoring to 15 points and increase the match to 15%. Also, if wholesale open access is a requirement than it is doubtful that true public-private partnerships will be made even with a 10% private match requirement if they have to participate in a wholesale open access environment. This section seems to be in conflict with the intentions of promoting true public-private partnerships also because the applicant can not be a for profit private entity. Instead, a

local government will need to select a private section company to establish this part of the points. There is no mention of what a possible contract will look like to be considered eligible.

- Local Control requirements: We agree with Comcast statements regarding local control obligations for 25 years. It should be consistent with local right of way franchise authority for qualification. This section and responsibilities need to be carefully defined as most local governments will unlikely be interested in committing for 25 years because they don't understand the true costs of running and maintaining a fiber optic network. Most budgets are already stretched to take on new liability.
- For-Profit entities not eligible to apply: There is nothing in the ARPA regulations of these funds that would prohibit grant funds from being administered to for profit entities. Rather this is a state budget partisan issue, and we feel that in reality our investments in building high quality privately funded broadband networks for the past 22 years are in jeopardy of being over-built by state funds. How do we continue to service our customers if we are forced out of a market by state grant funds if we cannot equally apply for such funds to further improve our networks and serve the residents of WA State?

PocketiNet Communications provides Internet services to 22 rural communities in E. WA through fiber optics and fixed wireless access systems. We take the time to treat each customer with respect and honor with local, caring customer support. For the past 22 years PocketiNet has re-invested 100% of its profits back into building a better communications network to serve its customers.

Thank you for your time and attention. Would be glad to explain or clarify any point above.

Todd Brandenburg



**TODD BRANDENBURG**

President & CEO

PocketiNet Communications, Inc.

(509) 593-4706 | [todd@pocketinet.net](mailto:todd@pocketinet.net)

2919 East Isaacs Avenue | Walla Walla, WA 99362

[www.pocketinet.com](http://www.pocketinet.com)