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FISCAL IMPACT REPORT

SPONSOR <u>HGEIC</u>	LAST UPDATED <u>03/13/23</u>
	ORIGINAL DATE <u>02/24/23</u>
SHORT TITLE <u>Transfer Connect NM Grant Program</u>	BILL NUMBER <u>CS/House Bill 262/HGEICS/aHAFC</u>
	ANALYST <u>Hitzman</u>

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	See Fiscal Implications	See Fiscal Implications	See Fiscal Implications		Nonrecurring	Connect NM Fund/General Fund

Parentheses () indicate expenditure decreases.
*Amounts reflect most recent analysis of this legislation.

Relates to an appropriation in the General Appropriation Act
Relates to Senate Bill 269

Sources of Information

LFC Files

Responses Received From

Department of Information Technology (DoIT)/Office of Broadband Access and Expansion (OBAE)
Public School Facilities Authority (PSFA)
Department of Transportation (NMDOT)

No Response Received

Department of Finance and Administration (DFA)
Public Regulation Commission (PRC)
Higher Education Department (HED)
Public Education Department (PED)
Indian Affairs Department (IAD)

SUMMARY

Synopsis of HAFC Amendments to House Bill 262

The House Appropriations and Finance Committee amendments to House Bill 262 (HB262) add back language that gives the Legislature appropriative authority over money in the connect New Mexico fund and requires disbursements be made upon warrants drawn down by the secretary of

the Department of Finance and Administration (DFA). The amendments also remove proposed language appropriating the money in the fund directly to the office.

Synopsis of HGEIC Substitute for House Bill 262

The House Government, Elections and Indian Affairs Committee substitute for House Bill 262 (HB262) amends the Connect New Mexico Act, clarifying definitions of “broadband infrastructure” to mean any facilities and equipment used to provide internet service, excluding private telecommunications equipment, and provides a new definition for “end user” and “internet,” meaning a global set of computing and electronic devices interconnected through networking infrastructures to provide data and information sharing. The bill also provides a definition for the “broadband office,” meaning the Office of Broadband Access and Expansion (OBAE) and notes that quality of service standards for broadband be determined by the office, rather than the department.

The bill updates the definition of “underserved” to refer to areas or properties that do not have access to internet services offering speeds greater than 100 megabits per second (Mbps) downstream and 20 Mbps upstream as well as definitions of “unserved” to refer to those receiving less than 25 Mbps upstream and 3 Mbps downstream.

Relating to the duties of the connect New Mexico council, the bill provides that the council shall advise and make recommendations to the broadband office regarding coordination of broadband programs and projects, rather than previously providing for the coordination to occur by the council in consultation with the department. Further, the council shall advise the office concerning the development of a grant program and make recommendations for awards, rather than requiring the council to evaluate and prioritize grant proposals itself. The council shall also adopt rules regarding the administration of grants—rather than to establish a program--from the connect New Mexico fund.

Regarding digital equity, the bill replaces references to the department with references to the office.

The bill amends sections of the act relating to the connect New Mexico fund. Regarding money in the fund in the HGEIC substitute of the bill; rather than being subject by the Legislature to appropriation to the council for purposes of administering the connect New Mexico grant program, the money shall now be appropriated to and administered by the office pursuant to rules adopted by the council for issuing grants. However, HAFC amendments to the bill add back the language authorizing the Legislature to appropriate from the fund and removes the language appropriating the money in the fund directly to the office. The bill then clarifies references to the council to instead refer to the “broadband council,” who shall implement a broadband grant program and expand broadband infrastructure and services. The bill provides that the council may administer awards to private entities for broadband infrastructure for “primarily residential purposes.” For administering grants, the broadband office, rather than the council, shall give consideration to certain criteria. The bill adds that the office shall also consider the extent to which the grantee contributes matching funds or in-kind support for grant awards to private entities, as well as the number of existing residences to which internet service would be made available and the extent to which the project fosters digital equity.

Regarding reporting, the bill replaces references to the council with references to the office.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

While the bill does not contain a new appropriation, HAFC amendments to HB262 amend the Connect New Mexico Act and items regarding the connect New Mexico fund. The fund has a balance of \$100 million for purposes of administering grants, of which only \$844.3 thousand has been spent (as of December 2022).

The Department of Information Technology (DoIT) notes it will likely need an additional \$450 thousand to support needed FTE, supplies, and human resource functions to support OBAE in its administration of grant awards. This impact would be scored as recurring because the office will likely require ongoing administrative support from DoIT in future years. However, it is not included in the above estimated operating budget impact table because these administrative costs would be incurred regardless of whether the program is administered by the office, as proposed in HB262, or the council, under existing statute.

SIGNIFICANT ISSUES

The HGEIC substitute for HB262 removed language specifying that money in the connect New Mexico fund “is subject to appropriation by the legislature” to the council for administering grants. Some funds, such as those related to elections, are established in a way that allows agencies to access funding for intended purposes without direct appropriations being required. However, HAFC amendments to the bill add back this authority and do not explicitly move the balance to OBAE.

As noted by OBAE, HB262 provides updated definitions of “broadband infrastructure” to now include “internet,” which is an “essential service” under Subsection H of the New Mexico Constitution, Article 9, Section 14 (Anti-Donation Clause) and “allows grant awards to private entities for broadband infrastructure to provide service primarily for residential purposes, in accord with Subsection H of the New Mexico Constitution, Article 9, Section 14 (Anti-Donation Clause).”

However, the Public School Facilities Authority (PSFA) notes “Section 14 of Article IX of the New Mexico Constitution prohibits state or local governments to provide direct or indirect donations or aid to any person or organization. As such, the grant awards to private entities proposed in this Bill must be awarded in a manner that does not conflict with the anti-donation clause of Section 14 of Article IX of the New Mexico Constitution.”

The Legislative Education Study Committee (LESC) notes similar concerns regarding anti-donation provisions:

OBAE will need to follow all relevant state procurement laws and ensure any RFPs and contracts executed under HB262 do not constitute the donation of public funds to a private company. This may require that the state remain the indisputable owner of any broadband infrastructure installed by a private ISP.

The Attorney General’s Office also provides the following regarding anti-donation:

Any private grant money given under HB262 (Section 5) would need to be done in accordance with Article 9, Section 14 of the State of New Mexico Constitution, the “antidonation clause.” The antidonation clause states, in part, that “neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation.” However subsection (H) of the antidonation clause allows an exception for the purpose of providing “essential services primarily for residential purpose if the assistance is granted pursuant to general implementing legislation approved by a majority vote of those elected to each house of the legislature” and defines “essential service” as including internet. Therefore, OBAE would just need to follow all relevant state procurement laws and the antidonation clause.

Prior LFC reports on broadband implementation have noted concerns and limitations within the DoIT Act that may limit the agency’s ability to own and operate infrastructure used by private entities.

The bill changes some references to the council to instead refer to the “broadband council,” however the bill does not provide an updated definition of “broadband council” in alignment with this change. The bill also provides that the council may administer awards to private entities for broadband infrastructure to provide primarily residential purposes, however the bill does not specify what a “primarily residential purpose” would include or how that would be determined.

Further, PSFA, which has a stake in the administration of broadband grant programs as the administrator of \$10 million in broadband funding each year and as an eligible recipient for such grants as provided for in HB262. PSFA provides the following:

In 2021, SB144 [the Remote Education Technology Infrastructure Act] required the Public School Capital Outlay Council (PSCOC) to develop guidelines for a statewide education network (SEN) integrating regional network hubs and allowed the PSCOC to provide grant assistance from the Public School Capital Outlay Fund (PSCOF) to fund the SEN in accordance with the guidelines it developed. In turn, the Public School Facilities Authority (PSFA) released a Request for Proposals (RFP) to be issued integral to the development of a SEN. The RFP requested proposals from qualified providers for the Backbone, Last Mile Connections and Commodity Internet for participating school districts and charter schools. Since the issuance of the RFP, the Office of Broadband Access and Expansion (OBAE) and the PSFA have been collaborating and coordinating efforts to establish the SEN. Due to the OBAE’s expertise and because the OBAE is better positioned to implement the SEN, the PSCOC and New Mexico Department of Information Technology (DoIT) contemplate entering into an Intergovernmental Agreement whereby, the OBAE will manage the SEN as well as the PSFA Broadband Deficiencies Correction Program (BDCP) staff.

It should be noted prospective grant awardees may feel restricted in their ability to apply for such grant programs if rules require more favorable scoring for provide matching or in-kind contributions for private entities. This has sometimes been referred to colloquially as “pay to play,” where prospective awardees are scored more favorably for contributing a higher level of financial support to a prospective project, essentially favoring those players who can more easily afford to contribute and often placing smaller entities at a disadvantage who are less able to contribute. On the other hand, the provision as written in HB262 only states the office shall give consideration to—not necessarily a preference to—those factors.

The bill as written also requires consideration of the extent to which grant awardees functionally expand their services and foster digital equity. Proponents of the provision may assert that requiring some level of contribution, especially from private entities, creates a stronger incentive to provide services in needed areas since they would have additional “skin in the game.” Further, this could be seen as an attempt to require some additional level of oversight of private entities to ensure their projects are aligning with state digital equity priorities and are expanding quality services as intended. However, the details of the final scoring criteria would need to be determined during rulemaking, and it is unclear how this would address such concerns regarding “pay to play;” for example, it is unclear whether projects demonstrating both a large impact on services in a given area as well as providing some matching contribution would be scored more favorably than those projects that only provide some level of matching contribution but with a lower demonstrated impact on services.

By moving the responsibilities for administering grants and adopting rules from the council to the office, the council’s function under HB262 becomes primarily advisory. The council has met monthly since January 2022 and consists of 16 members. The council has established several working groups to assist in developing policy and project recommendations regarding things like mapping, digital equity, workforce, and other issues pertaining to broadband access and expansion.

There may be concerns regarding council authorities, as it is unclear the extent of changes that would be required under HB262 regarding the relationship between the council and the office, especially when it comes to establishing priorities and making recommendations for action. Further, this bill changes duties of an independent council but it is unclear whether council members had the opportunity to provide an opinion on the contents of this bill, so it is unclear if the proposals under HB262 would result in conflict between the council and the office regarding its administrative duties and functions and whether activities and working groups already established under the council would remain in place.

Although the bill provides for a definition of underserved (getting less than 100/20 Mbps) and unserved (getting less than 25/3 Mbps) in alignment with current federal recommendations, the bill cites these specific speed thresholds instead of providing for alignment with Federal Communications Commission (FCC) standards as they change. By noting a particular speed threshold, the bill may require frequent updates as federal speed standards change over time. Further, definitions in this act should align with definitions in other sections of Chapter 63, including the NM Telecom Act 63-9A-3, the Rural Telecom Act 63-9H-3, and other acts including the Local Economic Development Act, 5-10-3. The latter includes:

B. "broadband telecommunications network facilities" means the electronics, equipment, transmission facilities, fiber-optic cables and any other item directly related to a system capable of transmission of internet protocol or other formatted data at current federal communications commission baseline speed standard, all of which will be owned and used by a provider of internet access services.

PERFORMANCE IMPLICATIONS

OBAE notes “The \$100 million in the CNMF is [currently] subject to disbursement pursuant to a rule driven grant program. Rules are under development, but the funds have not been accessible because rule making is still in process.” It may be the intention of this bill, at least in part, to accelerate the rate at which funds can be disbursed from the fund by opening up the uses and

moving the funds to OBAE, which arguably has more staff resources, time, and capacity to implement a full grant program than the council that meets only monthly and relies on staff support from DoIT. However, under HB262, the bill specifies that any awards made from the funds need to occur pursuant to rules adopted by the council. Therefore, as written, the bill would likely not have the effect of speeding up such disbursements since that disbursement still relies on rules being adopted and in place. The bill may ease the level of review and approvals needed for those awards by the council but would not likely result in faster distribution for this reason.

ADMINISTRATIVE IMPLICATIONS

Under existing law, the council and OBAE are administratively attached to DoIT. OBAE notes “the department and OBAE have been staffing and fulfilling the operational needs of the CNMC. This provision formalizes current relationships and operating practices.” The bill also seems to clarify some relationships between the office and council but moves some duties previously under the council to the office, which could have administrative impacts as the office becomes the administrator of such funds.

As noted by OBAE;

OBAE and the Council are administratively tied to the Department of Information Technology (DoIT), which handles all administrative functions performed by program support. If HB262 is enacted, the administrative functions that DoIT would have provided to support the Council’s grant program will instead be provided to support the OBAE grant program. Shifting administrative functions will have no fiscal impact on DoIT above and beyond the fiscal impact under the predecessor law, [the Connect New Mexico Act] HB10.

Grant program support for the Council will increase funding to P789 (OBAE) and will impact DoIT’s Administrative Services Division (ASD). Based on historical information from activities associated with the managing large grant funds, ASD conservatively estimates a \$450 thousand annual impact for additional FTE and other costs such as equipment, office supplies, and HCM fees.

HB262 should have no administrative or fiscal impact to the Department of Transportation (NMDOT) because NMDOT is already a member of the Connect NM Council. The proposed amendments do not alter or affect the existing obligations of NMDOT under the Connect New Mexico Act.

The bill also moves the responsibility of developing reports to the department and the office, rather than the department and the council, essentially removing the council’s role in reporting on access to and quality of service to broadband across the state. While this may be in line with the administrative capacities of each entity—with the department and office having more time and resources to develop and present reports—this may make it more difficult to implement the intended functions of the council under HB262, intended to advise and make recommendations to the broadband office regarding coordination of broadband programs and grant awards. The council may desire to maintain its current, more hands-on role in coordinating with the office to assist in data collection and reporting, which could help the council meet its duties.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

In addition to \$25 million in new general fund revenues, Senate Finance Committee amendments to House Bill 2 (the General Appropriation Act of 2023) re-appropriates \$99 million—nearly all of the remaining balance—from the connect New Mexico fund to the office to fund grant programs established under department rules and administered by OBAE in FY24 and FY25.

The bill also relates to Senate Bill 269, which proposes amendments to the DoIT Act that could possibly address concerns regarding DoIT and OBAE ownership over shared infrastructure in the context of anti-donation concerns.

TECHNICAL ISSUES

The Attorney General’s Office suggests defining or clarifying “primarily residential purposes” on page 10, lines 24-25.

OTHER SUBSTANTIVE ISSUES

A 2022 LFC evaluation on broadband funding, coordination, and oversight notes the council lacks membership from key stakeholders and representatives, including the Public Education Department and the Public Regulation Commission, both of which have important roles in broadband deployment in New Mexico. HB262 does not address this concern and, while amending the duties of the council, does not provide any changes to membership as written.

ALTERNATIVES

If it so desired, the Legislature can already appropriate funds directly to the office for such purposes without being limited by the provisions governing the fund or could appropriate to the fund and provide for further uses. As an example, it is proposed in the General Appropriation Act for FY24 to both appropriate new money to the office for matching grants and other initiatives as well as re-appropriate some of the connect New Mexico dollars to the office for broader purposes, including to administer grants.

OBAE notes its intention to propose the following amendments:

- Strike “broadband council” to “broadband office” at p.9.
- At p. 12, replace “the department, in coordination with the broadband office” with “the broadband office, in coordination with the council.”

The bill could include language maintaining the Legislature’s appropriative authority and still maintain the authorized uses as described:

Money in the fund is subject to appropriation by the legislature to the broadband office for the purpose of issuing grants pursuant to rules adopted by the council pursuant to Section 63-9K-4 NMSA 1978 as pursuant to Subsection B of this section.