

**ADMINISTRATIVE RULE REVIEW SUBCOMMITTEE
OF THE
JOINT BUDGET COMMITTEE**

**Wednesday, April 10, 2024
Upon Adjournment of Joint Budget Committee
Room A, MAC
Little Rock, Arkansas**

- A. Call to Order**
- B. Adoption of Subcommittee Rules**
- C. Rules Filed Pursuant to Ark. Code Ann. § 10-3-309**

1. DEPARTMENT OF COMMERCE, ARKANSAS ECONOMIC DEVELOPMENT COMMISSION (Glen Howie, Allison Hatfield)

a. SUBJECT: Arkansas BEAD Challenge Process

DESCRIPTION: The Arkansas BEAD Challenge Process rule is intended for the Arkansas State Broadband Office to execute, administer, and guide the federal Broadband Equity, Access, and Deployment (BEAD) Program in Arkansas, specifically the mapping challenge process. The Arkansas State Broadband Office will publish the Arkansas BEAD Funding Map, identifying locations eligible for BEAD funding. This proposed rule details the process for challenging the Arkansas BEAD Funding Map.

Key Points

- The mapping challenge process will consist of four phases: an initial 7-day period, followed by three 30-day periods.
- Eligible challengers include units of local government, nonprofit organizations, and internet service providers.
- There are four broad categories of allowable challenges, including planned or existing service, enforceable commitments, provider service level, and community anchor institution classification.

PUBLIC COMMENT: This rule was filed on an emergency basis and was reviewed and approved by the Executive Subcommittee on November 16, 2023. With respect to the permanent promulgation, a public hearing was held on March 4, 2024. The public comment period expired on

March 10, 2024. The agency provided the following summary of the comment it received and its response thereto:

Commenter's Name: Joe Molinaro

Commenter's Business/Agency: Arkansas Cable Telecommunications Association (ACTA)

Summary of Comment: Recognizing the complexity involved in the challenge process, most states have made modifications to ensure the challenge process allows sufficient time to accurately and efficiently identify unserved and underserved locations. With new information and development of activities from both the NITA and other states, the ACTA urges that you consider our suggested modifications in the development of a permanent rule for the Arkansas BEAD Challenge Process. These recommendations are:

- Providing a 45-day timeframe for the challenge process, during which all challenges must be submitted. The State should forward challenges during as soon as they are filed and verified to providers to allow them to start gathering rebuttal evidence.
- Providing a 45-day timeframe for the rebuttal process that begins after the end of the challenge process.
- Adopting an overall timeframe of 120 days for the entire challenge process, which will provide the State at least 30 days rebuttal evidence submitted earlier in the rebuttal process.
- Adopting a "Rolling Rebuttal" process that allows providers submitting rebuttal evidence to do so at any time during the rebuttal process but does not add any additional days to the rebuttal timeframe. Five states have chosen to adjudicate challenges on a rolling rebuttal basis.

Agency's Response to Comment: The Arkansas State Broadband Office (ASBO) employs a phased approach, strategically allocating its systems, processes, and staff to ensure complete focus on each stage of the challenge process. This method maximizes efficiency and minimizes the potential for errors. Implementing a rolling rebuttal system would introduce additional complexities and potentially strain our resource capacity.

ASBO is implementing a 90-day challenge process to mitigate the risk of non-compliance with the NTIA's aggressive schedule for Final Proposal submission. This schedule maximizes time allowed for grant application and award processes, and has been determined to be in the best interest of broadband stakeholders.

Were any changes made to the Proposed Rules as a result of this Comment? If so, please describe. No

Suba Desikan, an attorney with the Bureau of Legislative Research, asked the following questions and received the following answers thereto:

1. In the emergency promulgation, the agency included language concerning the qualifications for receiving BEAD funding, labor standards and protections, workforce readiness, low-cost broadband service option, and certification of compliance with BEAD requirements. Why was this language omitted in the permanent promulgation? **RESPONSE:** This language was omitted because the rule at issue pertains to two separate approvals from the federal government: (1) the challenge process and (2) the grant execution process. Although we anticipated receiving approval on the grant execution process by February 1, 2024, timely for the permanent rule promulgation process, as of date, we have not received approval. Therefore, we excluded this language in the permanent rule.

2. Other than the changes noted above in question 1 and the omission of the authority section, were there any other differences between the emergency rule and proposed permanent rule? **RESPONSE:** (1) The proposed permanent rule's language includes only the challenge process. Sections 5-9 of the emergency rule outlined execution of the BEAD funding guidelines and implementation. As described in Question #1 above, the agency had not received approval to from the federal government by February 1, 2024, thus we excluded that language from this proposed permanent rule. It will be included in a different permanent rule upon receiving federal approval. (2) Although not a material change, Section 3.6 Evidence and Review Approach, pg. 8 Letter P [of] the emergency rule has a specific date of "June 30, 2024" for the broadband to be deployed after the challenge process begins. In the proposed permanent rule, we updated the language allow "6 months" after the challenge process begins.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency indicated that the proposed rule has a financial impact. Specifically, the agency indicated that the Arkansas State Broadband Office has allocated up to \$450,000 to implement this one-time process, using federal grant dollars intended for said purpose. The agency clarified that there is no cost or impact to state general revenue, and that there is no ongoing cost – federal, state, or otherwise.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 15-4-209(a)(1), in accordance with state and federal law, the Arkansas Economic Development Commission shall administer grants, loans, cooperative agreements, tax credits, guaranties, and other incentives, memoranda of understanding, and conveyances to assist with economic development in the state. Further, pursuant to Ark. Code Ann. § 15-4-209(b)(5), the commission may promulgate rules necessary to implement the programs and services offered by the commission.

2. **DEPARTMENT OF FINANCE AND ADMINISTRATION, ARKANSAS RACING COMMISSION (Doralee Chandler)**

a. **SUBJECT: Rule 2 – Application for Casino Gaming License and Renewal**

DESCRIPTION: Pursuant to Amendment 100 of the Constitution of the State of Arkansas of 1874, the Arkansas Casino Gaming Amendment of 2018, the Arkansas Racing Commission shall promulgate rules governing the manner the Commission considers applications for issuance of casino licenses.

The rules promulgated in 2018 did not contemplate steps to accepting and opening a new application process if a license was not renewed, surrendered, revoked by the Commission, or voided by the Court. These rules are necessary to open up a new application period, correct formatting and grammatical errors, and provide consistency with Amendment 100.

PUBLIC COMMENT: No public hearing was held on this rule. The public comment period expired on March 8, 2024. The agency provided the following public comment summary:

Public comment period expired on March 8, 2024. There was no public hearing held. A notice of public comment period was posted in the newspaper for three consecutive days beginning on February 7, 2024. The Arkansas State Racing Commission received nine (9) written public comments during the public comment period. There was no change to the proposed rules at the conclusion of the public comment period.

The Commission received three (3) letters submitted from two Pope County residents objecting to the rules being amended to create a new open application process pursuant to the residents' objection to a casino being placed in Pope County.

Commenter Name: Lisa Reeves, Pope County resident (February 15, 2024)

1. Ms. Reeves voted to keep the casino out of her county. She does not want the casino and asked the Commission to stand with the voters in her town.

2. Ms. Reeves is seeking for the rules to be rejected in that it will allow a new application period for the casino and the citizens have been fighting for years to keep the county safe for the residents and children by keeping it free from casinos.

RESPONSE: Amendment 100, § 4(k) states that the Arkansas Racing Commission shall award a casino license to a casino applicant for a casino to be located in Pope County within two miles of the city limits of the county seat. In order to accomplish the issuance of the license as required by Amendment 100, the Commission needs to move forward with the proposed rules. No changes made.

Commenter Name: Shanean Rennie, Pope County resident. (February 15, 2024)

1. Ms. Rennie is seeking for the rules to be rejected in that it will allow a new application period for the casino and the citizens have been fighting for years to keep the county safe for the residents and children by keeping it free from casinos.

RESPONSE: Amendment 100, § 4(k) states that the Arkansas Racing Commission shall award a casino license to a casino applicant for a casino to be located in Pope County within two miles of the city limits of the county seat. In order to accomplish the issuance of the license as required by Amendment 100, the Commission needs to move forward with the proposed rules. No changes made.

The Commission received two (2) letters setting out requested language to modify the proposed rule.

Commenter Name: Lane Scott, Pope County Justice of the Peace (March 7, 2024)

1. Mr. Scott requested that the Commission add a subsection (19) to section 2.13 adding additional suitability requirements that allows the Commission to deem an applicant unsuitable if the activity any the part of an applicant is determined by the Commission to reflect discredit upon the State of Arkansas or the industry.

RESPONSE: Amendment 100 § 4(g) and (h) sets for the documents required to be presented by an applicant as well as the background check requirements for suitability. The addition of suitability requirements beyond those contained in Amendment 100 may be deemed arbitrary and capricious by the courts, if challenged.

Commenter Name: Hans Stiritz, Pope County Resident (March 7, 2024)

1. Mr. Stiritz maintains that the language in the rules presents insufficient terms for the use of the merit criteria in award or denial of

an application. He seeks to have additional criteria including an independent review examining the positive and negative impacts of the casino proposal. He believes that the rules should contain more guidance for the scoring process and ranking process in the rules.

RESPONSE: Rule 2.13(9)(a) (Selection Process and Criteria Based on Merit Section) provides the Commission with the authority to create criterion to be published with the notice of open application. Those requirements and scoring considerations do not have to be contained in the rules. Additionally, Rule 2.13(9)(c) and (d) provide that the merit criterion will be worth a number of points announced in the notice of open application period which will be totaled and ranked from highest to lowest. Specificity of the selection process and criteria is set out in the open application.

The public comments consisted of four (4) letters submitted extending support for the proposed rule changes pertaining to Rule 2 Application for Casino Gaming License and Renewal.

Commenter Name: Ben Cross, Pope Co. Judge (March 4, 2024)

1. Judge Cross expressed his support and endorsement of the proposed changes to the rule to streamline and provide a definitive meaning in correlation to the laws enacted by Amendment 100.

RESPONSE: Comment considered. No changes made.

Commenter Name: Roger Lee, Mayor of Dover Arkansas (March 5, 2024)

1. The mayor wants to support the proposed changes to issuing the license as the changes will simplify and speed up the selection process.

RESPONSE: Comment considered. No changes made.

Commenter Name: Dustin McDaniel, McDaniel Wolff, PLLC (March 7, 2024)

1. Mr. McDaniel supports the proposed rule as an effort to avoid future litigation. They are carefully constructed and do not constitute a substantive change to the Casino Gaming Rules.

RESPONSE: Comment considered. No changes made.

Commenter Name: Jordan Sowers, Justice of the Peace District 12 (March 8, 2024)

1. The justice of the peace supports the proposed changes to the rule as they were drafted to insulate the state from constant litigation and to expedite opening a new application period.

RESPONSE: Comment considered. No changes made.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency indicated that this rule has no financial impact.

LEGAL AUTHORIZATION: “The Arkansas Racing Commission shall administer and regulate casino licenses, including their issuance and renewal, and shall administer and enforce the provisions of [the Arkansas Casino Gaming Amendment of 2018] relating to all casino licensees.” Ark. Const. amend. 100, § 4(a). The Commission “shall adopt rules necessary to carry out the purposes of th[e] Amendment and perform its duties under th[e] Amendment.” Ark. Const. amend. 100, § 4(c). The Commission “shall issue four casino licenses[,]” with one casino to be located in each of the following counties: Crittenden, Garland, Jefferson, and Pope. Ark. Const. amend. 100, § 4(i)-(k).

Per the agency, these rules are being promulgated in response to *Cherokee Nation Businesses, LLC v. Gulfside Casino Partnership*, 2023 Ark. 153, 676 S.W.3d 368.

In *Cherokee Nation Businesses*, the plaintiffs argued that the Racing Commission violated Amendment 100 by awarding the Pope County casino license to two LLCs. *Cherokee Nation Businesses*, 2023 Ark. 153, at *3. The Supreme Court of Arkansas held that the license issued was “a legal nullity, void and of no effect” for two reasons. *Id.* at *1. First, one defendant’s only license application was “rejected for failure to meet the requirements of amendment 100[,]” and the defendant was therefore “not a ‘qualified applicant’ as required by amendment 100.” *Id.* at *8-9. Second, Amendment 100 “provides for one license to be awarded to one entity for one casino. . . . Nowhere in the text does it allow for joint or dual licensing to more than one applicant.” *Id.* at *9. Because the Racing Commission awarded the license to two separate legal entities, the court found that the award of the license violated Amendment 100 and that therefore the license was void. *Id.*

D. Adjournment