

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking
Proceeding to Consider Rules to
Implement the Broadband Equity,
Access, and Deployment Program.

Rulemaking 23-02-016

**COMMENTS OF THE CALIFORNIA BROADBAND & VIDEO ASSOCIATION ON
ADMINISTRATIVE LAW JUDGE'S RULING ISSUING STAFF PROPOSAL**

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Pursuant to the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure, the California Broadband & Video Association ("CalBroadband") respectfully submits these comments on the proposed Initial Proposal Volume I and Volume II rules prepared by Commission Staff ("Staff Proposal") for the Broadband Equity, Access, and Deployment ("BEAD") Program and served in the Administrative Law Judge's November 7, 2023 Ruling Issuing Staff Proposal ("Ruling").

I. INTRODUCTION

CalBroadband appreciates the Commission's efforts to efficiently and effectively connect all unserved and underserved Californians. The Staff Proposal includes several components that would help advance this goal, including prioritization of end-to-end fiber, a risk-based approach to subgrantee monitoring, and a recognition of the importance of flexibility in implementing certain BEAD Program requirements.

However, the Staff Proposal largely disregards a fundamental barrier to BEAD Program success in California: the anticipated multi-billion dollar gap between California's BEAD funding allocation from the National Telecommunications and Information Administration ("NTIA") and the cost of connecting all unserved and underserved locations in the state. The

Commission made clear in the BEAD Five-Year Action Plan that the state lacks sufficient funds to connect all unserved and underserved locations.¹ Despite this finding, the Staff Proposal all but ignores the most effective means of bridging this gap—the Minimal BEAD Outlay scoring criterion—allotting it the lowest amount of points out of all primary criteria and providing little incentive for *any* applicant to go beyond the required 25% project match. In so doing, the Commission would leave billions of dollars in private broadband co-investment on the table. Moreover, if left unchanged, the Staff Proposal would undermine the Commission’s ability to maximize funding to connect all unserved and underserved Californians.

The failure to “rigorously explore ways to cover a project’s cost with contributions outside of the BEAD program funding” and “incentivize matches of greater than 25 percent from subgrantees wherever feasible” is just one of several concerns.² CalBroadband also objects to the Staff Proposal’s inclusion of conditions—including the proposed requirements for affordability and project selection—that are inconsistent with the Infrastructure Investment and Jobs Act (“IIJA”) and NTIA’s directive that the Commission adopt a fair, open, equitable, and competitive selection process. Among other issues, the proposed affordability scoring criteria are inconsistent with the IIJA’s express prohibition of broadband rate regulation and would interfere with ISPs’ ability to sustain the networks built with subsidy funds. Specifically, any ISP that feels compelled to offer very high-speed broadband plans at below-market prices will be more likely to face challenges in covering the ongoing and significant costs of network

¹ BEAD Five-Year Action Plan at 105 (Aug. 28, 2023) (“California expects the cost to serve these locations using a reliable wireline connection to remain significantly higher than NTIA’s BEAD allocation,” estimating a multi-billion dollar funding gap).

² NTIA, *Broadband Equity, Access, and Deployment Program Notice of Funding Opportunity 20-21* (May 13, 2022) (“NOFO”), <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf>.

operation, maintenance, and upgrades needed to operate future-proof networks. While public ISPs could theoretically address revenue shortfalls by further burdening taxpayer funds,³ that cannot be counted on, nor is that a prudent option for broadband deployment. Moreover, this option is not available for private ISPs.

NTIA has made clear that the “unprecedented effort” of successfully achieving the BEAD Program’s goals will require that “each Eligible Entity maximize incentives for provider participation.”⁴ The Initial Proposal should promote strong and viable projects from subgrantees with the experience, expertise, and financial commitment to efficiently deploy broadband networks and to reliably and sustainably operate them long-term, after Program funds have been expended. Instead, the ultimate effect of the current Staff Proposal would inevitably be to deter participation by qualified, experienced ISPs. Disadvantaging qualified, experienced ISPs in the project selection process will lead to funds being awarded to inexperienced subgrantees who are not capable of sustaining long-term service or otherwise fulfilling their BEAD Program obligations, to the detriment of unserved and underserved Californians. The Commission should avoid imposing unnecessary provisions that go beyond the BEAD NOFO guidance and focus the

³ See, e.g., Christopher S. Yoo et al., *Municipal Fiber in the United States: A Financial Assessment*, 46 *Telecommc’ns Pol’y* 1, 23-24 (2022), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3448&context=faculty_scholarship (finding, based on an analysis of 15 public networks’ adjusted nominal cash flows between 2011 and 2019, that none were viable in the short-term, either requiring “infusions of cash from outside sources or debt relief through refinancing...”); T. Randolph Beard et al., *The Law and Economics of Municipal Broadband*, 73 *Fed. Commc’ns L.J.* 1 (2020), http://www.fclj.org/wp-content/uploads/2021/01/73.1.1_Municipal-Broadband-Article-Final-Proof.pdf (detailing numerous instances, including in Provo, Utah, Burlington, Vermont, and Tacoma, Washington where public networks were unable to generate revenue to sustain the network, saddling taxpayers with millions dollars of debt); Charles M. Davidson & Michael J. Santorelli, N.Y. L. Sch. Advanced Commc’ns L. & Pol’y Inst., *State Broadband Profile - Ohio*, at 14 (Feb. 2022) (describing how the public network in Fairlawn, Ohio “has had to prop the system up with annual transfers from its general fund”).

⁴ *Tailoring the Application of the Uniform Guidance to the BEAD Program; Request for Comments*, 88 *Fed. Reg.* 42918, 42920 (July 5, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-07-05/pdf/2023-14114.pdf> (“NTIA Part 200 Request for Comment”).

program on the core purpose of this BEAD proceeding: to create rules that maximize participation and efficiently deploy broadband service to connect all unserved and underserved Californians. Toward this end, CalBroadband recommends the following changes to Volume II and Volume I of the Staff Proposal:

Volume II

- ***Minimal BEAD Outlay Criterion:*** Utilize a scaled approach to award points, ranging from 0 points if $\leq 25\%$ of cost covered up to 40 points for 85% or more of cost covered.
- ***Project Selection:*** Select “Option 1: Applicants define Project Areas” but remove the reference to census block groups as the minimum geographic unit; de-conflict based on average subsidy-per-location; allow applicants to de-scope cost outlier locations; conduct any negotiations with applicants in a fair and transparent manner; and conduct additional funding rounds.
- ***Extremely High Cost Threshold (“EHCT”):*** Set based on the applications received rather than prior to the application window.
- ***Affordability Criterion:*** Adopt an objective “reasonable comparability” benchmark for the affordability criterion instead of arbitrary and unlawful rate regulation, and decrease points allotted to no more than 15 points.
- ***Low-Cost Service Option:*** Require a 100/20 Mbps low-cost service option for income-constrained households that is consistent with the low-cost option(s) an applicant makes available in unsubsidized areas of the state and is below the maximum ceiling of the residential rates provided in the Urban Rate Survey (“URS”). Adopt an eight-year definition of the “life of the infrastructure” for which the low-cost service option must be available.
- ***Fair Labor Practices Criterion:*** Score criterion based *only* on the applicant’s demonstrated record and plans to comply with federal labor and employment laws.
- ***Speed to Deployment Criterion:*** Increase allotment to 10 points and consider scale and potential uncontrollable delays when evaluating this criterion.
- ***Equity Criterion:*** Allot points based on whether applicant will serve a greater percentage of unserved and underserved locations, relative to the total number of locations proposed.
- ***Resilience Criterion:*** Clarify whether the Commission will consider factors besides location in a High Fire-Threat District (“HFTD”) and that no specific mitigation measures are required to meet this criterion.

- **Letter of Credit:** Provide alternative means for applicants to demonstrate creditworthiness beyond a letter of credit.
- **Technical, Financial, Managerial and Operational Credentials:** Apply a risk-based model to evaluate credentials, and allow alternatives to engineer requirements to certify network designs.
- **BABA Waiver:** Adhere to the federal government’s Build America Buy America (“BABA”) waiver.
- **Payments:** Follow NTIA guidance on the application of the Federal Uniform Guidance (i.e., Part 200).
- **Reporting:** Adopt a semi-annual reporting requirement, consistent with the NOFO.

Volume I

- **Timeline:** Provide 45 days for all challenge submissions, followed by another 45 days for all rebuttals, and require local governments/nonprofits to conduct a pre-screening process to remove frivolous or incomplete challenges submitted by individuals.
- **Speed Tests:** Exclude the proposed optional speed tests from the challenge process.
- **Fixed Wireless Modification:** Designate *all* locations served only by terrestrial licensed fixed wireless as “underserved.”
- **Community Anchor Institutions:** Evaluate community needs prior to classifying a Community Anchor Institution (“CAI”) as BEAD-eligible.
- **Challenge/Rebuttal Evidence:** Make targeted changes to the evidentiary requirements that will ensure the Commission can implement an administratively efficient, accurate, and reliable challenge process.
- **Area and MDU Modification:** Exclude the proposed optional area and Multiple Dwelling Unit (“MDU”) challenges.

Additionally, CalBroadband submits for consideration an **Appendix** of redlined and/or alternative text proposals regarding several key elements of Staff Proposal.

II. VOLUME II: BRIDGE THE FUNDING GAP

The Commission estimates that the cost to provide service to all unserved and underserved locations in California will “far exceed[] its BEAD allocation and available State

funding,”⁵ amounting to an apparent *multi-billion* dollar funding gap.⁶ Thus, the Commission should put a premium on adopting policies that maximize the reach of the state’s available funding, such as by incentivizing efficiency and the contribution of matching funds from private investment. Unfortunately, the Staff Proposal misses opportunities to bridge this gap. If adopted, certain policy proposals would actually expand this gap, making it even harder for California to achieve the BEAD Program’s goal of connecting all unserved and underserved locations with end-to-end fiber. Accordingly, CalBroadband urges the Commission to adopt policies that make the most of California’s BEAD funding: (1) “rigorously” prioritize the Minimal BEAD Outlay selection criterion, as directed by the NOFO;⁷ (2) select “Option 1: Applicants define Project Areas,” with certain modifications; and (3) adopt other safeguards to protect the competitive integrity of the subgrantee selection process.

A. Prioritize the Minimal BEAD Outlay Scoring Criterion

If the Commission wants to have enough funds to connect all unserved locations in California—let alone all underserved locations—it should strongly prioritize the Minimal BEAD Outlay scoring criterion to stretch the state’s BEAD allocation and other state funds as far as possible. Yet, the Staff Proposal would allocate only 15 of 100 points to this key criterion, which is the fewest points allotted among the primary criteria and fewer than the points allotted to other, optional criteria, which necessarily relegates it to a secondary criterion in violation of

⁵ Staff Proposal Volume II at 57, 13-15.

⁶ CPUC, *State of California Five-Year Action Plan, Broadband Equity, Access, and Deployment Program* 6-7 (Aug. 28, 2023), <https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/communications-division/documents/broadband-implementation-for-california/bead/california-bead-five-year-action-plan--final-draft--20230828.pdf> (discussing the estimated timeline and cost to connect all unserved and underserved locations in the State).

⁷ NOFO at 20-21.

the NOFO. CalBroadband urges the Commission to revise its proposed scoring to be consistent with the NOFO’s requirements.

The NOFO makes clear that states “must establish a competitive process designed to maximize the public benefits achieved through the subgrant process *by increasing subgrantee-provided match.*”⁸ Both the IIJA and NOFO recognize that the most efficient way to ensure BEAD funds can extend to serve all unserved and underserved locations will be through “rigorously” “incentiviz[ing] matches of greater than 25 percent from subgrantees wherever feasible.”⁹ The NOFO also recognizes that strong provider matches demonstrate applicants’ commitment to a project area—a necessary condition to achieve the BEAD goal of sustainable high-speed Internet service for years to come.¹⁰ These priorities are even more important in light of the potential *multi-billion* dollar funding gap that exists for California to meet the BEAD directive of connecting 100% of unserved and underserved locations in the state.

With this in mind, CalBroadband strongly opposes the negligible weight the Staff Proposal would give to Minimal BEAD Outlay. Compounding this error, applicants that propose simply to meet the 25% *minimum required threshold* for subgrantee match would automatically receive 10 points, with the remaining 5 points only available if an applicant proposes a substantial 50% match.¹¹ This approach fails to incentivize applicants to provide greater than a 25% match, and it also effectively neutralizes the relevance of this mandatory *primary* selection criterion to subgrantee selection, contrary to the NOFO’s intent. In fact, with an automatic

⁸ *See id.* at 37 (emphasis added).

⁹ *Id.* at 20-21; Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 60102(h)(3)(A)(i), 135 Stat. 429, 1198, 47 U.S.C. § 1702 (2021) (“IIJA”).

¹⁰ *See id.*

¹¹ Staff Proposal Volume II at 32.

10 points being awarded for any provider that agrees to the statutorily-mandated 25% match, the Staff’s Proposal effectively only allocates 5% of total points to Minimal BEAD Outlay, which means it would violate the NOFO’s requirement that Minimal BEAD Outlay be a primary criterion. Moreover, such a meager incentive structure does nothing to extend funding to connect all—or as many as possible—unserved and underserved Californians with future-proof broadband.

Assuming otherwise reasonable program rules, CalBroadband members stand ready and willing to help the Commission bridge this funding gap with force-multiplying private capital. But under the Staff Proposal, applicants would have little incentive to do so. If unchanged, this proposal could leave hundreds of millions of dollars in matching funds, at minimum, on the sidelines—at the expense of California consumers who will still be left without high-speed Internet access.

Instead, the Commission should allocate significantly more points (i.e., 40-50% of the total available points) to Minimal BEAD Outlay.¹² Doing so would put California in line with other states,¹³ and would ensure the Commission fulfills the NOFO requirement to “rigorously” explore ways to minimize BEAD outlay and “incentivize[] matches of *greater than 25 percent*.”¹⁴ In particular, the Commission should utilize a scaled approach that awards *no* points for meeting the 25% minimum match requirement and more points to applicants proposing greater matches, as detailed in the model rubric in the Appendix below. This approach will stretch already limited BEAD funds further.

¹² *Id.* See Appendix for redlined and proposed alternative scoring rubrics.

¹³ See, e.g., Connect Illinois, *Public Comment Draft: Initial Proposal Vol 2*, at 32 (Sept. 2023), <https://dceo.illinois.gov/content/dam/soi/en/web/dceo/connectillinois/documents/il-bead-initial-proposal-vol-2.pdf> (allocating 50% of scoring criteria to Minimal BEAD Outlay).

¹⁴ NOFO at 21 (emphasis added).

B. Allow Applicants to Define Their Own Project Areas

To help the Commission address funding shortfalls, CalBroadband provides recommendations for the Staff Proposal’s definition of project areas and also addresses other related issues, including the: (1) process by which the Commission should efficiently and effectively de-conflict overlapping applications; (2) need for a mechanism to de-scope locations that are cost outliers; and (3) benefits of basing the EHCT on actual applications the Commission receives.

As an initial matter, the Staff Proposal asks for comment on two potential options for the definition of project areas.¹⁵ CalBroadband strongly urges the Commission to select “Option 1: Applicants define Project Areas,” with certain modifications: applicants should be permitted to designate their own project areas, *without* reference to census block groups (“CBGs”) as a “minimum geographic unit.”¹⁶ This approach will allow applicants to develop more efficient and economical proposals that leverage existing networks and facilities, maximize network efficiency, and reflect the geographic level at which providers can successfully deploy and sustainably operate their proposed networks—broadband networks were never designed or built based on government-created geographic boundaries like CBGs. Indeed, as CalBroadband has previously commented, applicants’ determination of the appropriate geographic level for their proposals may be influenced by a variety of location-, project-, and provider-specific factors, such as difficult terrain or right-of-access issues.¹⁷ Additionally, as the Staff Proposal notes,

¹⁵ Staff Proposal Volume II at 35-38.

¹⁶ *Id.* at 37.

¹⁷ Reply Comments of the California Broadband & Video Association at 7, R.23-02-016 (May 8, 2023) (“CalBroadband Reply Comments”).

“this approach recognizes that applicants . . . are frequently best suited to determine the most economically viable grouping of locations into a single geographic unit for application.”¹⁸ This, in turn, would lead to more cost-effective proposals with higher matching funds and lower BEAD outlay—stretching limited federal funds to deploy fiber deeper into unserved and underserved areas of the state.

Absent CalBroadband’s proposed modifications, the Staff Proposal for Option 1 would require that “applicants’ design of Project Areas . . . include a minimum threshold of high cost or high need CBGs, as determined by the CPUC using a designation of high-cost CBGs and high-need CBGs (CBGs within a Disadvantaged Community or Low-Income Area).”¹⁹ If this requirement is included in the final rules, the Commission should clarify what that “minimum threshold” will be for applications and adopt as granular of a unit as practicable, such as a census block. The Commission should also clarify how it will identify “Disadvantaged Community or Low-Income Areas” for the high-cost and high-need CBG designations.²⁰ These details will provide much-needed clarity to potential applicants as they prepare to develop BEAD proposals.

By contrast, the Staff Proposal’s second option, basing project areas on “established jurisdictional boundaries” (i.e., school districts and Tribal boundaries), likely would not “align with efficient broadband design parameters.”²¹ Like CBGs, broadband networks were never designed or built based on geographic areas like school districts and Tribal boundaries, and such boundaries would not account for many of the factors that the Staff Proposal lists for

¹⁸ Staff Proposal Volume II at 37.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Contra id.* at 38.

consideration, such as “[p]roximity of existing network infrastructure” and proximity of unserved locations to served locations.²² Basing project areas on these political boundaries would lead to inefficient and costly allocation of funds while leaving unserved areas unconnected, ultimately jeopardizing the Commission’s ability to achieve both the state’s and the BEAD Program’s goals.

1. Conduct a De-Confliction Process That Helps Stretch BEAD Funding

First, the Commission should invite applications offering qualifying Reliable Broadband Service, as defined by the NOFO, to project areas of each applicant’s choosing. The Commission should select the highest scoring applicant to serve the locations proposed in its application, with priority given to fiber-to-the-home (“FTTH”) applications consistent with the NOFO. With respect to de-confliction of overlapping or competing applications under CalBroadband’s recommended project area approach (Option 1 without reference to CBGs),²³ CalBroadband suggests that the Commission de-conflict such applications by comparing the average subsidy-per-location requested in the overlapping area and awarding the overlapping locations to the applicant with the lowest subsidy request. In the event of a tie, applicants should rescope and resubmit their applications, repeating the process until there is a winner.

The second-highest scoring applicant should then have the option to serve any non-overlapping location for which it is the highest-scoring applicant or withdraw its application completely. In some cases, the lower-scoring applicant will still be able to extend service to non-overlapping locations. However, in other instances, an applicant’s proposal may have been contingent upon its ability to benefit from economies of scale or shared infrastructure across the

²² *Id.* at 36.

²³ *Id.* at 36-37.

originally proposed locations, such that the proposal would no longer be a viable use of BEAD funding with the overlapping locations removed.

For any subsequent funding rounds,²⁴ BEAD subgrants for any other overlapping areas once more should be awarded to the proposal with the highest score (or, in the event of a tie, to the proposal with the lowest BEAD outlay per location).²⁵ The Commission should continue to allow lower-scoring applicants to withdraw from these additional rounds, for the reasons described above.

2. *Establish a Mechanism to De-Scope Cost Outlier Locations*

The Staff Proposal would require applicants to serve 100% of unserved and underserved locations in a project area, but seeks comment “on the potential to allow applicants to *also* propose to serve a lower percentage of unserved and underserved locations.”²⁶ CalBroadband supports this proposal, which the Staff Proposal explains “will allow for the option of funding proposals to serve *many* unserved and underserved locations in a Project Area if no cost-effective application is received for 100 percent of these locations.”²⁷ In all events, the Commission should, at a minimum, establish a mechanism that allows applicants to de-scope broadband serviceable locations (“BSLs”) that are cost outliers. This approach would be consistent with the Staff Proposal’s recognition that including certain locations in an application may make the area too costly to be funded, and flexibility could “increase the chances of funding the vast majority of these locations throughout the State with the best technology possible.”²⁸ It also would avoid

²⁴ See *infra* Part II.C.2.

²⁵ See NOFO at 38.

²⁶ Staff Proposal Volume II at 38 (emphasis added).

²⁷ *Id.* at 22.

²⁸ *Id.* at 22, 38.

the automatic rejection of otherwise qualified applicants with competitive proposals to serve many other unserved and underserved locations.

3. *Base the EHCT on Applications Received*

The Staff Proposal also seeks comment on how to utilize the EHCT in light of the proposal to require applicants to propose to serve 100% of unserved and underserved locations in a project area while permitting applicants to submit additional proposals to serve a lower percentage of such locations.²⁹

As an initial matter, CalBroadband emphasizes that the Commission must set the EHCT to allow as many end-to-end fiber projects to be deployed as possible, consistent with the BEAD Program's goals. Accordingly, the Commission should not determine the EHCT based on nationwide studies, since these do not appropriately account for California-specific factors (e.g., population density, terrain, route access, etc.). The Commission also should not consider data regarding the costs per passing and subsidies per passing under the state's other broadband deployment grant programs since locations served through these other programs may be more readily serviceable at lower costs. The Commission should base the EHCT on the actual applications it receives instead of setting the EHCT prior to the application window, which would require the Commission to rely on mere hypotheticals and potentially inapposite data and models.³⁰ Doing so will allow the Commission to more accurately assess the likelihood and extent to which it can reach all unserved and underserved locations in the state.

²⁹ *Id.* at 42.

³⁰ *Id.* at 41-42 (seeking comment on whether the Commission should set the EHCT prior to the application window or based on applications).

C. Ensure Adequate Safeguards Are in Place to Protect the Competitive Integrity of the Subgrantee Selection Process

To further bridge the funding gap, the Commission should make other targeted changes to its selection process by: (1) conducting negotiations with applicants in a fair and transparent manner; and (2) conducting additional funding rounds, which would expand the competitive application options available and avoid wasting resources on the proposed negotiations process. This framework will also allow the Commission to faithfully carry out the NOFO’s directive to “ensure that adequate safeguards are in place to protect the integrity of the competition, including safeguards against collusion, bias, . . . arbitrary decisions, and other factors that could undermine confidence in the process.”³¹

1. Minimize Reliance on Opaque Negotiations

The Staff Proposal includes plans to “engage with applicants to reach final project boundaries and costs” during the “Negotiation Phase” of the selection process.³² CalBroadband appreciates that the Commission will seek to “maximize the reach and value of the BEAD funds to bring fiber to locations throughout California.”³³ However, doing so through individual negotiations during this phase will likely be *too little, too late*—as well as inconsistent with the NOFO’s directive to conduct a “fair, open, and competitive” selection process.³⁴

Once BEAD Program applications have been filed, the Staff Proposal would engage applicants in wide-ranging negotiations to reach “final agreement” on project area boundaries *and* costs, “both with respect to locations that received no applications and to which the CPUC

³¹ NOFO at 35.

³² Staff Proposal Volume II at 23-24.

³³ *Id.* at 24.

³⁴ NOFO at 35.

would like to attract other applicants, and with respect to locations where the proposals were too costly . . . and where there exists potential to secure lower pricing.”³⁵ As a result, this proposal would unnecessarily invite a heavy and potentially protracted administrative burden. As explained above, a far more effective and efficient way of ensuring that the reach and value of BEAD funds is “maximized” is to rigorously incentivize matching funds in the subgrantee selection process, as contemplated by the NOFO.

CalBroadband also has concerns that the Staff Proposal’s broad approach to negotiations, especially the Commission’s reservation of the post-hoc right to “negotiate[] lower pricing with the applicant based on the potential award of multiple aggregated Project Areas,” is inconsistent with the NOFO.³⁶ The NOFO contemplates “provider-specific outreach” “*only . . . after the [state] has solicited proposals and failed to obtain one or more proposals to serve the location or locations at issue.*”³⁷ The NOFO also directs that the state “shall, in this circumstance, work to ensure that its approach is as transparent as possible.”³⁸

In light of the overarching directive that states must establish a “fair, open, equitable, and competitive selection process” and otherwise “[p]rotect[] the [i]ntegrity” of this process,³⁹ the Commission cannot rely on non-public negotiations with individual applicants to extract

³⁵ Staff Proposal Volume II at 24.

³⁶ *See id.*

³⁷ NOFO at 38 (“If, after soliciting proposals, the Eligible Entity has received no proposals to serve a location or group of locations that are unserved, underserved, or a combination unserved and underserved, the Eligible Entity may engage with existing providers and/or other prospective subgrantees to find providers willing to expand their existing or proposed service areas. . . . *For the avoidance of doubt, this provider-specific outreach is only appropriate after the Eligible Entity has solicited proposals and failed to obtain one or more proposals to serve the location or locations at issue.*”) (emphasis added).

³⁸ *Id.*

³⁹ *Id.* at 35.

additional commitments or cost concessions once applications have already been submitted. That would be inconsistent with the NOFO and neither fair nor transparent. At a minimum, the Commission should specify how it will choose among “one or more applicants to determine whether and under what circumstances they would be willing to serve” project areas that have not received any applications.⁴⁰ Without further detail, the Staff Proposal is opaque and introduces uncertainty to the process, leaving open the potential for arbitrary decisions that undermine the integrity of the competitive selection process.⁴¹

2. *Conduct Multiple Funding Rounds*

The Staff Proposal emphasizes “flexibility” to engage in negotiations or conduct additional funding rounds for project areas that receive no initial applications.⁴² CalBroadband recommends that the Commission conduct additional funding rounds, which will ensure that subgrantees are selected to serve those areas through a *competitive* process, rather than through the opaque negotiations described above.

III. VOLUME II: REJECT AFFORDABILITY-RELATED PROPOSALS THAT CONTRAVENE THE IIJA’S PROHIBITION ON RATE REGULATION

In fashioning its affordability conditions, the Staff Proposal would improperly regulate broadband rates in a manner that is incompatible with the IIJA’s express prohibition on use of the BEAD Program to regulate broadband rates. Instead, CalBroadband recommends that the Commission address affordability by utilizing an objective “reasonable comparability” benchmark that ensures consistency of pricing in BEAD-subsidized and unsubsidized areas of

⁴⁰ See Staff Proposal Volume II at 24; see also *id.* at 40 (anticipating that the Commission will “negotiate with one or more applicants to maximize the chances of determining a solution” for areas that receive no applications).

⁴¹ See NOFO at 35.

⁴² Staff Proposal Volume II at 40.

California and leveraging providers' existing low-income programs, as many other states have proposed.

A. Modify the Proposed Affordability Scoring Criterion

The IJJA, in a section titled “No regulation of rates permitted,” states that “[n]othing in this subchapter may be construed to authorize [NTIA] to regulate the rates charged for broadband service.”⁴³ However, the Staff Proposal would award 40 points to the “affordability” criterion, based on applicants’ adherence to arbitrary pricing benchmarks of \$50/month inclusive of all fees for symmetrical 1 Gbps service (for priority projects) and \$30/month inclusive of all taxes and fees for 100/20 service (for non-priority projects).⁴⁴ The Staff Proposal also would require applicants to “make this [price] commitment in clear and unambiguous terms” in order to receive points for affordability, amounting to a price freeze of potentially indefinite duration.⁴⁵ As a practical matter, the disproportionate weight afforded to this factor in the proposed scoring would effectively make it a condition of program participation that ISPs offer their mass-market

⁴³ 47 U.S.C. § 1702(h)(5)(D). As courts have held in related contexts, statutory prohibitions against rate regulation apply where a state either (1) specifies the rates that must be charged for specific levels of service, or (2) freezes prices or restricts providers from adjusting rates in certain ways. *See, e.g., N.Y. State Telecomms. Ass’n v. James*, 544 F. Supp. 3d 269, 273 (E.D.N.Y. 2021) (preempting state law that would have required ISPs to offer low-income customers specific levels of broadband service at specific prices); *CTIA–Wireless Ass’n v. Echols*, 2013 WL 6633177, at *2 (N.D. Ga. Dec. 17, 2013) (preempting regulation requiring a minimum service rate of \$5.00/month under Section 332 of the Communications Act); *City of Dubuque v. Grp. W Cable, Inc.*, 1987 WL 11826, at *6-7 (N.D. Iowa Feb. 25, 1987) (preempting ordinance specifying rates that may be charged for second cable outlets and remote controls); *Town of Norwood v. Adams-Russell Co.*, 549 N.E.2d 1115, 1118 (Mass. 1990) (holding that the Cable Act preempted a rate freeze provision); *City of Burlington v. Mountain Cable Co.*, 559 A.2d 153, 155 (Vt. 1988) (same); *Westmarc Commc’ns, Inc. v. Conn. Dep’t of Pub. Util. Control*, 807 F. Supp. 876, 886 (D. Conn. 1990) (preempting a regulation prohibiting the cable operator from increasing its rates to offset a fine imposed by the regulator); *Cellco P’ship v. Hatch*, 431 F.3d 1077, 1080-83 (8th Cir. 2005) (customer consent requirement for any “substantive change” to a service contract was preempted rate regulation, because it “prevent[ed] providers from raising rates for a period of time, and thus fixes the rates”). The Staff Proposal would do both.

⁴⁴ Staff Proposal Volume II at 31.

⁴⁵ *Id.*

broadband services at Commission-specified price points. Thus, these below-market pricing commitments violate the IIA's express prohibition against rate regulation and require substantial modifications to comply with federal law. Moreover, Congress knew full well that participation in BEAD would be voluntary and yet still expressly prohibited rate regulation, so any argument that this is not rate regulation because applicants don't have to participate is without merit.

The Staff Proposal's approach to the Affordability criterion also cannot be squared with longstanding federal policies against rate-regulating broadband or congressional intent in the IIA. Even the FCC's *2015 Title II Order* that classified broadband Internet access service as a telecommunications service and applied some common carrier regulations to broadband expressly forbore from *ex ante* rate regulation,⁴⁶ and the FCC's recent proposal to reinstate that classification and similar regulations for broadband continues this policy of forbearance.⁴⁷ Congress intended the BEAD Program to be a once-in-a-generation opportunity to close remaining gaps in broadband *availability*, not a reversal of the longstanding law and policy prohibiting states from engaging in price regulation. Indeed, Congress intended to address broadband *affordability* through *other* IIA initiatives, such as the Affordable Connectivity Program ("ACP") and the requirement that BEAD subgrantees offer a "low-cost broadband

⁴⁶ See *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 ¶¶ 451-452, 499, 508 (2015) ("*2015 Title II Order*").

⁴⁷ See *Safeguarding and Securing the Open Internet*, Notice of Proposed Rulemaking, WC Docket No. 23-320, FCC 23-83 ¶ 105 (Oct. 20, 2023) ("[W]e 'do not and cannot envision adopting new *ex ante* rate regulation' or *ex post* rate regulation of BIAS, and we therefore propose to forbear from applying sections 201 and 202 to BIAS insofar as they would support adoption of rate regulations for BIAS.") (citing *2015 Title II Order* ¶ 451).

service option” to “Eligible Subscribers.”⁴⁸ Congress’s decision to center the IJA’s affordability initiatives on direct financial assistance for families most in need makes sense when NTIA’s data over the last decade consistently show that, while the barriers to broadband adoption are multi-faceted and complex, where affordability is the biggest barrier to adoption, non-adopting households are disproportionately the poorest households.⁴⁹

1. *NTIA Guidance Does Not Support Rate Regulation*

Nothing in the IJA, the NOFO, or other NTIA guidance permits or requires the Commission to engage in rate regulation. Even to the extent the Commission believes it were to have the authority under state law, the federal framework governing BEAD precludes the Commission from acting under any such authority here. The Staff Proposal’s approach is also unnecessary and unwise as a policy matter.

First, the statutory requirement to adopt a low-cost broadband service option for income-qualified customers does not justify the Commission’s impermissible price-setting proposal. To the extent that the NOFO contemplates that a state might actually define a provider rate, it does

⁴⁸ 47 U.S.C. § 1702(h)(4)(B); *see id.* § 1752. NTIA has defined “Eligible Subscribers” as households that qualify for ACP or various other government benefits, or those at or below 200 percent of the Federal Poverty Guidelines. NOFO at 12.

⁴⁹ *See* NTIA, *Digital National Data Explorer* (Oct. 5, 2022), <https://www.ntia.doc.gov/other-publication/2022/digital-nation-data-explorer#sel=noNeedInterestMainReason&demo=&pc=prop&disp=both> (finding that, in 2021, there was a greater difference between the percentage of non-adopting households in the lowest income bracket (<\$25,000) and that of the next lowest income bracket (\$25,000 – \$49,999), than there was between the percentage of non-adopting households in the \$25,000 – \$49,999 bracket compared to that of all other higher income brackets, including the percentage of non-adopting households in the highest income bracket (\$100,000+)); *see also* Pew Rsch. Ctr., *Internet/Broadband Fact Sheet* (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/#home-broadband-use-over-time?tabId=tab-3109350c-8dba-4b7f-ad52-a3e976ab8c8f> (similarly finding stark differences in home broadband adoption according to household income, such that only 57% of households making less than \$30,000 reported having home broadband service, compared to 92% of households making at least \$75,000).

so only as an *example* of how a state might fulfill the IIIJA requirement to provide a “low-cost broadband service option.”⁵⁰ In relevant part, the NOFO provides that states must propose a definition of “low-cost broadband service option,” which “should address . . . all recurring charges to the subscriber, as well as any non-recurring costs or fees to the subscriber (e.g., service initiation costs),” among other information.⁵¹ Putting aside whether that directive itself is consistent with the IIIJA’s rate regulation prohibition, the NOFO makes plain that the “low-cost broadband service option” is limited to “eligible subscribers,” i.e., those who meet specific income eligibility requirements. Those eligibility requirements exclude middle-income end users and foreclose the possibility that the required “low-cost broadband service option” could justify a further requirement that such service plans be broadly available to all consumers in a BEAD-funded service area.

For example, the NOFO provides that the low-cost broadband service option must “[a]llow[] the end user to apply the Affordable Connectivity Benefit subsidy to the service price.”⁵² But that requirement can only be true if the “end user” is otherwise eligible for ACP in the first instance. In other words, the end user must be a low-income household since the IIIJA sets eligibility for ACP at 200% of the poverty line.⁵³ Furthermore, under the IIIJA, the low-cost

⁵⁰ 47 U.S.C. §§ 1702(h)(4)(B), 1702(h)(5); NOFO at 67.

⁵¹ NOFO at 67; NTIA, *Broadband Equity, Access, and Deployment (BEAD) Program Initial Proposal Guidance* 78-79 (July 2023) (“NTIA Initial Proposal Guidance”), https://broadbandusa.ntia.doc.gov/sites/default/files/2023-07/BEAD_Initial_Proposal_Guidance_Volumes_I_II.pdf. The NOFO also provides an example definition for a low-cost broadband service option that includes, among other characteristics, a cost of “\$30 per month or less, inclusive of all taxes, fees, and charges if the subscriber does not reside on Tribal Lands . . . with no additional non-recurring costs or fees to the consumer.” NOFO at 67.

⁵² NOFO at 66, 67.

⁵³ This is an increase from the prior threshold of 135% of the poverty line, thereby making by some estimates up to 40% of U.S. households eligible for ACP. See White House, *FACT SHEET: Vice President Harris Marks Important New Milestone in Administration’s Efforts to Cut Costs for American*

broadband service option must be made available only to “eligible subscribers,” which NTIA defines in accordance with the same household eligibility criteria for ACP.⁵⁴ Accordingly, households that do not qualify for ACP (e.g., middle-income households) are *not* eligible for the low-cost broadband service option.

Second, other references to service pricing in the NOFO and NTIA guidance are made in the context of provider disclosures and do not imply a broadening of eligibility for the low-cost broadband service option to all users in BEAD-subsidized areas. For example, the NOFO provides that when selecting subgrantees, a state must consider “the prospective subgrantee’s commitment to provide the most affordable total price to the customer for 1 Gbps/1 Gbps service in the project area” for priority broadband projects and 100/20 Mbps service for non-priority projects—although CalBroadband believes that the Commission can and should consider additional speed tiers, as explained below.⁵⁵ The NOFO also provides that subgrantees must submit regular reports “[d]escrib[ing] the non-promotional prices, including any associated fees, charged for different tiers of broadband service being offered,” among other information.⁵⁶ Neither provision provides a basis for a state to set specific price thresholds for subgrantees’ service plans that must be offered to all consumers in subsidized areas. Additionally, while NTIA’s Initial Proposal Guidance unartfully says that “[t]he purpose of [the low-cost option] is to outline how the Eligible Entity plans to ensure that *all residents* within its jurisdiction will

Families (July 21, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/21/fact-sheet-vice-president-harris-highlights-milestone-of-1-million-new-participants-on-reducing-high-speed-internet-cost-for-americans/>.

⁵⁴ NOFO at 12-13.

⁵⁵ *Id.* at 43.

⁵⁶ *Id.* at 90.

have access to affordable broadband service options,”⁵⁷ this sentence is included in a discussion of the *low-cost broadband service option*, which, as described above, is limited to “*eligible subscribers*” who meet certain income thresholds.

Third, the Commission’s rate regulation proposals are unnecessary and unwise as a policy matter. The IJA reflects a finding that “[a]ccess to affordable, reliable, high-speed broadband is essential to full participation in modern life.”⁵⁸ But if the BEAD Program is to achieve that goal, then service over BEAD-funded networks must be economically sustainable over time. In NTIA’s *own words*, “the lack of a sustainable business case—namely a business case that generates a reasonable return on investment—is a core problem the BEAD Program is designed to address.”⁵⁹ This is because the remaining “[u]nserved and underserved areas present significant barriers for service, as evidenced by the lack of existing high-speed Internet infrastructure even after decades of the Federal efforts to expand broadband deployment in these areas.”⁶⁰ In recognition of that reality, NTIA notes that “incentives for broad participation are needed to address the unique challenges for which the BEAD Program was created to solve” because rules that “prevent providers from earning a reasonable return on investment during the period of performance . . . would not address the economic conditions that have stunted investment in these areas.”⁶¹ Thus, it is particularly inappropriate for the Commission to adopt prescriptive rates in BEAD-funded project areas.

⁵⁷ NTIA Initial Proposal Guidance at 79 (emphasis added).

⁵⁸ 47 U.S.C. § 1701(a).

⁵⁹ NTIA Part 200 Request for Comment at 42921.

⁶⁰ *Id.*

⁶¹ *Id.*

Even if BEAD grants cover a portion of the capital costs of construction, high-speed broadband networks must continuously be maintained and upgraded, as well as protected against cybersecurity threats, to meet evolving customer demands. These operating costs are significant and require a business model that is not subject to artificial, fixed constraints and has the flexibility to adapt to evolving marketplace realities.⁶² Price cap rate regulation risks starving the network, which, in turn, risks the network becoming obsolete and unsecure, requiring ongoing government subsidies just to remain viable, or even failing due to inability to cover operating costs.⁶³ This problem is particularly acute with the Staff Proposal, as the prices it has made conditions of receiving any kind of competitive score—\$50/month inclusive of all fees for symmetrical 1 Gbps service (for priority projects) and \$30/month inclusive of all taxes and fees for 100/20 service (for non-priority projects)—appear to be arbitrarily chosen round numbers selected without any regard for, much less analysis of, the income required for the long-term sustainability of the funded networks. None of these outcomes is good for California residents. Accordingly, as discussed below, broadband providers should have the flexibility to price and

⁶² Even highly regulated traditional utilities adjust their rates every few years given the need to address market changes, ongoing investments, inflation, and other factors. *See, e.g.,* CPUC, *What is a General Rate Case (GRC)?*, <https://www.cpuc.ca.gov/industries-and-topics/electrical-energy/electric-rates/general-rate-case> (explaining that GRCs “are proceedings used to address the costs of operating and maintaining the utility system and the allocation of those costs among customer classes,” and that “[e]ach large electric utility files a GRC application every three years”). And under this model of rate-setting, traditional utilities have struggled to maintain, much less improve, the quality of service provided to their customers. *See, e.g., Nat’l Ass’n of Telecomms. Officers & Advisors v. FCC*, 862 F.3d 18, 25 (D.C. Cir. 2017) (“Rate regulation of a firm in a competitive market harms consumers: Prices set below the competitive level result in diminished quality, while prices set above the competitive level drive some consumers to a less preferred alternative.”) (citing Alfred E. Kahn, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS*, Vol. I. at 21, 66-67 (1970)); Scott Wallsten, *Is Broadband a Public Utility? Let’s Hope Not.*, Technology Policy Institute Blog (May 21, 2020), <https://techpolicyinstitute.org/publications/broadband/is-broadband-a-public-utility-lets-hope-not/> (“Electric utilities, on average, have not innovated as well as broadband networks. Prices have increased faster, innovation has been slower, and productivity has increased more slowly in electricity than broadband.”).

⁶³ *See* Yoo et al., *supra* note 3.

package their services, without being penalized by an arbitrary and below-market affordability scoring criterion, to ensure that BEAD-funded networks can be maintained and upgraded while still being offered to consumers at prices reasonably comparable to those offered in non-subsidized areas. CalBroadband further recommends that the Commission’s low-cost service option and middle-class affordability plan similarly reflect these considerations, as discussed further below.

2. *Utilize an Objective “Reasonable Comparability” Benchmark and Decrease Points for the Affordability Criterion*

CalBroadband urges the Commission to remove unlawful rate regulation from its scoring of the Affordability criterion. Instead, the Commission should follow the lead of numerous

states, including New York,⁶⁴ Connecticut,⁶⁵ Oregon,⁶⁶ Montana,⁶⁷ Georgia,⁶⁸ Minnesota,⁶⁹ Maryland,⁷⁰ and Delaware,⁷¹ to award full points under this criterion to applicants that commit to

⁶⁴ State of New York ConnectALL Office, *Initial Proposal, Volume II* 46 (Nov., 2023), https://broadband.ny.gov/system/files/documents/2023/11/draft-initial-proposal-vol.-2-for-public-comment_2.pdf (proposing to award 15 points for the Affordability criterion, based on “applicants’ commitments to offer a symmetrical 1 Gbps service [for priority projects, or 100/20 Mbps service for non-priority projects] to BEAD-funded locations that does not exceed the cost of the same service in any other location in New York or other states in which the applicant offers service”).

⁶⁵ Connecticut Department of Energy & Environmental Protection, *Initial Proposal for the BEAD Program: Volume II* 31 (Nov. 2023), https://portal.ct.gov/-/media/DEEP/energy/Broadband/CT_DEEP_BEAD_IP_Vol2_Public-Comment-Draft_110623.pdf (proposing to award 15 points for the Affordability criterion, based on “applicants’ commitments to offer a symmetrical 1 Gbps service [for priority projects, or 100/20 Mbps service for non-priority projects] to BEAD-funded locations that will never exceed the cost of the same service in any other location in Connecticut or surrounding states in which the applicant offers service”).

⁶⁶ State of Oregon, *State of Oregon Initial Proposal Volume II* 38 (Nov. 2023), https://www.oregon.gov/biz/Publications/Broadband/Oregon_BEAD_IPV2_Draft.pdf (proposing to award 20 points for the Affordability criterion, based on “applicants’ commitments to offer a symmetrical 1 Gbps service [for priority projects, or 100/20 Mbps service for non-priority projects] to BEAD-funded locations that will not exceed the cost of the same service in any other location in Oregon or surrounding states in which the applicant offers service”).

⁶⁷ Montana Broadband Office, *Initial Proposal Volume II Initial Draft Overview* 25-26 (Nov. 10, 2023), https://connectmt.mt.gov/files/2023.11.10_BEAD-Initial-Proposal-Volume-II_POST.pdf (“Subgrantee applicants who commit to offering 1/1 Gbps service [for priority projects, or 100/20 Mbps service for non-priority projects] to the customers in BEAD project areas at the same rates they offer in their existing markets will earn 20 points.”).

⁶⁸ Georgia Technology Authority, *Initial Proposal Volume II* 37 (Nov. 1, 2023), <https://drive.google.com/file/d/14bTxEmMla1RKIsSWhncxZrHtz1IsYshr/view?usp=sharing> (“Georgia Volume II”) (proposing to award 15 points for the Affordability criterion, based on “applicants’ commitments to offer symmetrical 1 Gbps service [for priority projects] to BEAD-funded locations that will never exceed the cost of the same service in metropolitan areas in Georgia.”).

⁶⁹ Minnesota Office of Broadband Development, *Minnesota’s Initial Proposal Volume 2 Scoring Rubric* (Nov. 2023), https://mn.gov/deed/assets/ip-scoring-rubric_tcm1045-599342.pdf (“Minnesota Volume II”) (“Commitment to offer 1G/1G service at a rate that is either 1) consistent with the broadband pricing the subgrantee makes available in unsubsidized areas within Minnesota for that service; or is at or below the residential rates provided in the FCC Urban Rate Survey’s reasonable comparability benchmark for that serve = 15 points.”).

⁷⁰ State of Maryland Office of Statewide Broadband, *State of Maryland Initial Proposal Volume II* 32 (Nov. 2023), <https://dhcd.maryland.gov/Broadband/Documents/State-Plans/DRAFT-Maryland-BEAD-IPV2.pdf> (proposing to award 15 points for the Affordability criterion, based on “applicants’ commitments to offer a symmetrical 1 Gbps service [for priority projects, or 100/20 Mbps service for non-priority projects] to BEAD-funded locations that does not exceed the cost of the same service in any other location in Maryland or surrounding states in which the applicant offers service.”).

offer symmetrical 1 Gbps service (for priority projects) or 100/20 Mbps service (for non-priority projects) to BEAD-funded locations at a cost that does not exceed the cost for the same service in unsubsidized areas of the state.

Alternatively, an applicant should be permitted to commit to provide service based on rates that are no higher than the reasonable comparability benchmark rates based on the fixed broadband URS conducted annually by the FCC pursuant to 47 C.F.R. § 54.313(a)(3) for each tier of service offered, including the symmetrical gigabit-level service specified in the NOFO. Adopting this framework would be reasonable and consistent with the approach that the FCC has taken with the Rural Digital Opportunity Fund Program and Universal Service Fund (“USF”)-subsidized high-cost areas, where rates for services delivered over subsidized networks must not exceed comparable residential rates in the URS or in the provider’s unsubsidized areas in the state.⁷²

3. *Give Affordability a More Balanced Role in the Selection Process*

Under the Staff Proposal, prescriptive affordability requirements would be by far the most important factor in subgrantee selection—equivalent to all the points for Minimal BEAD Outlay, Labor Standards, and Speed to Deployment *combined*. This misallocation of points would make affordability commitments effectively a gating requirement for BEAD Program

⁷¹ Delaware Broadband Office, *Delaware Initial Proposal Volume II 21* (Oct. 13, 2023), <https://broadband.delaware.gov/contentFolder/pdf/BeadBroadbandProposal-Volume2.pdf> (proposing to award 15 points for the Affordability criterion, based on “applicants’ commitments to offer a symmetrical 1 Gbps service [for priority projects] to BEAD-funded locations that will never exceed the cost of the same service in metropolitan areas of Delaware.”).

⁷² In the USF context, any recipient of high-cost support must provide “[a] certification that the pricing of a service . . . is no more than the applicable benchmark to be announced annually in a public notice issued by the Wireline Competition Bureau, or is no more than the non-promotional price charged for a comparable fixed wireline service in urban areas in the states or U.S. Territories where the eligible telecommunications carrier receives support.” 47 C.F.R. § 54.313(a)(3).

participation while diluting the importance of other mandatory factors to the point of insignificance. As drafted, the Staff Proposal signals to applicants that are unable to make indefinite, below-market pricing commitments that their applications will not be competitive, thereby deterring provider participation. In addition to making selection unlikely for otherwise qualified providers, the proposed scoring for this criterion seriously jeopardizes the Commission's ability to connect all unserved and underserved locations in the state, contrary to California's Broadband For All initiative and the goals of the BEAD Program.⁷³

The Commission should decrease the points available for the Affordability criterion from 40 points to no more than 15 points (effectively swapping its point allocation in the Staff Proposal with that of Minimal BEAD Outlay). Combined with the modifications described above to avoid unlawful rate regulation, this point allocation will give due credit to realistic affordability commitments without encouraging selection of projects that will not remain financially viable over time. At a minimum, the Affordability criterion should not receive more weight than the most critical selection criterion of Minimal BEAD Outlay.

B. Incorporate the Revised Affordability Criterion into the State's Middle-Class Affordability Plan

The Commission proposes to address middle-class affordability through several strategies, including by utilizing the Affordability criterion, which as presented in the Staff Proposal is highly problematic and inconsistent with federal law as described above.⁷⁴ The Commission should instead promote affordability by ensuring that consumers in BEAD-subsidized areas are charged rates consistent with those charged to Californians in unsubsidized parts of the state, consistent with CalBroadband's recommendations to revise the Affordability

⁷³ See State of California, *About Broadband for All*, <https://broadbandforall.cdt.ca.gov/about/>.

⁷⁴ Staff Proposal Volume II at 198-99.

criterion. The Staff Proposal itself gives credence to this concept by listing among its middle-class affordability initiatives “[d]ifferential pricing between urban and new project areas: The gigabit best pricing policy mandated in the BEAD program scoring matrix sets requirements around geographic nondiscrimination.”⁷⁵ However, the current scoring matrix does no such thing; instead, it mandates a specific price in BEAD project areas that is *inconsistent* with market-based pricing in unsubsidized areas.⁷⁶ Adopting CalBroadband’s proposal for the “affordability” scoring criteria will make geographic nondiscrimination a reality, ensuring that Californians in BEAD-subsidized areas have access to affordable and reliable broadband service at the same rates as in unsubsidized areas of the state. Importantly, this all supports the Commission having a strategic plan for addressing middle-class affordability.

C. Leverage ISPs’ Existing Low-Income Offerings for the Low-Cost Service Option Requirement

CalBroadband urges the Commission to leverage providers’ existing low-cost offerings and consider the low-cost service option requirement to be met if the applicant’s price is: (1) consistent with either the low-cost offerings the applicant currently (at the time of application) makes available in unsubsidized areas within the state, or the low-cost offerings available from other providers in unsubsidized areas within the state (including for applicants without an existing low-cost option); *and* (2) below the maximum ceiling of the residential rates provided in the FCC’s URS for the service tier with specified speeds of 100/20 Mbps, as an additional, objective mechanism to ensure affordability.

Other states have proposed this approach to the low-cost service option. For example, Minnesota found that doing so “best effectuates the purposes of the BEAD Program first and

⁷⁵ *Id.* at 199.

⁷⁶ *Id.* at 31.

foremost by ensuring that the low-cost service option, combined with ACP participation—the two statutorily prescribed affordability measures in the IJA—will enable affordable broadband service to be offered to eligible subscribers,” while “the speed, service, and upgradability elements will ensure that eligible subscribers receive high-quality, low-cost broadband service over the funded network.”⁷⁷

Although NTIA suggested that an example low-cost broadband service option could be offered to Eligible Subscribers for the useful life of the network assets at \$30 or less per month (inclusive of all taxes, fees, and charges),⁷⁸ the U.S. Secretary of Commerce, who oversees NTIA, recently made clear that “[w]e are not rate regulating, we are not price setting, and we *are not* requiring states to do that.”⁷⁹ In fact, NTIA recently clarified that states are not required to set a specific dollar figure and may instead propose a mechanism that would tie the cost of the low-cost service option to an objective benchmark.⁸⁰ Thus, the Commission should provide subgrantees with some flexibility to satisfy the low-cost option requirement, by adopting the definition proposed in the Appendix.

CalBroadband appreciates that the Staff Proposal reasonably includes a mechanism for inflation-based adjustments to the low-cost broadband service option and contemplates allowing

⁷⁷ See, e.g., Minnesota Volume II at 27.

⁷⁸ NOFO at 67-68.

⁷⁹ *CHIPS and Science Implementation and Oversight: Hearing Before the S. Comm. on Com., Sci., and Transp.*, 118th Cong. (Oct. 4, 2023) (statement of Gina Raimondo, Sec’y, U.S. Dep’t of Com.) (emphasis added), available at <https://www.commerce.senate.gov/2023/10/chips-and-science-implementation-and-oversight>; see also 47 U.S.C. § 1702(h)(5)(D) (“Nothing in this subchapter may be construed to authorize the Assistant Secretary or [NTIA] to regulate the rates charged for broadband service.”).

⁸⁰ NTIA, *Broadband Equity, Access, and Deployment (BEAD) Program Frequently Asked Questions and Answers Version 4.0*, 42 (Nov. 6, 2023) (“BEAD FAQs”), https://broadbandusa.ntia.doc.gov/sites/default/files/2023-11/Broadband_Equity_Access_Deployment_Program_Frequently_Asked_Questions_Version_4.0.pdf.

subgrantees to submit a request to waive or modify the enumerated requirements “in the future should the need arise.”⁸¹ However, and no matter how the Commission defines the low-cost plan, it must: (1) maintain the clarification that applicants may annually adjust the low-cost option’s required price to account for any increases in inflation, and expand such adjustment to also include governmental fees that are or may become applicable to broadband service; and (2) adopt an eight-year definition of the “life of the infrastructure” for which the low-cost service option must remain available, as aligned with Treasury’s definition of the same for American Rescue Plan Act (“ARPA”) broadband grant projects, and the approach currently being adopted by many other states.⁸²

Finally, the Staff Proposal’s requirement that subgrantees offer a low-cost option at *\$15 per month* if ACP funding is expended and no successor program is established goes beyond any measure contemplated in the IJA or NOFO and would introduce massive uncertainty for applicants.⁸³ Once again, the Staff Proposal’s proposed price is arbitrary and not apparently based on any actual facts or analysis, making its proposal equally capricious. The Staff Proposal doesn’t even attempt to justify its proposed price, which is half the price of what Congress deemed an appropriate *subsidy* for an income-constrained household. Such a requirement will

⁸¹ Staff Proposal Volume II at 194.

⁸² See U.S. Dep’t of Treasury, *SLFRF and CPF Supplementary Broadband Guidance 3* (May 17, 2023) (“Treasury Part 200 Guidance”), <https://home.treasury.gov/system/files/136/SLFRF-and-CPF-Supplementary-Broadband-Guidance.pdf>; see also, e.g., Virginia Department of Housing and Community Development, *Commonwealth Connect Initial Proposal Volume 2: NTIA Curing Edits*, at 49, (Nov. 2023), <https://www.dhcd.virginia.gov/sites/default/files/DocX/vati/ntiacuring-virginiabeadvolume2.pdf>; Georgia Volume II at 129. Another option would be for California to use the tax recovery life of broadband network assets, which is 7 years, as a uniform proxy for determining the “useful life of network assets.” Tax lives for these broadband assets are prescribed by the IRS and are required to be followed by all taxpaying entities. Specifically, entities are required to depreciate assets using the Modified Accelerated Cost Recovery System (“MACRS”). See 26 U.S.C. § 168(b).

⁸³ Staff Proposal Volume II at 194.

severely undermine the effectiveness of the BEAD Program. In order to submit accurate, competitive bids that maximize the effectiveness of BEAD funding, applicants require certainty as to project cost and any related price commitments. The Commission should reject conditions that effectively change the rules of the game after applications have been submitted.

IV. VOLUME II: ENSURE A “FAIR, OPEN, AND COMPETITIVE” SUBGRANTEE SELECTION PROCESS THROUGH TARGETED CHANGES TO THE SCORING CRITERIA

The NOFO requires states to ensure that their subgrantee selection process is “fair, open, and competitive.”⁸⁴ To that end, CalBroadband recommends that the Commission modify certain other aspects of its proposed scoring rubric, consistent with the IIJA, NOFO, and BEAD Program goals. In addition to the changes CalBroadband recommends for the Minimal BEAD Outlay and Affordability scoring criteria detailed above, making modest, targeted changes to the proposed evaluation and weighting of the Fair Labor Practices, Speed to Deployment, Equity, and Resilience selection criteria as discussed below will ensure the Initial Proposal is consistent with the NOFO.

A. Minimal BEAD Outlay and Affordability

As discussed above, the Commission proposes to award up to 40 points to Affordability, while awarding only up to 15 points for Minimal BEAD Outlay (10 of which are automatic upon meeting the threshold 25% matching requirement).⁸⁵ CalBroadband reiterates the need to invert the scoring for these two criteria, for the reasons explained above.

⁸⁴ NOFO at 35.

⁸⁵ Staff Proposal Volume II at 31.

B. Fair Labor Practices

The Commission proposes to award 20 points to the Fair Labor Practices criterion, with 10 points based on “(1) a demonstrated history of compliance with federal labor laws; (2) demonstrated commitments to future compliance with federal labor laws; and (3) the quality and contents of labor practice-related items submitted during the Application Phase,” and the other 10 points for the applicant’s “workforce capacity building and development commitments, especially those prioritizing equitable workforce development.”⁸⁶ Consistent with the NOFO’s requirements, scoring for this criterion should be based *only* on the applicant’s demonstrated record of and plans to comply with federal labor and employment laws. The Commission should refrain from awarding additional points for commitments that the NOFO unambiguously treats as *optional*.⁸⁷ In all events, the Commission should be transparent and specific as to how it awards points. Unnecessarily imposing additional obligations on top of preexisting labor-related challenges in California could threaten to diminish provider participation and delay deployments. Such additional obligations present even greater challenges to new entrants, who may lack the resources to address these issues at scale or would be required to divert scarce resources away from addressing the numerous other challenges to deployment. Please see below for CalBroadband’s recommendations on other labor-related considerations.

⁸⁶ *Id.*

⁸⁷ See NOFO at 57 (providing an optional list of elements that “[a]n effective plan for compliance with federal labor and employment laws *can* include” – not *must* include) (emphasis added); see also Staff Proposal Volume II at 62 (proposing to make “applicants’ representations in the Workforce Plan section of their application . . . binding commitments upon award of a subgrant”).

C. Speed to Deployment

Under this criterion, the Staff Proposal would award 5 points for priority projects and 1 point for non-priority projects to applicants who demonstrate project completion within two years of receiving BEAD funds, barring environmental review requirements under CEQA.⁸⁸ CalBroadband recommends that the Commission award *at least* as many points for this criterion as it does to any other *optional* criteria (i.e., 10 points), as reflected in the Appendix below.⁸⁹ Because this criterion is one of the few factors expressly mandated in the IJA,⁹⁰ it is all the more imperative that the Commission afford it greater weight. To maintain a total of 100 points available in the scoring process, corresponding deductions could be made in the points available for equity and resiliency, which are not required selection criteria under the IJA or NOFO.

Additionally, to the extent that the Commission allows applicants to propose to serve less than 100% of BEAD-eligible locations in a project area, it should consider the scale of the applicant's proposed service to such locations in evaluating this criterion, as well as the potential for other extenuating circumstances, such as access to poles, conduits, rights-of-way, and permitting delays. This approach will help incentivize providers to deploy BEAD-funded networks to unserved and underserved Californians as expeditiously as possible.

⁸⁸ Staff Proposal Volume II at 32.

⁸⁹ *See id.* (providing 10 points each to the Equity and Resilience criteria).

⁹⁰ *See* IJA § 60102(h)(1)(A)(iv)(III), 47 U.S.C. § 1702(h)(1)(A)(iv)(III); *see also* NOFO at 43 (“[States] *must* give secondary criterion prioritization weight to the prospective subgrantee’s binding commitment to provide service by an earlier date certain [than four years] . . . *with greater benefits awarded to applicants promising an earlier service provision date.*”) (emphasis added).

D. Equity

The Commission proposes to award “up to 10 points for the number of locations [applicants] propose to serve that are located in a disadvantaged or low-income community.”⁹¹ While equity is an important program goal, CalBroadband urges the Commission to recalibrate the basis of awarding points under this criterion. As an initial matter, optional criteria not mentioned in the NOFO should not be awarded double the amount of points of the required secondary criterion included in the NOFO (i.e., speed to deployment) or the effective points a provider can obtain for exceeding the 25% match the IIJA requires. Moreover, the entire Broadband *Equity, Access, and Deployment* Program was designed by Congress, and implemented by NTIA, to advance digital equity goals *by bringing high-speed broadband access to unserved and underserved areas*. The mandatory selection criteria advance these goals, but, to the extent the Commission is intent on separately allocating points for the Equity criterion, CalBroadband respectfully urges the Commission to use it to prioritize applications that propose to serve a greater percentage of unserved and underserved locations, relative to the total number of locations proposed to be served in a project.⁹² The starkest contrast in the digital divide is between those who have access to high-speed broadband and those who do not. Prioritizing applications that propose to exceed the NOFO’s 80% baseline of unserved and underserved locations will help ensure that limited BEAD funds do not go toward duplicating networks in

⁹¹ Staff Proposal Volume II at 32.

⁹² See CalBroadband Reply Comments at 10-11.

areas that already receive robust broadband service and that such funds are instead directed “principal[ly]” to the areas that need it the most, as contemplated by the BEAD Program.⁹³

At minimum, the Commission should split the available points in this criterion to evaluate both (1) the percentage of unserved and underserved locations relative to the total number of locations proposed to be served in a project, as described above; and (2) the number of locations in a disadvantaged or low-income community proposed to be served as suggested in the Staff Proposal. To that end, if the Commission retains its currently proposed evaluation of such locations in any form, CalBroadband recommends that the Commission clarify how it will define and identify “disadvantaged or low-income communities.” These terms are undefined in the Staff Proposal but would need to have a clear and objective meaning if used as factors in the competitive selection process.

E. Resilience

The Staff Proposal would award 10 points for this criterion, based on the number of project locations in a Tier 2 or Tier 3 HFTD.⁹⁴ Elsewhere, however, the Commission suggests that it will “[c]onsider[] average down time and emergency response time in applicant selection,” among other “risk mitigation processes.”⁹⁵ But these factors are not mentioned in the Staff Proposal’s description of the scoring criteria. Accordingly, the Commission should clarify whether it will, in fact, consider factors other than project locations in a Tier 2 or 3 HFTD in its

⁹³ See NOFO at 14 (“A ‘project’ may constitute a single unserved or underserved broadband-serviceable location, or a grouping of broadband-serviceable locations in which not less than 80 percent of broadband-serviceable locations served by the project are unserved locations or underserved locations.”); *id.* at 7 (explaining that the “principal focus” of the BEAD Program is deploying broadband service to unserved and underserved locations).

⁹⁴ Staff Proposal Volume II at 32.

⁹⁵ *Id.* at 187.

subgrantee selection and, if so, how such factors would be evaluated and incorporated into the proposed scoring rubric.

Moreover, the Staff Proposal includes a list of “possible strategies grant participants can engage in to address natural hazard risks”—ranging from undergrounding to backup power to “[r]etrofitting and hardening existing network assets that are deemed critical to BEAD expansion projects”—without explaining if or how these strategies will be considered in subgrantee selection.⁹⁶ CalBroadband recommends that the Commission clarify whether applicants will be *required* to adopt specific mitigation measures, including those listed in the Staff Proposal as “possible [mitigation] strategies” or those required by the Commission’s prior resiliency decisions.⁹⁷ While some of these resiliency measures may be appropriate in certain project areas, they come with significant costs and operational challenges such as permitting that may make the difference between a project being viable or not. Applicants need certainty about such requirements at the application stage and should not be subject to changing obligations later in the funding process. In any event, the Commission should *not* impose these measures as gating conditions for BEAD Program participation, particularly when providers’ incentives are already aligned with the state’s to deliver the most robust, reliable broadband service to their customers. Additionally, imposing such obligations would increase deployment costs and decrease the reach of limited funds.

V. VOLUME II: REFRAIN FROM TURNING THE NOFO’S OPTIONAL LABOR AND EMPLOYMENT SUGGESTIONS INTO FORMAL REQUIREMENTS

When introducing its section on Workforce Readiness, the Staff Proposal makes two key findings: (1) “the State saw a reduction of over 10,200 jobs in industries related to broadband

⁹⁶ *Id.*

⁹⁷ *See id.* & nn.178-79.

deployment [over the past five years], which was greater than national trends” (i.e., a six percent reduction rather than the four percent national figure); and (2) “wages for Californians in the broadband construction roles are higher than national averages in the same roles, suggesting a competitive compensation environment” for broadband labor.⁹⁸ These findings reinforce two key conclusions that should underpin the Commission’s approach to effectuating the BEAD Program’s workforce considerations. *First*, shovel-ready broadband workforces are currently scarce. *Second*, rigorous competition for this scarce workforce means that workers, benefitting from the high standards of California labor law, are already protected. And the generational influx of broadband deployment capital expenditures both in California and nationally means that these competitive dynamics will be sustained in the coming years.

With this in mind, CalBroadband urges the Commission to take a light-touch approach to implementing the BEAD labor and workforce directives. As discussed with respect to the Fair Labor Practices subgrantee selection criterion above, CalBroadband respectfully urges the Commission to *only* consider the applicant’s demonstrated record of and plans to comply with federal labor and employment laws when scoring this criterion, consistent with the NOFO’s requirements. The Commission should refrain from awarding additional points for commitments that the NOFO unambiguously treats as *optional*.⁹⁹ In that same vein, CalBroadband urges the Commission to provide applicants flexibility to address labor standards and achieve a highly skilled workforce without prescriptive requirements that could deter qualified applicants with a

⁹⁸ *Id.* at 67.

⁹⁹ See NOFO at 57 (providing an optional list of elements that “[a]n effective plan for compliance with federal labor and employment laws *can* include” – not *must* include) (emphasis added); see also Staff Proposal Volume II at 62 (proposing to make “applicants’ representations in the Workforce Plan section of their application . . . binding commitments upon award of a subgrant”).

history of fair employment practices. The Staff Proposal largely achieves these objectives, and we applaud the Commission Staff for a strong first draft in this respect.

In particular, CalBroadband commends the Staff Proposal for affording flexibility in how applicants demonstrate a skilled workforce in their applications. This flexibility appropriately recognizes that any one or more of the NOFO's suggested practices, in the context of other employer initiatives, can demonstrate a robust commitment to a highly skilled workforce.¹⁰⁰

CalBroadband also appreciates the reasonable accommodation of allowing a seven-day period to cure any responses deemed incomplete or insufficient. This will help ensure that all applicants, including new entrants with no prior labor and workforce compliance history, can put their best foot forward on workforce matters. CalBroadband strongly urges the Commission to maintain the Staff Proposal's well-reasoned, flexible approach to labor and workforce matters when it submits the Initial Proposal for NTIA review.

Consistent with this approach, CalBroadband also urges the Commission to apply the same reasonable flexibility when considering the level of detail required at the application stage and what specific workforce-related representations will become binding agreements upon award of a subgrant.¹⁰¹ Given the delay between the time in which applications are due and shovels actually hit the dirt, it is understandable that project-specific details may evolve. Thus, the Commission would be much better served by requiring its proposed level of detail regarding the specific experience levels, certifications, job titles, and workforce size as part of the compliance and post-award certification process, rather than through the application process.

¹⁰⁰ See, e.g., Staff Proposal Volume II at 29-30, 50-51, 54, 60-62.

¹⁰¹ See *id.* at 62.

VI. VOLUME II: PROVIDE APPLICANTS FLEXIBILITY AND ALIGN PROGRAM IMPLEMENTATION WITH NTIA GUIDANCE

CalBroadband appreciates that the Staff Proposal generally adheres to the NOFO's requirements on subgrantee certifications, disclosures, and qualifications, including demonstrations of the applicant's financial, managerial, technical, and operational capabilities. However, to ensure the most qualified applicants are selected to deploy high-speed and reliable networks to unserved and underserved Californians and to encourage greater provider participation in the BEAD Program, the Commission should make the following targeted changes: (1) provide alternative means for applicants' demonstration of creditworthiness; (2) apply a risk-based approach to evaluating applicants' technical, financial, managerial, and operational credentials, including through a reasonably flexible definition of "professional engineer"; (3) clarify that the Commission will follow the Department of Commerce's proposed limited waiver of the BABA requirements; (4) apply a risk-based approach to evaluate applicants' business plans; and (5) adopt a "semi-annual" reporting timeframe consistent with the NOFO's approach to subgrantee monitoring and accountability.

A. Provide Alternative Means to Letter of Credit Requirement

CalBroadband recommends that the Commission provide alternative means for applicants to demonstrate creditworthiness.¹⁰² Specifically, the Commission should align its approach with NTIA's recent conditional waiver of the letter of credit requirement, including by: allowing *all* applicants to use performance bonds; establishing a BEAD reimbursement period that spans no more than six months; and allowing applicants to commit to maintaining a letter of credit or performance bond in the amount of 10% of the subaward until they have demonstrated to the

¹⁰² Staff Proposal Volume II at 45-46, 142-43.

satisfaction of the state that they have completed the buildout of 100 percent of locations to be served by the project or until the period of performance of the subaward has ended, whichever occurs first.¹⁰³ This flexibility will help minimize the burden and cost of obtaining letters of credit for *all* applicants, while allowing the Commission to ensure that applicants have the financial capabilities to deliver on their commitments.

B. Apply a Risk-Based Approach to Evaluating Applicants’ Technical, Financial, Managerial, and Operational Credentials

Just as the Staff Proposal would pragmatically apply a risk-based approach to reporting and monitoring, as discussed further below, the Commission should apply the same framework to evaluate applicants’ technical, financial, managerial, and operational credentials at the application stage.

First, the Staff Proposal indicates that the Commission will require a professional engineer, licensed in California, to certify various application materials.¹⁰⁴ CalBroadband concurs that grants should only be provided where the recipient’s proposal is sound and the operator is capable. However, as written, this is an unnecessarily burdensome requirement. Where an applicant already has an established history of deploying broadband networks and providing broadband service on a larger scale—i.e., has (i) operated as a broadband provider in California for more than ten years, or (ii) currently serves more than 30,000 California broadband customers—the applicant should be allowed to certify its network designs and diagrams using a Society of Cable Telecommunications Engineers (“SCTE”)-certified in-house

¹⁰³ NTIA, *Notice of Programmatic Waiver* (Nov. 1, 2023), <https://broadbandusa.ntia.doc.gov/funding-programs/policies-waivers/BEAD-Letter-of-Credit-Waiver>.

¹⁰⁴ Staff Proposal Volume II at 52-53.

engineer who designs and oversees the implementation of those designs in the regular course of business.

If, however, an applicant does not have an established prior track record of similar deployment projects, that applicant should be required to provide a certification from a licensed professional engineer that the applicant's network design and diagram reflects a network capable of meeting BEAD Program requirements. At a minimum, the Commission should specify what it considers to be a "professional engineer" for purposes of this requirement. CalBroadband suggests the following alternative language:

As used herein, a "professional engineer" shall mean a professional engineer certified by the Society of Cable Television Engineers (SCTE) or similar professional group specializing in communications networks, and licensed in the State of California; provided, however, that in the case of an applicant which has an established history of deploying broadband networks by (i) operating as a broadband provider in California for more than ten (10) years; or (ii) currently serving more than 30,000 California broadband customers, the use of an in-house SCTE certified engineer, without regard to his licensure status in California, is an acceptable alternative.

Second, CalBroadband urges the Commission to modify the Staff Proposal and engage in risk-based due diligence before allowing applicants to proceed to the bidding phase. The Staff Proposal would require that applicants submit pro forma business case analyses covering a ten-year period, rather than the three-year period contemplated in the NOFO, and provide additional detail (including projected churn, take rates, ARPU, etc.).¹⁰⁵ This scrutiny, which goes further than the NOFO requires, is appropriate when stress-testing the qualifications of a new or recent entrant into the ISP marketplace, but it is not necessary for all applicants. Just as the Commission has recognized that different post-award monitoring mechanisms will be appropriate to different subgrantees based on their respective risk profiles, so too should the

¹⁰⁵ *Id.* at 47-48.

Commission consider reducing the necessary showings for financial, technical, managerial, and operational credentials based on applicants' demonstrated experience providing broadband service in the current marketplace. For instance, the Commission should allow publicly traded entities or companies that have a bond rating of Investment Grade from Moody's, Standard and Poor's, or Fitch at the time an application, which already must comply with other robust financial reporting requirements, to provide such documentation demonstrating their financial capabilities, in lieu of the Staff Proposal's required documentation.

C. Adhere to the Federal Government's BABA Waiver

Although the Staff Proposal acknowledges that the Department of Commerce proposed a limited waiver of the BABA requirements,¹⁰⁶ the Commission should expressly provide that it will align its approach with the waiver, if approved.

D. Follow NTIA Guidance on the Application of the Federal Uniform Guidance

In its discussion of applicants' demonstration of "financial sustainability," the Staff Proposal explains that "[t]he CPUC will require applicants to demonstrate that costs proposed for this grant program will be reasonable, allowable, allocable, and necessary for the supported activity," and that "[t]he Application, as well as the Program Guide, will reference 2 CFR Part 200 for applicable administrative requirements and cost principles."¹⁰⁷ Although the Staff Proposal indicates the Commission's intention to provide additional guidance on this topic, CalBroadband strongly urges the Commission to closely adhere to NTIA's Part 200 guidance.

¹⁰⁶ *Id.* at 35 & n.32 (citing U.S. Dep't of Com., *Limited General Applicability Nonavailability Waiver of the Buy America Domestic Content Procurement Preference as Applied to Recipients of Broadband Equity, Access, and Deployment Program, Request for Comments* (Aug. 2023), <https://www.commerce.gov/sites/default/files/2023-09/BEAD%20BABA%20Waiver%20Replacement.pdf>).

¹⁰⁷ *Id.* at 47.

While the final guidance remains pending, NTIA’s Request for Comment on the guidance tentatively concluded that, consistent with the Treasury’s Part 200 guidance for its ARPA broadband grant programs, a BEAD award can be treated as a fixed-cost subaward that is *not subject to Part 200 cost principles*.¹⁰⁸ The Staff Proposal should follow such guidance, and if any ambiguities exist, the state should default to the well-considered, flexible policies adopted by the Treasury Part 200 Guidance.

E. Adopt a Semi-Annual Reporting Timeframe Consistent with the NOFO for a “Pragmatic” Approach to Subgrantee Monitoring and Reporting

The Staff Proposal proposes to establish “risk-based monitoring” whereby, after reviewing the organizational, financial, and technical strengths of each subgrantee, it will “assign a risk category” to the subgrantee and tailor monitoring and technical assistance based on that risk.¹⁰⁹ CalBroadband strongly supports this risk-based approach and appreciates the Staff Proposal’s effort to find “pragmatic, yet effective” solutions.¹¹⁰ Moreover, this approach is consistent with the NOFO’s directive to ensure that projects are carried out in accordance with the law and that prospective subgrantees are capable of undertaking such projects competently in compliance with all applicable laws.¹¹¹

¹⁰⁸ NTIA Part 200 Request for Comment at 42921-22; Treasury Part 200 Guidance at 2 (“The Uniform Guidance permits agencies to provide an exception from the cost principles and procurement requirements in the case of fixed amount subawards (See 2 CFR 200.1, 200.201(b), and 200.333). Typically, fixed amount subawards may only be issued with the prior written approval of the federal awarding agency and only in an amount up to the \$250,000 Simplified Acquisition Threshold. Treasury, with the approval of the Office of Management and Budget, is providing that recipients may issue fixed amount subawards for broadband infrastructure projects without further Treasury approval regardless of whether the value of the sub-award exceeds \$250,000 and that recipients are not required to apply the cost principles and procurement requirements of the Uniform Guidance to ISPs receiving such fixed amount subawards.”).

¹⁰⁹ See Staff Proposal Volume II at 203-04.

¹¹⁰ *Id.*

¹¹¹ See NOFO at 56.

The Commission can further promote alignment with the NOFO by adopting its proposed pacing for subgrantee reporting. In assessing subgrantee performance, the Staff Proposal proposes to engage in desk reviews, field engineering reviews/audits, and site visits, and to require “timely” reports.¹¹² The Staff Proposal does not, however, specify timing for such reporting. CalBroadband respectfully suggests that the Commission follow the NOFO’s direction and require that subgrantees submit reports “semiannually” for the duration of the subgrant to track the effectiveness of the use of funds provided.¹¹³ Moreover, in furtherance of the stated aim for a “pragmatic” approach to subgrantee monitoring, the Commission should provide reasonable advance notice of any on-site inspections and specify the documentation or other materials that should be prepared to make the meeting as productive and efficient as possible for both providers and the monitoring staff.

VII. VOLUME II: STREAMLINE ACCESS TO POLES FOR TIMELY DEPLOYMENT

CalBroadband appreciates the Staff Proposal’s acknowledgment of the important objective of streamlining cost-effective access to poles, conduits and easements.¹¹⁴ The Staff Proposal is correct to note that the Commission’s adoption of one-touch make-ready rules in 2022 is consistent with this objective.¹¹⁵ But the Staff Proposal is notably lacking in any additional steps the state can—and should—take to facilitate broadband deployment. It is helpful that the Commission will “encourage municipalities that own poles or conduits to make

¹¹² Staff Proposal Volume II at 205.

¹¹³ See NOFO at 90.

¹¹⁴ See Staff Proposal Volume I at 134-38.

¹¹⁵ *Id.* at 136; D. 22-10-025 (*Decision Adopting One-Touch Make-Ready Requirements*, issued Oct. 27, 2022).

them available” under the policies laid out in the state’s Local Government Permitting Playbook.¹¹⁶ As that Playbook notes, however, most poles are not municipally owned.¹¹⁷

CalBroadband anticipates that the majority of BEAD-funded deployments will be aerial. For this reason, delays in broadband providers’ access to poles could significantly impede or even derail California’s efforts to leverage BEAD funding to deploy broadband as widely as possible throughout the state. To avoid that outcome, CalBroadband recommends the Commission take the following steps to streamline access to poles for BEAD-funded projects:

- Require that, where a pole owner will not be able to complete application review, survey, estimate, and make-ready within the timeframes required by the Commission’s ROW Rules, it must notify the applicant of that fact within 15 business days of receiving a complete application, so the applicant can promptly pursue the self-help remedy.¹¹⁸
- Adopt specific timelines for projects in excess of the 3,000 poles/5 percent limit.¹¹⁹
- Prohibit pole owners from limiting the size of an application or the number of poles included in an application in order to avoid the timelines.
- Prohibit pole owners from unreasonably withholding or delaying consent for a broadband provider to hire qualified contractors to perform application review, survey, estimate, and make-ready work that the pole owner is unable or unwilling to timely complete.
- To minimize disputes, require pole owners to promptly disclose all public and non-public information necessary to calculate allowable pole attachment rates.
- Establish a presumption that it is unreasonable for a pole owner to restrict the use of space- and cost-saving construction techniques that are permitted under industry

¹¹⁶ *Id.* at 136.

¹¹⁷ *State of California Local Permitting Playbook [to advance the Broadband for All Action Plan]* (Aug. 2022), at 31 n.7, <https://broadbandforall.cdt.ca.gov/wp-content/uploads/sites/19/2022/09/California-Local-Jurisdiction-Permitting-Playbook-1.pdf>.

¹¹⁸ *See* D. 22-10-025, Att. A, § IV.G.2 (requiring that pole owners “immediately notify” new attachers of any deviation from timelines).

¹¹⁹ *See id.* § IV.D.5 (requiring that the pole owner “negotiate in good faith the timing” of such requests).

standard construction guidelines, such as boxing and extension arms, where such work can be performed consistent with General Order 95.¹²⁰

- Clarify that a pole owner cannot require a requesting attacher to pay the entire cost to replace poles with preexisting conditions that would already justify replacement without the new attachment and/or poles that are already tagged for replacement.¹²¹
- Require that pole owners bear a portion of pole replacement costs based on the age and remaining value of the pole (i.e., the pole owner bears a greater share for older poles), to reflect the fact that the pole owner benefits from the replacement by receiving a new, undepreciated pole with a longer expected useful life, and can use or rent to attachers the additional pole capacity.
- Require that pole replacements be completed within the timeframe for make-ready work above the communications space.¹²²
- Prohibit pole owners from requiring that attachers obtain professional engineer certifications where the pole owner is already charging the attacher engineering fees.

At a minimum the Commission should condition the receipt of BEAD funding by any entity that owns poles (including municipal entities) on compliance with these requirements, as well as the Commission's other pole attachment rules. In addition, when appropriate, the Commission should urge the State Legislature to take action with regard to pole rental rates in California, which are among the highest in the nation and directly impact the amount of capital available to providers for broadband deployment.¹²³

¹²⁰ See SR-1421, *Telcordia Blue Book – Manual of Construction Procedures*, Figs. 3-1, 14-1; FCC, *Connecting America: The National Broadband Plan* 111 (2010), <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>. Maine and New York have enacted such requirements. See 65-407-880 Me. Code R. § 2(B); N.Y. Pub. Serv. Comm'n, *Proceeding to Review Certain Pole Attachment Rules*, Case 22-M-0101, App. A, at 6-7 (Mar. 1, 2022).

¹²¹ See D. 22-10-025, Att. A, § VIII.C.1; see *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling, 36 FCC Rcd. 776 ¶ 6 (WCB 2021).

¹²² See *id.*, Att. A, § IV.C.2.b.

¹²³ CalBroadband will provide specific recommendations upon request.

VIII. VOLUME I: ADOPT TARGETED MODIFICATIONS TO THE CHALLENGE PROCESS

CalBroadband appreciates and strongly supports the Commission’s proposal to treat as “underserved” locations that the FCC’s National Broadband Map shows to have available qualifying broadband service delivered via Digital Subscriber Line (“DSL”) technology. Such treatment is expressly allowed by NTIA’s guidance.¹²⁴ NTIA has concluded that treating locations that are “served” by DSL as “underserved” will “better reflect the locations eligible for BEAD funding because it will facilitate the phase-out of legacy copper facilities and ensure the delivery of ‘future-proof’ broadband service.”¹²⁵ CalBroadband urges the Commission to maintain this proposal to ensure that the BEAD Program delivers all California residents access to reliable broadband service. CalBroadband also supports the Commission’s proposals to treat as “unserved,” in certain circumstances, locations that the National Broadband Map shows to be “underserved” by DSL technology or licensed fixed wireless.¹²⁶

To ensure that the Commission’s challenge process accurately and efficiently identifies remaining served, unserved, and underserved locations in California, CalBroadband urges the Commission to adopt certain other modifications to the BEAD Model Challenge Process and make additional targeted changes to the Staff Proposal. In particular, the Commission should:

- A. Ensure that the challenge process is “transparent, evidence-based, fair, and expeditious,” as required by the NOFO, by providing a 45-day period for challenge submissions, followed by a 45-day period for *rebuttals* to any challenges, and requiring local governments/nonprofits to conduct a pre-screening process to remove frivolous or incomplete challenges submitted by individuals;
- B. Exclude the proposed optional speed tests from the challenge process, inclusion of which could inundate the state with inaccurate challenges and compromise the Commission’s

¹²⁴ NTIA, *BEAD Model Challenge Process* at 8 (Nov. 1, 2023) (“NTIA BEAD Model Challenge Process”), <https://www.ntia.gov/sites/default/files/2023-09/bead-model-challenge-process.zip>.

¹²⁵ *Id.*

¹²⁶ Staff Proposal Volume I at 9-10.

ability to properly determine unserved and underserved locations in California;

- C. Designate *all* locations that are served only by terrestrial licensed fixed wireless as “underserved”;
- D. Evaluate community needs prior to classifying a CAI as BEAD-eligible, particularly in light of the fact that California’s BEAD allocation likely will be insufficient to achieve “complete coverage” across all of California;
- E. Make targeted changes to the evidentiary requirements that will ensure the Commission can implement an administratively efficient, accurate, and reliable challenge process; and
- F. Exclude the proposed optional area and MDU challenges, which are insufficiently defined by the BEAD NOFO and could add unnecessary complexity to the Commission’s challenge process.¹²⁷

Incorporating these targeted modifications into the Commission’s final Initial Proposal is critical to ensuring that the Commission’s BEAD challenge process is ultimately able to efficiently and accurately identify the state’s remaining unserved and underserved areas that are eligible for BEAD funding.

A. Provide 45 Days Each for Challenge Submissions and Rebuttals, and Require Local Governments/Nonprofits to Conduct a Pre-Screening Process to Remove Frivolous or Incomplete Challenges

The NTIA BEAD Model Challenge Process permits the entire challenge process to span 120 days following publication of the BEAD-eligible locations.¹²⁸ Yet, in the Staff Proposal, California proposes that the challenge process only span up to 90 days.¹²⁹ In that time, the Staff Proposal allots 30 calendar days to submit an initial challenge, only 15 calendar days from notification of a challenge to submit rebuttals, and 30 calendar days from the rebuttal for the state’s final determination.

¹²⁷ NOFO at 34.

¹²⁸ NTIA BEAD Model Challenge Process at 11 n.9.

¹²⁹ Staff Proposal Volume I at 12-14.

CalBroadband urges the Commission to modify its Staff Proposal by: (i) establishing a 30-day period *before* the opening of the challenge submission window to allow providers to submit evidence of existing, enforceable federal, state, and local broadband deployment commitments; (ii) providing at least a 45-calendar day timeframe for the challenge phase followed by a 45-calendar day timeframe for *the rebuttal phase*; (iii) adopting an overall timeframe of 120 days, as contemplated by NTIA, to conduct the challenge process; and (iv) requiring local governments and nonprofits to conduct a screening process for individual challenges to remove frivolous or incomplete challenges.

As an initial matter, the Commission should establish a 30-day period before the challenge process begins for providers to submit evidence of existing, enforceable federal, state, and local broadband deployment commitments. Doing so will ensure that the state is not missing any existing commitments that are not yet identified on the latest maps or are otherwise unknown to the state. Beyond helping to ensure the accuracy of California's initial set of eligible locations, obtaining this information is an additional failsafe to ensure that the Commission satisfies NTIA's requirement that it not include in its set of eligible locations any location that is already subject to an enforceable federal, state, or local commitment to deploy qualifying broadband as of the date that the challenge process is concluded.¹³⁰

The Commission should also provide at least 45-calendar days for the challenge phase followed by 45-calendar days for the rebuttal phase, within an overall timeframe of 120 days for the challenge process. The current 90-day challenge process underestimates the time it will take to analyze, challenge, and rebut an entire statewide map of locations, for providers, the Commission, and other participants. Providers, for example, will have to comprehensively

¹³⁰ See NOFO at 36.

review and potentially challenge or rebut eligibility designations for every location, and many providers may be required to concurrently undertake the same analysis in numerous other states. The Staff Proposal’s timeframes are simply not adequate to allow for sufficient analysis and risk the Commission receiving incomplete information, which would impede the accuracy of funding decisions and undermine the state’s ability to direct funding to unserved and underserved locations. In addition, the Staff Proposal disregards NTIA’s “strong[] recommend[ation]” that the challenge submission and rebuttal windows remain open “for *at least 30 days*.”¹³¹

CalBroadband also recommends that the Commission require local governments or nonprofits to screen any individual challenges they receive to remove incomplete or frivolous challenges before submittal, and confirm that any submitted challenges are from residents of that locality or, in the case of a nonprofit, from nonprofit members or others with an established connection to the nonprofit.

CalBroadband urges the Commission to make these targeted modifications to its Staff Proposal to ensure that the Commission conducts a fair, expeditious, and evidence-based challenge process that accurately identifies the unserved and underserved locations across California.

B. Exclude Optional Speed Tests from the Challenge Process to Avoid Inundating the Commission with Inaccurate Challenges

The Commission should exclude optional speed tests from the challenge process because they could compromise the Commission’s ability to accurately determine the state’s BEAD-eligible locations. The Staff Proposal includes NTIA’s optional speed test challenge module and

¹³¹ See NTIA BEAD Challenge Process *Policy Notice 21* (Sept. 7, 2023) (emphasis added) (“NTIA BEAD Challenge Process Guidance”), https://www.ntia.gov/sites/default/files/2023-09/bead_challenge_process_policy_notice.pdf.

adopts the methodological requirements for speed tests from NTIA’s model. However, speed test evidence often inaccurately measures network performance delivered, and NTIA’s guidance explicitly clarifies that accepting speed tests is entirely optional—and many states have declined to adopt this module.¹³²

The Commission can, and should, use its discretion to exclude subscriber speed tests. Due to the inherent difficulty of ensuring that speed tests contain accurate, verifiable information, the FCC only uses this data as a supplemental source of information, not as the sole basis for a challenge to a provider’s reporting of a location as served. For this reason, pursuant to NTIA’s guidance, states that use speed tests are required to impose significant and burdensome requirements on challengers. For example, speed test measurements:

- Must include information such as the time and date the speed test was conducted, the provider-assigned IP address, and identify the residential gateway conducting the test;
- Must be conducted on three different days;
- Require the customer to certify, via a copy of the customer’s bill, the speed tier to which the customer subscribes;
- Require the Commission to develop and provide an online form to grant access to all of those elements to challenged entities, and any contractors supporting the challenge process and the service provider; and

¹³² See, e.g., ConnectLA, *BEAD Initial Proposal Volume 1*, (Sept. 2023), <https://connect.la.gov/media/q5mll4a5/bead-ip-volume-1.pdf>; Tennessee Department of Economic & Community Development, *BEAD Initial Proposal Volume 1* (Aug. 2023); Idaho Department of Commerce, *BEAD Initial Proposal Volume 1* (Sept. 2023), https://linkup.idaho.gov/wp-content/uploads/2023/09/ID-Vol-I-Final-Draft-Post-for-Public-Comment_9.29.23.pdf. Indeed, given the “variability of numerous broadband network factors that affect the accuracy of speed tests – such as network traffic and demand, end-user technology (modems and routers), and lack of knowledge of user service adopted,” states are rejecting speed tests as part the BEAD challenge process because they “are not an effective way to ensure correct identification of all eligible locations.” Public Service Commission of Wisconsin, *The Broadband Equity, Access & Deployment (BEAD) Initial Proposal Volume 1*, at 8 (Sept. 2023) Public Service Commission of Wisconsin, *The Broadband Equity, Access & Deployment (BEAD) Initial Proposal Volume 1*, at 8 (Sept. 2023), <https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=480766>.

- Cannot predate the beginning of the challenge period by more than 60 days.

Then, because speed-test challenges cannot be submitted by individual subscribers, they must be gathered and submitted by a different entity, such as a local government or nonprofit organization. If such data meets the above-mentioned requirements, a responding provider will then offer a countervailing speed test. After that, the Commission must evaluate all of this evidence to make a final determination of the challenge, which is separate and apart from the difficulty of ascertaining whether a subscriber met the parameters required to ensure the challenge is valid and may be considered. To be clear: these rigorous parameters are necessary to ensure the reliability of speed-test evidence; however, they illustrate the incredible complexity of allowing and adjudicating speed-test challenges, and it would be overly difficult and burdensome—for providers, subscribers, and the Commission—to ensure that all of these requirements are met.

CalBroadband also notes that the Staff Proposal suggests that the Commission will also use speed test data collected in connection with another Commission grant program challenge or objection process, as well as the Commission’s CalSPEED initiative.¹³³ However, the speed test data collected in connection with these programs likely will not meet the evidentiary standards required by NTIA’s guidance. CalBroadband urges the Commission to remove the reference to such speed test data from Volume I as well.

Fundamentally, accepting speed tests is unnecessary to determine actual speeds offered to subscribers in California, particularly for cable and fiber providers, because the FCC has already recently confirmed that “actual speeds experienced by the subscribers of most ISPs are close to

¹³³ Staff Proposal Volume I at 10.

or exceed the advertised speeds.”¹³⁴ For example, in referring to several of CalBroadband’s member companies, the FCC concluded that:

*Customers of Charter, Comcast, [and] Cox . . . experienced median download speeds that were very consistent, i.e., they provided greater than 95% of the advertised speed during peak usage period to more than 80% of panelists for more than 80% of the time. In particular, Charter, Comcast, [and] Cox . . . provided 100% or greater than their advertised speed during the peak usage period to more than 80% of their panelists for more than 80% of the time.*¹³⁵

Thus, speed tests are unnecessary because the FCC has already independently validated the fact that CalBroadband’s members consistently offer consumers actual speeds that meet or even exceed advertised speeds.

DSL broadband ISPs, however, “continue to advertise ‘up-to’ speeds that, on average, exceed the actual speeds experienced by their subscribers.”¹³⁶ Similarly, in markets served exclusively by licensed fixed wireless service that were determined to be “served” and initially ineligible for BEAD funding, recent estimates suggest that these fixed wireless providers typically only have sufficient excess capacity to actually serve 10-15 percent of the homes and businesses in that market.¹³⁷

¹³⁴ FCC, *Twelfth Measuring Broadband America Fixed Broadband Report* 13 (Jan. 6, 2023), <https://data.fcc.gov/download/measuring-broadband-america/2022/2022-Fixed-Measuring-Broadband-America-Report.pdf> (“FCC MBA Report”).

¹³⁵ *Id.* at 16.

¹³⁶ *Id.* at 13.

¹³⁷ See Jonathan Chaplin, New Street Research, *The Impact of Fixed Wireless on BEAD* at 2-5 (July 22, 2023) (stating that licensed fixed wireless service providers “have said that they can’t economically add capacity to their mobile network for [licensed fixed wireless (‘FW’)] alone – they invest in capacity for mobile users, and where this results in pockets of excess capacity not needed by mobile users, they will sell FW subscriptions. The process of determining how many FW subscribers a carrier can support in a given cell site is complex (and the analysis must be done on a sector-by-sector basis) When they reach their subscription limit, they stop selling subscriptions in the sector.”).

In the alternative, if the Commission does not strike consumer speed tests as a basis for a challenge, it should, at a minimum:

- Include all of NTIA’s evidence and veracity requirements for optional speed-test measurements;
- For individual challenges that are aggregated by a local government or nonprofit, require the local government or nonprofit to submit only consumer speed tests that have at least some indicia of reliability;
- Require that speed tests be accompanied by a certified attestation from the customer that states the following: *“I hereby certify, under penalty of perjury, that the download and upload speed indicated in this submission are the true and correct speeds to which I subscribe at the location where the speed tests included in this submission were measured. The entry of my name above constitutes my electronic signature to this certification. Persons making willful false statements in this form can be punished by fine or imprisonment under 18 U.S.C. § 1001.”*¹³⁸; and
- Permit providers to rely on speed test results using federally approved methodologies, including from the FCC’s MBA Reports, as a source to rebut consumer speed-test challenges.

C. Designate Locations Served Only by Terrestrial Licensed Fixed Wireless as “Underserved”

Consistent with the Commission’s well-reasoned judgment for its proposal to treat locations that are “underserved” by licensed fixed wireless as “unserved,” CalBroadband urges the Commission to treat *every* location that is classified as “served” exclusively via licensed fixed wireless as “underserved” and eligible for BEAD funding. Recent research demonstrates that licensed fixed wireless providers typically only have sufficient capacity to serve a small percentage of the homes and businesses in their coverage areas and are unable to provide service

¹³⁸ See, e.g., State of Arizona, Arizona Commerce Authority, *BEAD Challenge Process 20* (Oct. 2023), www.azcommerce.com/media/04kpua31/aca-bead-initial-proposal_volume-i-final-revision.pdf.

to all potential customers in their coverage areas.¹³⁹ However, all of those homes and businesses were initially considered “served,” a determination that should therefore change.¹⁴⁰

Indeed, the Commission has already determined *why* CalBroadband’s proposed modification is necessary, given that “fixed wireless speeds fluctuate heavily” and “service performance can be affected by a customer’s proximity to a base station, the capacity of the cell site, the number of other users connected to the same cell site, the surrounding terrain, and radio frequency interference.”¹⁴¹ Accordingly, similar to treating locations exclusively “served” via DSL as “underserved,” the Commission should modify the challenge process to treat areas “served” exclusively by any licensed fixed wireless service as “underserved” and eligible for BEAD funding. Doing both will further encourage the deployment of end-to-end fiber projects, where feasible, which will help “ensure the delivery of ‘future-proof’ broadband service” to as many California residents as possible, as envisioned by NTIA.¹⁴²

D. Ensure the Commission’s Identification of CAIs as BEAD-Eligible Is Tailored to Community Needs

Over the long term, CAIs can be an important piece in meeting California’s connectivity needs, and CalBroadband appreciates the methodology that the Commission used to develop its proposed list of eligible CAIs. However, it is unlikely that the Commission will have sufficient

¹³⁹ See Chaplin, *supra* note 146, at 2-5.

¹⁴⁰ Other states have agreed. Vermont, for example, does “not believe terrestrial fixed wireless technologies can reliably deliver the speed and latency requirements for a location to be considered ‘served’ under the IJA (i.e., not less than 100 Mbps download and 20 Mbps upload and latency less than or equal to 100 milliseconds).” Vermont Community Broadband Board, *Vermont’s Draft Broadband Equity, Access, and Deployment Initial Proposal, Volume I*, at 21 (July 2023), <https://publicservice.vermont.gov/sites/dps/files/documents/Vermont%20BEAD%20Initial%20Proposal%20Volume%201%20for%20public%20comment.pdf>.

¹⁴¹ Staff Proposal Volume I at 9.

¹⁴² See NTIA BEAD Model Challenge Process at 8.

BEAD funds to support CAIs, since even the Commission notes that “California’s BEAD allocation [is] being fully committed to deploying service to unserved locations,”¹⁴³ let alone all underserved locations in the state—both of which are prioritized ahead of CAIs. However, to the extent that CAIs will receive BEAD funding, the Commission’s efforts to identify and connect qualifying CAIs should be narrowly tailored to the needs of the community in order to maximize the reach of those funds.

Specifically, the Commission should rigorously evaluate whether such locations are truly community hubs that require gigabit symmetrical Internet access.¹⁴⁴ The Commission should also evaluate whether such locations are already on track to receive qualifying service, for example, as existing ISPs deploy symmetrical gigabit service throughout their service areas and into new areas. CalBroadband members are currently in the process of evolving their networks to deliver multi-gigabit symmetrical speeds that will exceed the BEAD-required service levels to CAIs. For example, Charter, Comcast, and Cox each plan to evolve their hybrid fiber coaxial (“HFC”) networks using a number of technologies, including deploying additional fiber deeper into their networks, adding spectrum and allocating more upstream spectrum to increase upstream speeds, using Distributed Access Architecture to efficiently and flexibly support both HFC and PON in the last mile, and deploying DOCSIS 4.0 technology by year end 2025, which supports multi-gig and symmetrical Internet speeds, all of which will benefit the CAIs in their service areas.¹⁴⁵ Again, while it is unlikely there will be BEAD funding available after

¹⁴³ Staff Proposal Volume I at 9.

¹⁴⁴ Moreover, the expansive definition of CAI is already likely to encompass institutions where regular mass-market service would be adequate to meet customer needs (e.g., many medical offices), so the enhanced speed requirement may have limited practical value.

¹⁴⁵ See Charter Communications, Inc. Annual Report (10-K) at 1 (Jan. 27, 2023), <https://ir.charter.com/static-files/60656fe0-803a-4aa0-8da8-30865d4899f1>; Press Release, Comcast

applications for unserved and underserved locations are funded, the Commission should exclude CAIs from BEAD eligibility if they are currently served by a network that is on track to be upgraded to qualifying speeds independent of any forthcoming BEAD investment.

E. Make Targeted Changes to the Evidentiary Requirements for the Challenge Process

It is critical that challenges and rebuttals are supported with sufficient evidence. To further this imperative, CalBroadband urges the Commission to make targeted changes to the evidentiary requirements to help ensure that the Commission administers an efficient and reliable challenge process:

- *For **availability challenges**, require evidence to have been collected within the last six months, which will avoid evidence that is too stale to be credible.* Although NTIA’s Model Challenge Process and the Staff Proposal would accept “a letter or e-mail dated within the last 365 days that a provider failed to schedule a service installation or offer an installation date within 10 business days of a request,”¹⁴⁶ service could very well have been established in the last 365 days. Indeed, providers are required to submit updates to the FCC’s Broadband Data Collection portal every six months. The same time benchmark should be used here.
- *For **availability challenge rebuttals**, clarify that providers:*
 - *Are not required to produce customers’ bills.* A provider that serves a location may not have a customer bill if the customer is using a different service provider or has chosen not to subscribe at all, or if the deployment is recent.
 - *Are permitted to provide any credible form of evidence that service is available as a standard installation at a certain location.* For example, providers should be able to submit evidence of a general mailing in the area

Corp., *Comcast Accelerates Nation’s Largest and Fastest Multi-Gig Rollout* (Feb. 9, 2023), <https://corporate.comcast.com/press/releases/comcast-multi-gig-rollout-xfinity-10g-network-upgrade>; Cox Communications, *Cox Shares Details on Plans to Launch Multi-Gigabit Service to Half Its Base This Year*, Telecompetitor (July 24, 2023), <https://www.telecompetitor.com/cox-shares-details-on-plans-to-launch-multi-gigabit-service-to-half-its-base-this-year/>.

¹⁴⁶ NTIA BEAD Model Challenge Process at 13.

offering service.¹⁴⁷ The Commission should also clarify that screenshots showing service availability are acceptable rebuttal evidence for all availability challenges.¹⁴⁸ In addition, the Commission should not limit availability rebuttal evidence to confirmation that service was provided to a BSL within the previous 12 months.¹⁴⁹ The ability of a cable network to serve a given location, once service is provided, typically does not change year-over-year because the cable network does not have capacity constraints like other technologies such as fixed wireless access. Therefore, the Commission should allow evidence confirming that the provider has provided service to a BSL at any time in the past.

- *For planned service challenges, clarify that evidence of a construction contract, pole attachment license, franchise agreement, or similar evidence of planned deployment is sufficient to demonstrate that broadband will be deployed to a location. Any of these showings would be reasonable, but the Staff Proposal’s requirement to submit evidence that all necessary permits have been applied for or obtained¹⁵⁰ is overly burdensome both for providers to produce and for the Commission to review. It is also unnecessary in light of the other available evidence.*
- *For planned service challenges, require qualifying service to be deployed by June 30, 2025. A broadband provider that has firm upcoming construction plans to serve or upgrade locations without an enforceable commitment should be permitted to submit evidence that the location will be served as of June 30, 2025, not an earlier date. Although the Staff Proposal specifies June 30, 2024,¹⁵¹ this date, which is also listed in NTIA’s Model Challenge Process, appears to be an example provided for illustrative purposes only. In light of the fact that the Commission will be making challenge determinations in 2024, the Commission can and should provide for a date that will capture reasonably imminent projects that would render BEAD funding for an area superfluous. For this very reason, other states that will make challenge determinations in 2024, like Nebraska, have proposed to use June 30, 2025 as the date for administrating planned service challenges, which is more reasonable.¹⁵²*

¹⁴⁷ See NTIA, *BEAD Challenge Process Policy Notice 17* (Sept. 7, 2023) (“NTIA BEAD Challenge Process Guidance”), https://www.ntia.gov/sites/default/files/2023-09/bead_challenge_process_policy_notice.pdf.

¹⁴⁸ See Staff Proposal Volume I at 26.

¹⁴⁹ See *id.*

¹⁵⁰ See *id.* at 29.

¹⁵¹ See Staff Proposal Volume I at 16.

¹⁵² See State of Nebraska, *Nebraska Broadband Office, BEAD Challenge Process* at 12 (Sept. 2023), <https://broadband.nebraska.gov/media/i0rjyrip/nbo-bead-initial-proposal-volume-1-public-draft.pdf>.

F. Exclude the Proposed Area and MDU Challenges

CalBroadband also respectfully urges the Commission to exercise its discretion not to include the area and MDU challenges in its challenge process. NTIA's Model Challenge Process explicitly treats area and MDU challenges as *optional*.¹⁵³ Such challenges should be excluded because they adopt arbitrary metrics that are not representative of available service offerings and would unnecessarily compromise the Commission's ability to conduct its challenge process in a fair and expeditious manner, as required by the IJA and the NOFO. Specifically, the fact that a small number of BSLs per area or MDU are subject to a challenge is not itself evidence that *every other* BSL within that area or MDU is not served. Accordingly, these challenges would require the Commission to expend valuable staff and resources to review rebuttal evidence for an exponentially higher number of locations than were challenged in the first place, all within a very brief period. This would not only make area and MDU challenges an ineffective mechanism to accurately identify unserved and underserved locations in California but could also prevent the Commission from "review[ing] all applicable challenge and rebuttal information in detail without bias, before deciding to sustain or reject a challenge."¹⁵⁴

IX. CONCLUSION

CalBroadband and its members look forward to continuing to work with the Commission as it implements the California BEAD Program. Adopting CalBroadband's targeted recommendations described herein will provide the Commission with the best chance of ensuring that all Californians without access to high-speed broadband benefit from this historic opportunity.

¹⁵³ NTIA BEAD Model Challenge Process at 18.

¹⁵⁴ *See id.* at 12-13.

Respectfully submitted,

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APPENDIX: KEY CHANGES TO STAFF PROPOSAL

Proposed Scoring Criteria for Priority Broadband Projects (end-to-end fiber)

Scoring Criterion	Points available
Primary Criteria (required under NTIA Rules)	
Affordability	40 -15
Labor Standards	20
Minimum BEAD outlay	15 up to 40
Primary Criteria subtotal	75
Secondary Criterion (required under NTIA Rules)	
Speed to Deployment	5 -10
Secondary Criteria subtotal	5
Additional Prioritization Factors	
Equity	10 -8
Resilience	10 -7
Additional Prioritization Factors subtotal	20
Total	100

Proposed Scoring Criteria for Other Last-Mile Broadband Deployment Projects

Scoring Criterion	Points available
Primary Criteria (required under NTIA Rules)	
Affordability	40 -15
Labor Standards	20
Minimum BEAD outlay	15 up to 40
Primary Criteria subtotal	75
Secondary Criteria (required under NTIA rules)	
Technical Capability	4
Speed to Deployment	1
Secondary Criteria subtotal	5
Additional Prioritization Factors	
Equity	10
Resilience	10
Additional Prioritization Factors subtotal	20
Total	100

Scaled Rubric For Minimal BEAD Program Outlay

Percent of Eligible Project Costs Covered by Non-State Match	Points
85% and above	40
75 - 84.99%	35
65 - 74.99%	30
55 - 64.99%	25
45 - 54.99%	20
35 - 44.99%	15
30 - 34.99%	10
>25 - 29.99%	5
0 - 25%	0

Low-Cost Broadband Service Option

1. At a minimum, the low-cost broadband service must:
 - Provide typical download speeds of at least 100 Mbps and typical upload speeds of at least 20 Mbps, or the fastest speeds the infrastructure is capable of if less than 100 Mbps/20 Mbps;
 - Provide typical latency measurements of no more than 100 milliseconds;
 - Not be subject to data caps, non-governmental imposed surcharges, or usage-based throttling, and be subject only to the same (or better) acceptable use policies to which subscribers to all other broadband internet access service plans offered to home subscribers by the participating subgrantee must adhere; and
 - In the event the provider later increases the speeds of one of its low-cost plans it will permit Eligible Subscribers that are subscribed to that plan to upgrade to those new speeds at little or no cost.
2. Subgrantee applicants must include in their application a commitment to charge a price for their low-cost broadband option to low-income households that meet the eligibility requirements for ACP. The price submitted by the applicant will meet the CPUC's definition of the low-cost service option if it meets either of the following:
 - It is consistent with the low-cost offerings the subgrantee applicant currently (at the time of the application) makes available in unsubsidized areas within the state; or

- It is consistent with the low-cost offerings available from other providers in unsubsidized areas within the state (including for subgrantee applicant without an existing low-cost option).
3. As an additional, objective mechanism to ensure affordability, the CPUC will require that price submitted by the provider must be below the maximum ceiling of the residential rates provided in the Federal Communications Commission's ("FCC's") U.S. reasonable comparability benchmark, calculated annually in the fixed broadband Urban Rate Survey ("URS") for the service tier with a specified download speed of 100 Mbps and upload speed of 20 Mbps.
 4. Subgrantees are required to participate in the Affordable Connectivity Program ("ACP") or any substantially similar successor program offered by the federal government, and Eligible Subscribers in BEAD funded areas that are eligible for a broadband service subsidy can apply the subsidy to the low-cost broadband service option.

As an alternative, subgrantees could voluntarily choose to adopt and implement the sample low-cost broadband service option set forth in the BEAD NOFO. *See* NOFO at 67-68.