

**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 CTIA ON
BROADBAND EQUITY, ACCESS, AND DEPLOYMENT
PROGRAM INITIAL PROPOSAL**

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CTIA respectfully submits these comments in response to the California Public Utilities Commission's draft Initial Proposal for Broadband Equity, Access, and Deployment ("Initial Proposal") funding, which will be submitted to the National Telecommunications and Information Administration. Attachments A and B hereto provide CTIA's comments on the Initial Proposal's Volumes 1 and 2, respectively.

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ATTACHMENT A

**COMMENTS OF CTIA ON
BROADBAND EQUITY, ACCESS, AND DEPLOYMENT
PROGRAM INITIAL PROPOSAL VOLUME 1**

I. INTRODUCTION AND SUMMARY

CTIA¹ respectfully submits these comments in response to the California Public Utilities Commission’s (the “Commission’s”) draft Volume 1 of its Initial Proposal for Broadband Equity, Access, and Deployment (“BEAD”) funding (“Volume 1”), which will be submitted to the National Telecommunications and Information Administration (“NTIA”).² The draft of Volume 1 reflects a great deal of work by the Commission, and CTIA looks forward to engaging with the Commission to optimize California’s approach to promoting broadband deployment with its BEAD funding. BEAD funding for broadband deployment represents a unique opportunity to help close the digital divide in California, so it should be spent as efficiently as possible to maximize its impact.

CTIA requests that the Commission withdraw Volume 1’s proposed low-speed fixed wireless modification (“Fixed Wireless Modification”) to NTIA’s BEAD Model Challenge Process. Under the proposed Fixed Wireless Modification, the Commission will “presume the 36,887 locations that the National Broadband Map shows to have available non-qualifying broadband service (i.e., a location that is ‘underserved’) delivered over Licensed Fixed Wireless (“LFW”) as ‘unserved’ for reported speeds that are lower than or equal to 30/5 Mbps.”³

¹ CTIA—The Wireless Association® (CTIA) (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st-century connected life. The association’s members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry’s voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry’s leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

² Administrative Law Judge’s Ruling Issuing Staff Proposal, R.23-02-016, at Att. A (Nov. 7, 2023).

³ Volume 1 at 9.

The Fixed Wireless Modification is impermissible as a matter of law and unwise as a matter of policy for several reasons. First, the Commission’s approach is contrary to the plain language of both the Infrastructure Investment and Jobs Act (“IIJA”)⁴ and NTIA’s rules to implement it.⁵ This change is not valid as a modification to reflect “data not in the Broadband Map” because it impermissibly relies on disagreements with definitions codified in federal law. Unless the Fixed Wireless Modification is removed from Volume 1, the Initial Proposal will be subject to Disapproval by NTIA.⁶

Second, the reasons offered in Volume 1 for removing locations served by fixed wireless access (“FWA,” or 5G Home Broadband) that allegedly test below 30/5 megabits per second (“Mbps”) – whether provided using 5G, 4G LTE, or any other FWA technology – are invalid because they are based on inaccurate and incomplete information and analysis. To the extent that such shortcomings in network performance exist in specific cases, NTIA’s process anticipates that they will be removed through the evidence-based challenge process (based on actual testing) – not before the challenge process even begins.

I. THE FIXED WIRELESS MODIFICATION IS INCONSISTENT WITH THE IIJA AND THE BEAD NOFO.

CTIA urges the Commission to recognize that the IIJA and NOFO do not permit it to recategorize locations served only by fixed wireless broadband as “unserved” as described in the Fixed Wireless Modification. The IIJA’s definition of “unserved” refers to the availability of access to “reliable broadband service,” offered at a speed of not less than 25 Mbps download and

⁴ IIJA, Pub. L. No. 117-58, § 60101 *et seq.* (2021).

⁵ See NTIA Notice of Funding Opportunity (“NOFO”), May 12, 2022.

⁶ NOFO at 34 (Disapproval).

3 Mbps upload, as determined in accordance with the “Broadband DATA Maps.”⁷ The IJJA recognizes fixed wireless broadband as a “Reliable Broadband Technology,”⁸ and – beyond the 25/3 Mbps speed requirement – it meets or exceeds speeds 100/20 Mbps at locations throughout the nation, including in California. Effectively changing the definition of “unserved” from below 25/3 Mbps to below 30/5 Mbps and treating areas as “unserved” that are shown on the Broadband DATA Maps as “underserved” would be inconsistent with and contrary to the plain language of the IJJA and the BEAD program requirements described in the NOFO. Thus, the proposed approach is invalid and impermissible and will subject the Initial Proposal to Disapproval by NTIA.

Congress assigned to the federal government the task of developing “Broadband DATA Maps”⁹ that must be used to identify areas that are underserved or unserved for purposes of BEAD,¹⁰ and the NOFO also requires that California “[i]dentify each unserved location and underserved location ... using the most recently published Broadband DATA Maps....”¹¹ The Commission’s proposal to disregard the Broadband DATA Maps where they show that a

⁷ 47 U.S.C. § 642(c)(1)(A); IJJA at § 60102(a)(2)(C). CTIA recognizes that the Department of the Treasury, in implementing the American Rescue Plan Act (“ARPA”), viewed areas served only by fixed wireless broadband as unserved or underserved. *See* Coronavirus State and Local Fiscal Recovery Funds, Interim Final Rule, 86 Fed. Reg. 26786, 26821 (May 17, 2021). A critical distinction between Treasury’s implementation of ARPA and the Commission’s implementation of BEAD, however, is that Treasury did not face the same legal constraints; ARPA did not offer a statutory definition of unserved or underserved areas as the IJJA does.

⁸ “Reliable Broadband Service” is a “broadband service that the Broadband DATA Maps show is accessible to a location via: ... (iv) terrestrial fixed wireless technology utilizing entirely licensed spectrum or using a hybrid of licensed and unlicensed spectrum.” NOFO at 15; IJJA at § 60102(a)(2)(L). Fixed wireless broadband is a Reliable Broadband Service under this definition.

⁹ 47 U.S.C. § 642(c)(1)(A); IJJA at § 60102(a)(2)(C).

¹⁰ IJJA at § 60102(a)(1)(A) & (C) (assigning a categorization “as determined in accordance with the broadband DATA maps”). While not defined in the IJJA or NOFO, for convenience, areas with service above the underserved threshold are herein described as “served.”

¹¹ NOFO at 31.

location is served via FWA at speeds between 30/5 Mbps and 25/3 Mbps is not “using the ... Broadband DATA Maps” as required. This violates the plain language of the IJA and the NOFO.

Furthermore, the NOFO tasks California to “[i]dentify each unserved location and underserved location,”¹² defining “unserved” and “underserved” by reference to the Broadband DATA Maps and whether those locations have access to “Reliable Broadband Service” such as fiber or FWA.¹³ The Commission’s approach does not accomplish the task of identifying locations meeting the defined meaning. Rather, it proposes to ignore the definitions in the IJA, Broadband DATA Act, and NOFO to misidentify underserved locations as unserved.

While NTIA permits states to make modifications to “reflect data not present in the National Broadband Map,”¹⁴ and the Commission apparently seeks to justify the Fixed Wireless Modification under that provision,¹⁵ NTIA also makes clear that it “will not approve proposals to make wholesale changes to the classification of locations as unserved, underserved, or served” based on a state’s disagreement with the definitions in federal law.¹⁶ Here, the Commission is not seeking to incorporate information that is missing from the National Broadband map. NTIA’s Challenge Process Policy makes clear that locations may be reclassified only where “rigorous speed test methodologies demonstrate” that the service received is materially below the threshold speed requirement – here, the 25/3 Mbps threshold for underserved locations.¹⁷ As

¹² *Id.*

¹³ NOFO at 16-17.

¹⁴ *See, e.g.*, NTIA, BEAD Challenge Process Policy Notice, at 10 (Sept. 7, 2023) (“NTIA Challenge Process Policy”).

¹⁵ Volume 1 at 8 (describing the proposed modification as one of the “Modifications to Reflect Data Not Present in the National Broadband Map”).

¹⁶ NTIA Challenge Process Policy at 10.

¹⁷ NTIA Challenge Process Policy at 10.

explained in more detail below, the Commission’s technical analyses miss that mark.¹⁸ As a result, the Fixed Wireless Modification is not a valid modification based on information not present in the National Broadband Map, but rather an impermissible change to the definition of “underserved” as set forth in the IJA.¹⁹ This modification therefore will not be approved by NTIA.

If any of the network concerns that the Commission raises in the Fixed Wireless Modification in fact emerge with respect to any location identified as served on the Broadband DATA Maps, the IJA and NOFO provide for an evidence-based challenge process available to “a unit of local government, nonprofit organizations, or broadband service providers,” by which those entities can bring challenges seeking to reclassify locations from their Broadband DATA Map designation²⁰ – although, of course, recategorizing speeds between 30/5 and 25/3 as “unserved” would not be permitted through testing or any other means, as described above. Thus, the IJA and NOFO anticipate that concerns of this type about the categorization of locations in the Broadband DATA Map will be addressed through the challenge process, not by general removal of locations served by Reliable Broadband Service technologies before the challenge process even begins.

Moreover, the Commission is not a type of entity that the IJA or NOFO recognizes as appropriate to raise these types of challenges in the first instance, since it is not a unit of local government, nonprofit, or broadband service provider. In other words, the IJA and NOFO

¹⁸ See *infra* Section III.

¹⁹ See *id.*

²⁰ See NOFO at 34 (“Each Eligible Entity shall develop and describe in the Initial Proposal, a transparent, *evidence-based*, . . . challenge process.” (emphasis added)); IJA, at § 60102(h)(2); IJA, at § 60102(h)(2) (requiring an evidence-based challenge process and limiting challenges to the above-described defined class).

establish a process whereunder California must judge recategorization challenges tendered by others based on evidence of network performance shortfalls but does not designate the Commission as an entity eligible to offer such challenges.

Accordingly, because the Fixed Wireless Modification impermissibly disregards and modifies statutory definitions, ignores the Broadband DATA Maps, and circumvents the prescribed challenge process, the Commission should remove it from its Initial Proposal to NTIA.

II. THE TECHNICAL ARGUMENTS OFFERED IN VOLUME 1 TO SUPPORT THE FIXED WIRELESS MODIFICATION ARE INACCURATE.

Even assuming the action described in the Fixed Wireless Modification was legally permissible – which it is not – the technical arguments the Commission offers in support of the Fixed Wireless Modification are based on inaccurate or incomplete information.

The Commission asserts, based solely on anecdotal articles, that wireless broadband speeds “fluctuate” and argues that “impartial third parties have found that not all cellular fixed wireless subscribers receive speeds above 25/3.”²¹ Anecdotes are not evidence, however, and anecdotes reaching the opposite conclusion are easy to identify. For example, impartial, unbiased consumer review sites have concluded that 5G Home Internet customers receive service well above 25/3 Mbps.²²

²¹ Volume 1 at 9.

²² See, e.g., Trey Paul, “T-Mobile Home Internet: Can a Mobile Company Really Do Home Internet Better?,” CNET (Sept. 22, 2023) (“my CNET colleagues averaged just over 40 Mbps download speeds with T-Mobile Home Internet, and some households may get up to just over 100Mbps. Anecdotally, we've heard of some users seeing download speeds as high as 300Mbps. Still, T-Mobile's FAQ section promises customers will ‘see typical download speeds between 72-245Mbps.’”), <https://www.cnet.com/home/internet/t-mobile-5g-home-internet-review/>.

Volume 1 also asserts that the Commission “has observed” that some fixed wireless broadband providers’ speed reports “have not been replicated in other testing environments, such as the [Commission’s] own CalSPEED process.” Volume 1 does not indicate how often these observations have occurred, but third-party testing data does not support this assertion. For example, according to Ookla, in the third quarter of 2023, the average mobile download speed across the three largest mobile providers (T-Mobile, Verizon, and AT&T) was 104 Mbps – not only well above the “unserved” threshold, but above “served” levels as well.²³ Ultimately, however, none of these data sources satisfies the standards for a “rigorous speed test” finding that NTIA contemplates might justify evidence-based reclassification of locations.²⁴

Volume 1 also proposes that the Fixed Wireless Modification is appropriate because speeds may be lower than 25/3 Mbps if “users are deprioritized during periods of network congestion.”²⁵ To the extent that speeds vary due to an internet service provider’s network management practices, CTIA notes that these practices are ubiquitous across the telecommunications industry.²⁶ What’s more, internet service providers – regardless of service

²³ Speedtest Global Index: United States Median Country Speeds September 2023, OOKLA, <https://www.speedtest.net/global-index/united-states?mobile#market-analysis> (scroll to “Market Analysis” and select “Q3 2022” and “Q3 2023” from the drop-down menu).

²⁴ *See supra* Section II (*citing* BEAD Challenge Policy at 10).

²⁵ Volume 1 at 9-10.

²⁶ *See, e.g.*, Acceptable Use Policy for Xfinity® Internet, XFINITY, <https://www.xfinity.com/Corporate/Customers/Policies/HighSpeedInternetAUP> (“xfinity Network Management”); Network Management Practices, CHARTER, <https://www.spectrum.com/policies/network-management-practices> (“Charter Network Management”); Internet Service Disclosure – Network Practices: Congestion Management Policy, BRIGHTSPEED, <https://www.brightspeed.com/aboutus/legal/consumer/internet-service-disclosure/full-version.html#:~:text=Congestion%20Management%20Policy,fair%20distribution%20of%20network%20resources> (“Brightspeed Network Management”); Network Practices, AT&T, <https://about.att.com/sites/broadband/network>; Network Management, VERIZON, <https://www.verizon.com/about/our-company/network-management>; Open Internet, T-MOBILE, <https://www.t-mobile.com/responsibility/consumer-info/policies/internet-service>.

type – implement these policies to combat network congestion and slowdown, illustrating that technical restrictions extend beyond fixed wireless service.²⁷

The Broadband DATA Maps – and the IJJA’s reliance thereon – already account for the real-world impact of any possible network management practices and network fluctuations, as does the challenge system that is built into the BEAD grant process. The Broadband DATA Maps are based on real-world broadband availability data that is both updated by providers twice a year and subject to challenge from the public. Therefore, if network management practices or network fluctuations are truly leaving areas incapable of meeting the 100/20 Mbps threshold, that limitation is already reflected in the Broadband DATA Maps and is not a valid reason to reclassify fixed wireless locations.

The challenge process outlined by the Commission in Volume 1 already provides for reclassification of locations based on proven – not hypothetical – failure to meet speed standards. That process, not a blanket reclassification, is the appropriate way to address any locations that may not meet speed standards. Furthermore, it would discriminate against wireless providers to single out their alleged practices and ignore other broadband providers’ network management practices.

The analysis offered in support of the Fixed Wireless Modification also fails to account for other important relevant data, particularly the broad evidence that 5G Home Broadband is delivering a service that satisfies consumers’ needs. For example, 5G Home Broadband is the

²⁷ See, e.g., xFinity Network Management (“High-speed bandwidth and network resources are not unlimited. Managing the network is essential...”); Charter Network Management (“Charter does not guarantee that a customer will achieve [maximum] speeds at all times. ... The "actual" speed a customer experiences may vary based on a number of factors and conditions...”); Brightspeed Network Management (“[I]f Brightspeed customers encounter any congestion, it is typically during the hours of peak usage... During peak hours, the majority of our residential customers are using the Internet simultaneously, giving rise to a greater potential for congestion.”).

fastest growing broadband service in the country, representing approximately 90% of new broadband connections in 2022,²⁸ demonstrating that consumers are satisfied with the service. 5G Home Broadband also has significantly higher consumer satisfaction scores than other fixed broadband technologies, including higher satisfaction scores than fiber-based broadband providers.²⁹ In sum, the 5G Home Internet services provided by CTIA’s members meet programmatic requirements today and should not be reclassified as “unserved.”³⁰

Finally, the Commission itself has raised questions about whether it will have sufficient funding to reach all unserved locations in the State.³¹ It therefore is counterintuitive, perhaps even self-defeating, to add 36,887 locations to the 307,000 existing “unserved” locations that the State must reach before it can consider funding any other locations or goals. These shortcomings further justify removal of the Fixed Wireless Modification, and CTIA urges the Commission to strike the proposal from Volume 1.

²⁸ Mike Dano, “FWA Captures 90% of All New US Customers, Pleasing Around 90% of Them,” LIGHT READING (March 3, 2023), [https://www.lightreading.com/broadband/fixed-wireless-access-\(fwa\)/fwa-captures-90-of-all-new-us-customers-pleasing-around-90-of-them/d/d-id/783658](https://www.lightreading.com/broadband/fixed-wireless-access-(fwa)/fwa-captures-90-of-all-new-us-customers-pleasing-around-90-of-them/d/d-id/783658); Mike Dano, “FWA to Remain ‘Biggest Disruptor’ Through 2024,” LIGHT READING (June 29, 2023), [https://www.lightreading.com/broadband/fixed-wireless-access-\(fwa\)/fwa-to-remain-biggest-disruptor-through-2024/d/d-id/785484](https://www.lightreading.com/broadband/fixed-wireless-access-(fwa)/fwa-to-remain-biggest-disruptor-through-2024/d/d-id/785484) (noting that wireless broadband currently accounts for 80%-90% of industrywide new broadband subscriber additions, a trend likely to continue through 2024).

²⁹ T-Mobile, The State of Fixed Wireless Access 9, https://www.t-mobile.com/news/_admin/uploads/2022/12/2945098_CCD_State-of-Fixed-Wireless-Access_Infographic-Report_REVW_v18_RGB-2.pdf (“State of FWA”) (describing 145 Mbps average speeds, 100 Mbps median speeds, and 1 Gbps peak speeds).

³⁰ See, e.g., Important Information About Verizon Wireless Broadband Internet Access Services, VERIZON, <https://www.verizon.com/support/broadband-services/> (describing 5G Home Internet Plus plans with download speeds of 300-1000 Mbps and upload speeds of 25-75 Mbps); State of FWA at 5.

³¹ CA Five-Year Plan at 2 (available funding “will not enable deployment of broadband infrastructure to all unserved locations in the State if not spent prudently, coordinated effectively, and targeted toward communities most in need”).

II. CONCLUSION

CTIA appreciates the opportunity to engage with the Commission toward successful implementation of the BEAD program in California and closing the digital divide.

ATTACHMENT B

**COMMENTS OF CTIA ON
BROADBAND EQUITY, ACCESS, AND DEPLOYMENT
PROGRAM INITIAL PROPOSAL VOLUME 2**

I. INTRODUCTION AND SUMMARY

CTIA respectfully submits these comments in response to the California Public Utilities Commission's ("Commission's") draft Volume 2 of its Initial Proposal for Broadband Equity, Access, and Deployment ("BEAD") funding ("Volume 2"), which will be submitted to the National Telecommunications and Information Administration ("NTIA").¹ Volume 2 reflects a great deal of work by the Commission, and CTIA looks forward to engaging with the Commission to optimize California's approach to promoting broadband deployment with its BEAD funding.

To help ensure the achievement of the BEAD program's goals in California, CTIA recommends that the Commission:

- Allow applicants to define project areas;
- Modify the point values for speed to deployment in its scoring rubric to better reflect NTIA's² requirement to incentivize more rapid deployment;
- Adjust its approach to affordability scoring;
- Clarify the requirements for its low-cost affordability program and remove the requirement for subgrantees to offer a \$15/month plan should the Affordable Connectivity Program ("ACP") expire and not be replaced;
- Modify its discussion of climate risk mitigation procedures to clarify the scope of its existing disaster recovery rules; and
- Define how it will establish the Extremely High Cost Per Location Threshold ("EHCPLT") and use it in the selection process, consistent with NTIA's NOFO.

¹ Administrative Law Judge's Ruling Issuing Staff Proposal, R.23-02-016, at Att. B (Nov. 7, 2023).

² NTIA, Notice of Funding Opportunity, at 31 (May 12, 2022) ("NOFO").

I. SUBGRANTEE APPLICANTS SHOULD BE PERMITTED TO DEFINE PROJECT AREAS (SECTION 5.7, REQUIREMENT 8)

The Commission should provide prospective subgrantees flexibility to define their own project areas. Volume 2 seeks comment on two alternative methods for defining BEAD project areas: (1) allowing applicants to define project areas or (2) defining project areas based on existing political boundaries.³ Although the NOFO gives states flexibility to solicit proposals from prospective subgrantees at the geographic level of their choosing,⁴ allowing bidders to define the project areas on which they wish to bid will result in the best outcome for California because it will: (i) encourage more cost-effective proposals from applicants who maximize network efficiency and effectively leverage existing infrastructure, and (ii) account for considerations such as topography, terrain, environmental factors, and right-of-way considerations that could otherwise become barriers if project areas are not defined by actual bidders.

II. THE COMMISSION SHOULD MODIFY THE POINT VALUES FOR SPEED TO DEPLOYMENT IN ITS SCORING RUBRIC TO MEANINGFULLY EVALUATE THE MERITS OF OTHER RELIABLE BROADBAND SERVICE TECHNOLOGIES PROPOSALS (5.3.2 SCORING CRITERIA, REQUIREMENT 8).

The Commission should eliminate its proposal to provide less weight for speed to deployment for Other Broadband Service proposals compared to Priority Broadband Service proposals. The BEAD NOFO provides that States “must give secondary criterion prioritization weight” to bidders’ commitments to provide service sooner than the four-year requirement, “with greater benefits awarded to applicants promising an earlier service provision date.”⁵ In response

³ Volume 2 at 35-39.

⁴ NOFO at 38.

⁵ *Id.* at 43.

to this requirement, Volume 2 proposes to provide five points to Priority Broadband Service bidders that agree to a two-year buildout timetable, but only one point for Other Reliable Broadband Service bidders.⁶ This proposal should be modified.

Although there is a fiber preference in the BEAD program generally, non-priority projects will typically not be evaluated against priority projects, so the point differential is seemingly unrelated to this preference. If making only a single point available for non-priority projects is unrelated to supporting a fiber preference, then it should be amended because awarding a single point is a poor implementation of the NOFO requirement to incentivize more rapid deployment commitments.

The proposed scoring rubric establishes a two-tier speed-to-deployment framework. Volume 2 awards zero points for all deployment commitments from 25-48 months, and awards either five points or one point – for priority and non-priority projects, respectively – for all deployment commitments at or below 24 months.⁷ The NOFO requires that “greater benefits [be] awarded to applicants promising an earlier service provision date,” but other than the single differentiation made for deployment commitments at or below 24 month, Volume 2 fails to award greater points to applicants for more rapid deployment.

CTIA suggests that Volume 2 be amended to better reflect NTIA’s requirement that scoring incentivize faster deployment. Volume 2 would be improved by creating more than a single differentiation for prompt deployment. For non-priority broadband projects, this is only possible if more than a single point, and preferably the five points available for fiber projects, is made available.

⁶ Volume 2 at 32.

⁷ *Id.*

III. THE COMMISSION SHOULD ADJUST ITS APPROACH TO AFFORDABILITY SCORING TO ALIGN WITH LEGAL LIMITATIONS AND FEDERAL BENCHMARKS (5.3.2 SCORING CRITERIA, REQUIREMENT 8).

The Commission proposes to allocate affordability points based on whether the applicant proposes to provide particular rates (\$50 for Priority Broadband applicants or \$30 for Other Broadband Service applicants), with a point deduction for each dollar by which the applicant’s proposal exceeds the target rates.⁸ In essence, the Commission has applied a rate cap at the target prices.

Other states have taken more market-based approaches that the Commission may wish to consider. Ohio’s draft Initial Proposal, Volume 2, for example, proposes to calculate an average of applicant-proposed rates from all applications, and award points to applicants proposing prices below the average.⁹ Other market-based approaches that encourage and reward lower prices without engaging in rate-setting can be found in the Initial Proposal, Volume 2, of South Carolina and South Dakota.¹⁰

CTIA highlights these other approaches because all of them are preferable to using a rate cap, which is a form of rate regulation, and such regulation is prohibited under the BEAD program. In the process of enacting the Infrastructure Investment and Jobs Act (“IIJA”), federal lawmakers specifically barred broadband rate regulation in a subsection entitled “No Regulation

⁸ *Id.* at 44, 58.

⁹ See State of Ohio Initial Proposal, Volume II, Broadband Equity, Access, and Deployment Program, at 66-67 and 74, https://broadband.ohio.gov/static/202310-DRAFT_Ohio-BEAD-Initial-Proposal-Volume-II_vShare.pdf.

¹⁰ See State of South Carolina Initial Proposal, Volume II, Broadband Equity, Access, and Deployment Program, at 22-23, https://ors.sc.gov/sites/ors/files/Documents/Broadband/BEAD/Initial%20Proposal/South%20Carolina_BEAD_IP%20Volume%202%20Draft.pdf; State of South Dakota Initial Proposal, Volume II, Broadband Equity, Access, and Deployment Program, at 19, https://sdgoed.com/wp-content/uploads/2023/10/South-Dakota-BEAD-Volume-2-Initial-Proposal_DRAFT.pdf.

of Rates Permitted.”¹¹ As a result, NTIA is barred from regulating rates, and it cannot impose conditions on or provide incentives to Eligible Entities to accomplish that goal indirectly. Approving proposals like the Commission’s that contain a rate cap or otherwise engage in ratemaking would violate this prohibition.¹²

Moreover, broadband service is an interstate information service and, as such, may not be subjected to common carrier regulations.¹³ Rate regulation is a classic form of common carrier regulation.¹⁴ Consequently, the Commission’s authority to address affordability is cabined and circumscribed and may not include prescribing or otherwise regulating rates.¹⁵

If the Commission, despite the unlawfulness of the approach, chooses to retain a rate cap to measure against, and CTIA strongly encourages the Commission to use a market-based approach instead, the Commission might consider using the FCC’s reasonable comparability

¹¹ IIIJA, Pub. L. 117-58, § 60102(h)(5)(D), 135 Stat. at 1201 (2021).

¹² See, e.g., *HIAS, Inc. v. Trump*, 985 F.3d 309, 325 (4th Cir. 2021) (Executive Branch may not impose conditions on a federal program that are inconsistent with the program’s statutory scheme); *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1234-35 (9th Cir. 2018) (Executive Branch violates Separation of Powers by attempting to condition federal funding on requirements not contained in underlying statute); *City of Providence v. Barr*, 954 F.3d 23, 45 (1st Cir. 2020) (same); *City of Philadelphia v. U.S. Att’y Gen.*, 916 F.3d 276, 291 (3d Cir. 2019) (same); *City of Chicago v. Barr*, 961 F.3d 882, 909 (7th Cir. 2020) (same); see also *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act ... unless and until Congress confers power upon it.”).

¹³ *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2018), *pet. for rev. granted in part, denied in pertinent part*, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (*per curiam*). Even for the brief period between 2015-2018 when the FCC treated broadband service as a common carrier service, the FCC rejected rate regulation. See *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling and Order, 30 FCC Rcd 5601, 5775, 5814 ¶¶ 382, 451 (2015).

¹⁴ See, e.g., *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 230-32 (1994) (rate regulation is a classic example of common carrier regulation).

¹⁵ This is particularly true as to wireless broadband service, which is independently exempt from state rate regulation under federal law. See 47 U.S.C. § 332(c)(3)(A).

benchmark for that purpose.¹⁶ That benchmark is based upon the FCC’s urban rate survey of broadband pricing applicable to recipients of support through similar broadband deployment programs, such as the Connect America Fund Phase II and Rural Digital Opportunity Fund.¹⁷ It shows that an unlimited data plan offering 100/20 Mbps would cost an average of \$105.03 per month.¹⁸ Using the FCC’s benchmark will help ensure that rate plans available on networks built in California using federal deployment subsidies are similar, which will help avoid consumer confusion that could arise from companies potentially charging neighbors different rates depending on the federal subsidy program used to deploy the different network segments from which they receive service.

CTIA and its member companies are proud of their record of making service more affordable for all Americans and support the BEAD program’s emphasis on ensuring affordable service offerings on BEAD-subsidized networks. But Volume 2’s approach to affordability fails to lay out an effective, legally sustainable strategy to ensure that middle class households in California can afford service from the providers funded by BEAD. These affordability requirements could also discourage qualified providers from bidding on areas at all, decreasing the likelihood of drawing competitive bids.

¹⁶ *Wireline Competition Bureau and Office of Economics and Analytics Announce Results of 2023 Urban Rate Survey for Fixed Voice and Broadband Services*, FCC Public Notice, DA No. 22-1338, WC Docket No. 10-90 (rel. Dec. 16, 2022).

¹⁷ *See, e.g.*, 47 C.F.R. § 54.805(a) (“For purposes of determining reasonable comparability of rates, recipients are presumed to meet this requirement if they offer rates at or below the applicable benchmark to be announced annually by public notice issued by the Wireline Competition Bureau....”)

¹⁸ *Id.*

IV. THE COMMISSION SHOULD CLARIFY VOLUME 2’S LOW-COST AFFORDABILITY REQUIREMENTS AND REMOVE THE \$15 “SUCCESSOR” PLAN REQUIREMENT (13.1 LOW-COST BROADBAND SERVICE OPTION, REQUIREMENT 16).

CTIA and its members strongly support efforts to ensure that broadband service is affordable. The wireless industry has long been at the forefront of pioneering affordable options for consumers, such as the first prepaid wireless plans requiring no contract, credit check, or deposit. Wireless providers currently offer a variety of affordable plans in California, including plans supported by the ACP and the FCC's Lifeline program. The majority of all ACP customers choose wireless broadband service, demonstrating a strong consumer preference for the benefits of wireless broadband.¹⁹

CTIA suggests two improvements to the Commission’s low-cost affordability program. First, the Commission should clarify that providers are permitted to adjust the applicable low-cost service option price for inflation and cost of living increases, which would be an economically sound approach, and is one that NTIA expressly supports.²⁰ The Commission proposes that the low-cost plan must be made available “for the life of the infrastructure,”²¹ so

¹⁹ See USAC, ACP Enrollment and Claims Tracker, Additional ACP Data, Total Enrolled ACP Subscribers by Service, <https://www.usac.org/about/affordable-connectivity-program/acp-enrollment-and-claimstracker/additional-acp-data/>.

²⁰ See November 3, 2023 NTIA Guidance at 61.

²¹ Volume 2, at 194. CTIA notes that the Commission has not defined the “life of the infrastructure,” which is a variation of the term, “useful life of the infrastructure,” used in the NOFO. CTIA suggests that the Commission should define the “useful life” as five years, which is consistent with the price commitment period for the Commission’s Federal Funding Account. See D.22-04-055, Decision Adopting Federal Funding Account Rules at 56, 96, and Exhibit A at Section 7.b. (Pricing) (April 22, 2022) (differentiating the life of the infrastructure from the period prices must remain unchanged) (“FFA Decision”). Five years would also be consistent with the required period to offer the low-cost plan at a set price proposed by other states in their BEAD proposals. See Maine’s BEAD Initial Proposal, Volume 2 at 45.

unless this adjustment is included, this low-cost plan requirement could have a chilling effect on BEAD participation.

Second, the Commission should not require “subgrantees to offer the low-cost broadband service option at a price of \$15 per month for all income-qualified customers if ACP funding is expended and no successor program guaranteeing an equivalent subsidized price of service for eligible customers is established.”²² The Commission offers no explanation for why broadband providers would be in a position to, or would be willing to, offer the same plan previously offered at \$30 for half that price simply due to a change in regulations.

Furthermore, this requirement goes well beyond the current ACP participation requirement and far exceeds affordability standards (i.e., scoring requirements) applicable to the Commission’s Federal Funding Account (“FFA”).²³ CTIA recommends that the Commission strike the language requiring a \$15 plan and replace it with language that reflects the current FFA requirement that “Applicants must participate in the Federal Communications Commission’s Affordable Connectivity Program (“ACP”) or offer an equivalent service plan for the life of the ACP. Should the ACP end, the Commission will identify a[n equivalent] successor low-income subsidy program participants must participate in.”²⁴

This change, including the additional language regarding equivalency, is consistent with the Commission’s approach to the FFA, in which it sought commitments from carriers to offer for five years the price stated in their applications.²⁵ The FFA rules require participation in the

²² Volume 2 at 194.

²³ See FFA Decision at Exhibit A, Section 7.f. (Affordability).

²⁴ *Id.* at 96 and Exhibit A at Section 7.f. (Affordability).

²⁵ FFA Rules 7.b. (Performance Criteria, Pricing).

ACP program so that eligible customers can apply the ACP benefit to defray the price stated in a winning application. However, if the ACP program ends, carriers will continue to collect the overall service prices stated in the applications, with only the potential for some variation in the amount received from the customer and the amount received from some later identified subsidy program; there would be no change in the overall amount charged for the service. This is in stark contrast with the Commission's current suggestion, which would cut in half the amount charged for the service. The approach proposed in Volume 2 is at odds with the Commission's approach to the FFA and seems sure to deter bidder participation in the Commission's BEAD program, which would constitute poor policy. Coupled with the requirement for the low-cost plan to be available "for the life of the infrastructure," this requirement could also have a chilling effect on BEAD participation.

Accordingly, the Commission should make these suggested changes to its proposed low-cost plan.

V. THE COMMISSION SHOULD MODIFY ITS DISCUSSION OF CLIMATE RISK MITIGATION PROCEDURES TO CLARIFY THE SCOPE OF ITS EXISTING BACKUP POWER RULES (SECTION 12.4, REQUIREMENT 15).

In discussing climate risk mitigation procedures that it has already adopted, Volume 2 asserts that, under existing rules adopted in D.20-07-011, "[p]roviders are required to provide 72 hours of backup power for their facilities in Tier 2 and Tier 3 high fire threat districts in order to maintain minimum service during disasters or electric grid outages."²⁶ Although the implications of including this statement in Volume 2 are at best unclear, CTIA notes that at a minimum, this statement fails to recognize that D.20-07-011 specifically recognizes that backup

²⁶ Volume 2 at 187.

power is neither required nor feasible at all sites.²⁷ In D.20-07-011, the Commission also recognized that maintaining service to 100% of customers is not possible and creates an “unrealistic expectation.”²⁸ In brief, CTIA suggests that the Commission delete the statement in Volume 2 regarding 72 hour backup power because it is incomplete and outside the scope of this proceeding.

VI. VOLUME 2 MUST DEFINE MORE CLEARLY HOW THE COMMISSION WILL SET THE EXTREMELY HIGH COST PER LOCATION THRESHOLD (SECTION 5.11, REQUIREMENT 8).

The NOFO requires states’ Initial Proposals to include “a detailed plan to competitively award subgrants consistent with Section IV.B.7.a of this NOFO,” which must include “identification of, or a detailed process for identifying, an Extremely High Cost Per Location Threshold to be utilized during the subgrantee selection process.”²⁹ The Commission’s Volume 2 neither identifies an EHCPLT for California nor sets out a detailed process for identifying one. Volume 2 discusses a variety of approaches it could take to setting the EHCPLT, but does not reach any conclusions regarding which approach the Commission might take.³⁰

Failing to specify how the EHCPLT will be identified may make it less likely that California will enjoy robust participation by a diverse set of subgrantees in the BEAD program, which would diminish the benefits of the program for all the residents and businesses of

²⁷ See e.g., D.20-07-011 at 95 (“Instead, we direct the wireless providers to identify, in their Resiliency Plan, facilities that do not need backup power, are unable to support backup power due to a safety risk, or that are objectively impossible or infeasible to deploy backup power...”); see also *id.* at 129, Conclusion of Law 55 (same).

²⁸ *Id.* at 85 (“We agree with parties that the “100 percent language” creates an inappropriate expectation...”).

²⁹ NOFO at 31.

³⁰ Volume 2 at 41-42.

California. However, while the NOFO clearly obligates states to set the EHCPLT or share a detailed process for setting it, if the Commission's deferral of this task is part of a holistic, technology-neutral approach that embraces the use of non-fiber Reliable Broadband Service technologies to achieve broadband deployment as prioritized by the IIJA and NOFO, then the approach could prove a useful tool in pursuit of programmatic goals.

VII. CONCLUSION

CTIA appreciates the opportunity to engage with the Commission toward successful implementation of the BEAD program in California and closing the digital divide.