

**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
(Filed February 23, 2023)

**OPENING COMMENTS OF THE UTILITY REFORM NETWORK
AND CENTER FOR ACCESSIBLE TECHNOLOGY
ON THE ALJ RULING REQUESTING COMMENT ON THE DRAFT INITIAL
PROPOSAL STAFF PROPOSAL**

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Summary of Proposed Changes

TURN and CforAT recommend that the Commission adopt the Draft Initial Proposal with modifications revising several aspects of the proposed rules:

- The Commission should modify the grant conditions to require (1) all projects deploying middle mile or wholesale last mile to be open access, and (2) require all projects to incorporate 72-hour battery backup.
- Regarding the letter of credit and matching requirements, the Commission should (1) adopt the NTIA conditional waivers for the Letter of Credit requirement, (2) harmonize the Draft Initial Proposal's Letter of Credit requirement with the California Advanced Services Fund (CASF) Broadband Loan Loss Reserve Program rules, and (3) waive the matching requirement for Tribes.
- The Commission should modify the Challenge Process to be more equitable by (1) reducing the burden on permissible community-based challengers and (2) ensuring residents of multiple dwelling units (MDUs) are meaningfully reflected as eligible locations.

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I. INTRODUCTION

In accordance with the *Administrative Law Judge's Ruling Issuing Staff Proposal* (ALJ Ruling), The Utility Reform Network (TURN) and Center for Accessible Technology (CforAT) respectfully submit these opening comments.¹ The ALJ Ruling requests comment on the Draft Initial Proposal, Volumes I and II (collectively Draft Initial Proposal), of the California Public Utilities Commission (Commission)'s implementation of the federal Broadband Equity, Access, and Deployment (BEAD) Program. TURN and CforAT generally support the Draft Initial Proposal and recommend adopting it with the modifications discussed below.² Given the scope and complexity of the Draft Initial Proposal, TURN and CforAT reserve the right to provide further comment in reply.

The Draft Initial Proposal generally appears to comply with the requirements set out in the National Telecommunications and Information Administration (NTIA) BEAD Notice of Funding Opportunity (NOFO),³ including, amongst other elements, prioritizing affordability, equity, and resiliency in the selection process; proposing strong affordability requirements; and

¹ See *Administrative Law Judge's Ruling Issuing Staff Proposal*, R.23-02-016 (issued Nov. 7, 2023). The ALJ Ruling asks whether the Draft Initial Proposal complies with federal requirements, should be adopted, and whether the proposal should be modified. See ALJ Ruling at 4. TURN and CforAT incorporate responses to those questions in these comments. All references to the draft initial proposal will refer to California's Volume I or II staff proposal documents with references to other state initial proposals so denoted.

² See ALJ Ruling at 4 (Question 2). Unless otherwise stated, all documents referenced in these comments are to documents in the record of this proceeding, R.23-02-016.

³ For example, on resiliency, the proposed planning and contingency documentation requirement would be implemented at the application stage. See Initial Proposal Volume II at 32. The Draft Initial Proposal does not require affirmative obligations to aid subgrantees to satisfy the NOFO network outages requirement. TURN and CforAT further discuss this in Section II.A.2 below.

adopting key modules from the NTIA’s Model Challenge Process.⁴ TURN and CforAT appreciate these aspects of the Draft Initial Proposal.

While the Draft Initial Proposal meets the NOFO requirements, it appears that the Commission has declined to adopt additional grant conditions beyond those required, notwithstanding the NOFO’s clear directive authorizing states to implement additional rules as they determine to be appropriate in order to meet the states’ broadband goals.⁵ The NOFO empowers the states with the discretion to formulate state-specific conditions to further BEAD Program goals.⁶ Below, TURN and CforAT recommend modifications to the Draft Initial Proposal that would strengthen the requirements in order to advance the California’s statewide broadband goals.

II. DISCUSSION

A. The Commission Should Add Grant Conditions for Open Access and 72-Hour Battery Backup.

As discussed above, the NOFO empowers states to adopt state-specific rules that further BEAD program goals and the state’s own broadband goals. In order to advance California’s broadband goals, the Commission should modify the Draft Initial Proposal to incorporate

⁴ See ALJ Ruling at 4 (Question 1) (seeking comment on whether the Draft Initial Proposal satisfies federal requirements).

⁵ U.S. Department of Commerce, National Telecommunications and Information Administration (NTIA), Notice of Funding Opportunity, Broadband Equity, Access, and Deployment Program (BEAD) at 65-68 (May 12, 2022) (NOFO).

⁶ For example, the NOFO permits the state to “choose its own means of competitively selecting subgrantees for last-mile broadband deployment projects, subject to approval by the Assistant Secretary” so long as the subgrantee selection process satisfies “the Infrastructure Act’s mandates and the BEAD Program’s goals.” See NOFO at 40.

additional grant conditions requiring (1) open access for middle mile and wholesale last mile deployments, and (2) a 72-hour battery backup requirement for all deployments.⁷

1. The Draft Initial Proposal Should Require Open Access for Middle and Wholesale Last Mile Deployments.

The Commission should require BEAD program-funded middle and wholesale last-mile projects to provide open access for the life of the infrastructure.⁸ The NOFO encourages states “to adopt selection criteria promoting subgrantees’ provision of open access wholesale last-mile broadband service for the life of the subsidized networks, on fair, equal, and neutral terms to all potential retail providers.”⁹ Specifically, the NOFO acknowledges that some states “might assign especially high weights to selection criteria relating to . . . open access in selecting BEAD subgrantees.”¹⁰ The NOFO defines open access as:

[A]n arrangement in which the subgrantee offers nondiscriminatory access to and use of its network on a wholesale basis to other providers seeking to provide broadband service to end-user locations, at just and reasonable wholesale rates for the useful life of the subsidized network assets.¹¹

⁷ See ALJ Ruling at 4 (Question 3).

⁸ TURN and CforAT reserve the right to comment on proposals to prioritize open-access projects in reply comments. For example, several states have proposed granting points to Priority Broadband Projects and Non-Priority Broadband Projects. See, e.g., Colorado BEAD Initial Proposal, Volume 2 at 46 (Oct. 2023), https://drive.google.com/file/d/1Um_uLrR7IjTcdMbsOdW3QvrNxsskLxnl/view; Idaho BEAD Initial Proposal, Volume 2 at 25 (Sept. 2023), <https://linkup.idaho.gov/wp-content/uploads/2023/09/ID-Vol-II-Final-Draft-Post-for-Public-Comment-9.29.23.pdf>; Washington BEAD Initial Proposal, Volume 2 at 36 (Nov. 2023), <https://deptofcommerce.app.box.com/s/hnu4g9c0zom4y5sh55qd3t9ijzf0ym9t>; Arizona BEAD Initial Proposal, Volume 2 at 43 (Nov. 2023), https://www.azcommerce.com/media/baebeqt1/aca-bead-initial-proposal_vol-ii_draftv8_for-final-review_110623_.pdf; New York BEAD Initial Proposal, Volume 2 at 48 (Nov. 2023), https://broadband.ny.gov/system/files/documents/2023/11/draft-initial-proposal-vol.-2-for-public-comment_2.pdf.

⁹ NOFO at 46. The NTIA also requires conduit access points for BEAD-funded networks. See NOFO at 66.

¹⁰ See *id.* at 66.

¹¹ *Id.* at 14.

The Draft Initial Proposal describes the importance of open access but does not require open access rules for deployments or adopt any state-specific requirement for open access.¹²

California has previously determined as a matter of state policy that it should prioritize open access to broadband networks. The Commission has previously found that “[o]ffering open access . . . will provide valuable public benefits, including competition, cost efficiencies, and long-term scalability” and that “[t]hese benefits will enable more Californians to be served over time” (emphasis added).¹³ For example, the Commission’s California Advanced Services Fund (CASF) Broadband Infrastructure Account program rules,¹⁴ CASF process for leveraging Rural Digital Opportunity Fund monies,¹⁵ and CASF Federal Funding Account program rules¹⁶ include open access requirements for middle-mile deployments.

Given this existing determination and the opportunity presented by the BEAD program, the Commission should go beyond simply promoting open access; it should require it. Specifically, TURN and CforAT recommend that the Commission require all middle mile and wholesale last mile infrastructure projects be open access. Moreover, the Commission should adopt an open access requirement consistent with the one provided in the NOFO:

[All BEAD program-funded middle mile and wholesale last mile networks must offer nondiscriminatory access to and use of its network on a wholesale basis to](#)

¹² See Initial Proposal Volume II at 17. The Draft Initial Proposal only refers to “open access” three times, two are references to the California Department of Technology’s Middle Mile Broadband Initiative.

¹³ D. 21-01-003 (R. 20-08-021, CASF) at FOF #21; see also D. 21-01-003 (R. 20-08-021, CASF) at 18; D. 22-11-023 (R. 20-08-021, CASF), Attachment A, at 11.

¹⁴ See D. 22-11-023 (R.20-08-021, CASF) at COL #7 (finding it reasonable to eligibility rules as detailed in Section 3.7 and Attachment 1, which includes an open access requirement for middle-mile infrastructure).

¹⁵ See D. 21-01-003 (R.20-08-021, CASF) at FOF #21.

¹⁶ See D. 22-04-055 (R.20-08-021, CASF) at 52.

other providers seeking to provide broadband service to end-user locations, at just and reasonable wholesale rates for the useful life of the subsidized network assets.

The NOFO requires conduit access, stating that “fiber-optic cables or conduit underground or along a roadway must include interspersed conduit access points at regular and short intervals for interconnection by unaffiliated entities.”¹⁷ TURN and CforAT appreciate this mandate for conduit access, which can facilitate open access, but conduit access alone is not sufficient. Without additional funding conditions that require that subgrantees operate open access networks, other network operators’ access will be subject to the whims of the subgrantee.

The need for strong open access requirements is increased due to the looming sunset of federal Unbundled Network Elements (UNE) rules, which require incumbents to make their network infrastructure available to competitors. Unless strong open access requirements are adopted, the loss of this mandate may significantly impact the effectiveness of BEAD program-funded projects to bridge the digital divide.¹⁸ The existing UNE rules allow new entrants to offer service more easily; without the rules, potential competitors would face additional barriers to market entry.¹⁹ The Commission can mitigate the potential harm from the sunset of UNE rules by requiring all middle mile and wholesale BEAD-funded infrastructure to be open access. This would support future buildouts or promote new entrants, compounding the effectiveness and reach of the BEAD program-funded deployments to bridge the digital divide.

¹⁷ NOFO at 66 (emphasis added).

¹⁸ *See generally Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services*, Report & Order, 35 FCC Rcd 12425 (2020).

¹⁹ *See Reply to Opposition of Public Knowledge and The Utility Reform Network*, FCC WC Docket No. 19-308, at 8-11 (filed Oct. 14, 2022).

2. The Commission Should Incorporate Grant Conditions to Require 72-Hour Battery Backup on all BEAD-funded infrastructure.

The Draft Initial Proposal should require providers to establish 72-hour battery backup power serving all BEAD-funded infrastructure, or at a minimum, for infrastructure serving Tier 2 and Tier 3 High Fire Threat Zones, in order to supplement existing state policy supporting resiliency and to promote public safety. The NOFO allows states to establish minimum resiliency requirements as part of their grant conditions.²⁰ The NOFO also includes its own resiliency standards, stating that a BEAD program-funded network’s “outages should not exceed, on average, 48 hours over any 365-day period except in the case of natural disasters or other force majeure occurrence.”²¹ To accomplish this goal, the NOFO requires the state to ensure that networks are designed to meet this requirement and directs states to establish and enforce performance metrics once the networks are operational.²²

As with other elements of the BEAD program, states are also authorized to adopt additional resiliency requirements to support state goals. The Draft Initial Proposal includes a preliminary discussion of the California’s climate risks²³ and proposes one non-binding resiliency measure requiring business continuity plans that include a discussion of natural hazard risk mitigation and identification of high-risk areas with “specific responses to how [applicants]

²⁰ See NOFO at 64-65. The NOFO requires that the state to “ensure that any subgrant agreement for a Funded Network permits the subgrantee to . . . ensure the technical feasibility . . . of a project providing broadband service[.]” See NOFO at 64. When applied to ensuring that subgrantees satisfy the network outages requirement, the NOFO confers discretion to the Commission to achieve the BEAD Program’s network capability requirements.

²¹ *Id.* at 65 (providing guidance that the “[the state] should consider the cost to the Program per location while accounting for any factors in network design that might make a project more expensive, but also more scalable or resilient”).

²² See *id.* at 65.

²³ Initial Proposal Volume II at 144-188.

will incorporate mitigation measures into their deployment planning.”²⁴ With the exception of this element, the Draft Initial Proposal does not establish resiliency requirements for all BEAD program-funded infrastructure.²⁵ Nor does it include minimum standards for those continuity plans, or any other concrete reliability and resiliency requirements. Rather, the Draft Initial Proposal only “[e]ncourag[es] the use of backup generator power systems where applicable.”²⁶

It would be appropriate for the Draft Initial Proposal to incorporate greater resiliency requirements, consistent with prior developments in California. The Commission has previously acknowledged the importance of reliability and resiliency and has been engaged in ongoing efforts to promote more reliable and resilient communications networks through resiliency mandates.²⁷ Currently, the Commission requires all telecommunications providers to develop and file comprehensive resiliency plans, including backup power requirements and other resiliency measures.²⁸ Specifically, two Commission decisions direct that providers have 72-hour battery backup power for service in Tier 2 and 3 High Fire Threat Districts.²⁹ The Initial Proposal should expand that mandate to require 72-hour battery backup power serving all BEAD infrastructure.

²⁴ Initial Proposal Volume II at 187.

²⁵ *See id.*

²⁶ *Id.*

²⁷ TURN and CforAT agree that the Commission has led the nation in “ensuring that networks are resilient, as the State faces unprecedented climate threats,” and agrees that the Commission should continue this work. Initial Proposal Volume II at 186.

²⁸ *See* D.21-10-020 (R.20-09-001, Broadband OIR) at OP #1-6 (adopting wireless provider resiliency strategies); D.21-02-029 (R.18-03-011, Disaster Relief) at OP #1, #4 (adopting wireline provider resiliency strategies); D.20-07-011 (R.18-03-011, Disaster Relief) at OP #1-3 (same).

²⁹ *See* D. 21-02-029 at OP #4; D. 20-07-011 at OP #2.

A 72-hour battery backup requirement would support public safety. The BEAD program will fund broadband infrastructure that supports over-the-top telecommunication services and the public’s access to 9-1-1. Currently, California has more wireline Voice over Internet Protocol (VoIP) lines than Plain Old Telephone Service (POTS) lines.³⁰ For wireline services, this suggests that large numbers of Californians rely on VoIP services—and therefore broadband services—to access 9-1-1. The Commission previously held that it “has jurisdiction over facilities-based wireline providers, and authority to ensure the reliability of communications networks in emergencies.”³¹ Further, the Commission’s “police power authorizes [it] to ensure that all facilities that carry 9-1-1 traffic ... are maintained to ensure uninterrupted connectivity during public emergencies, and to enable users to reach emergency services, regardless of the service provided over those facilities.”³² Given the reality that Californians rely on VoIP service to contact 9-1-1 and the Commission’s interest in promoting public safety, the Commission should require that any BEAD-funded wireline project include a 72-hour battery backup for emergencies.

Similarly, wireless telephone service may also rely on BEAD program-funded broadband infrastructure. Currently, the vast majority of 9-1-1 calls in California are placed over wireless

³⁰ See, e.g., FCC, Industry Analysis Division, Office of Economics and Analytics, “Voice Telephone Services: Status as of December 31, 2021” at 12 (Aug. 2023) (reporting 1,138,000 switched access connections versus 3,542,000 Interconnected VoIP connections for California as of Dec. 31, 2021), <https://docs.fcc.gov/public/attachments/DOC-396136A1.pdf>.

³¹ D.21-02-029 (R.18-03-011, Disaster Relief) at COL #1.

³² Id. at 14-15.

networks.³³ The Commission has previously required wireless providers “to implement the 72-hour backup power requirement across Tier 2 and Tier 3 High Fire Threat Districts, for[] . . . network equipment located in communities lacking sufficient wireless service coverage.”³⁴ This obligation was based on a Commission determination in 2020 that “[w]ireless network resiliency must be improved so that vital communications services are not interrupted and remain available for Californians during emergencies.”³⁵ Given Californians’ ongoing reliance on wireless service to contact 911 and the Commission’s interest in promoting public safety, the Commission should build on this past requirement and mandate that wireless providers seeking BEAD funding must include 72 hours of battery backup power to support wireless infrastructure.

B. The Commission Should Modify the Financial Requirements to Promote Equity

1. The Commission Should Modify the Letter of Credit Requirement Section to Reflect the Latest NTIA Guidance.

The Commission should modify the Letter of Credit (LOC) requirement in the Initial Draft Proposal to incorporate the NTIA’s latest guidance and expressly adopt all four of NTIA’s waiver provisions. As currently written, the Initial Draft Proposal LOC requirement poses a significant barrier for non-traditional providers generally, and Tribal entities in particular, to full

³³ See D.20-07-011 (R.18-03-011, Disaster Relief) at FOF #19 (citing D.20-07-011 (R.18-03-011, Disaster Relief) that found “80 percent of all calls to 9-1-1 during the 2017 and 2018 wildfires came from wireless devices[]”); see also FCC, “Fourteenth Annual Report to Congress on State Collection and Distribution of 911 and Enhanced 911 Fees and Charges” at 13 (2022) (reporting 23,242,971 total wireless 9-1-1 voice calls for the calendar year 2021 in California versus 1,810,942 wireline voice calls and 1,476,428 VoIP calls).

³⁴ See D.20-07-011 (R.18-03-011, Disaster Relief) at OP #3 (giving providers eight months from the date of adoption in 2020 to implement the backup power requirement).

³⁵ See *id.* at 52.

participation in the program.³⁶ Municipal, small, and other non-traditional providers have raised concerns about their ability to fully participate in the BEAD program specifically because of the challenges they would face in meeting the LOC requirement as currently drafted.³⁷

The current LOC requirement directs each applicant to submit a letter from a bank committing to issue an irrevocable standby letter of credit to the applicant for a value of no less than 25 percent of the amount awarded to the project.³⁸ For a project of several hundreds of thousands or millions of dollars, many non-traditional providers would likely be unable to secure an LOC because they do not have ready availability of the initial capital typically needed for this type of support. For example, the Yurok Tribe noted in prior proceedings before the Commission that lacking a tax base can prevent tribal communities from raising the necessary capital to undertake deployments.³⁹ Adopting the NTIA waiver, and additional waivers described below, can mitigate these barriers.

On November 1, 2023, the NTIA issued a conditional waiver of its LOC requirement.⁴⁰ Given the timing of this waiver, the Initial Draft Proposal did not incorporate the NTIA LOR

³⁶ See Yurok Tribe Opening Comments, BEAD OIR Proceeding (R.23-02-016) at 6-7 (filed Apr. 17, 2023); TURN Opening Comments, BEAD OIR Proceeding (R.23-02-016) at 11-14 (filed Apr. 17, 2023).

³⁷ See Julia King, “Broadband builders contend with BEAD’s letter of credit rule” Fierce Telecom (Aug. 17, 2023), <https://www.fiercetelecom.com/broadband/broadband-builders-navigate-bead-letter-credit-requirement>; see also Julia King, “Coalition proposes alternatives to NTIA’s contentious BEAD rule”, Fierce Telecom (Sept. 6, 2023), <https://www.fiercetelecom.com/broadband/coalition-proposes-alternatives-ntias-contentious-bead-rule>.

³⁸ See NOFO at 72-73.

³⁹ See Yurok Tribe Loan Loss Reserve Opening Comments (R.20-08-021, CASF) (filed Oct. 14, 2022) at 8 (noting that tribes generally lack discretionary funds and a tax base).

⁴⁰ See NTIA, “BEAD Letter of Credit Waiver” (Nov. 1, 2023), <https://broadbandusa.ntia.gov/funding-programs/policies-waivers/BEAD-Letter-of-Credit-Waiver> (LOC Waiver).

guidance and, instead, seeks comment on how to do so.⁴¹ Generally, the NTIA waiver permits the state to implement four conditional programmatic waivers:

- Subgrantees can opt to secure a LOC at a credit union,⁴²
- Subgrantees can opt to use performance bonds,⁴³
- The state can reduce the amount of LOC or performance bonds upon completion of certain milestones,⁴⁴ and
- Subgrantees can opt for an alternative initial LOC or performance bond percentage.⁴⁵

The NTIA’s conditional waivers offer non-traditional providers greater flexibility and alternative means to satisfy the LOC requirement, and the Commission should adopt all four provisions.

For example, the provision authorizing credit unions to issue an LOC will widen the pool of financial institutions available to providers, and may allow for options that provide lower rates and fees.⁴⁶ The performance bond option may be more readily available to municipalities than an LOC. The options to lower the amount of an LOC or performance bond over time and the ability to opt for a LOC or performance bond percentage lower than 25% would also give non-traditional providers flexibility in financing their projects.

For Tribes specifically, these waivers would not eliminate all challenges. In comments on the CASF Loan Loss Reserve Program, the Yurok Tribe noted that the “[b]onds are generally

⁴¹ See Initial Proposal Volume II at 45.

⁴² See LOC Wavier § 2.1.

⁴³ See *id.* § 2.2.

⁴⁴ *Id.* § 2.3.

⁴⁵ *Id.* § 2.4.

⁴⁶ See Masha Abarinova, “NTIA releases waiver for BEAD letter of credit rule,” Fierce Telecom (Nov. 1, 2023).

not available to Tribes.”⁴⁷ Tribes face other well-documented public financing challenges.⁴⁸

However, adopting all four of NTIA’s conditional waivers would permit Tribal providers and governments additional options. Below, TURN and CforAT recommend further waivers for Tribes to address the LOC barrier.

2. The Commission Should Revise the Letter of Credit Requirement Section to Include the CASF Broadband Loan Loss Reserve Program.

The NTIA has voiced its openness to states’ requests for additional LOC waivers for cases that do not fall under the four programmatic waivers it has established. The NTIA permits the state “to request waivers for additional circumstances not covered by [the LOC] programmatic waiver where prospective subgrantees can meet the requirements under the NOFO by other means.”⁴⁹

In the CASF proceeding, R.20-08-021, the Commission created a definition of eligible debt, identifying financial instruments the LLP will support, including bonds and loans.⁵⁰ Specifically, Rule 1.1(1) of the LLP rules states that “[t]he LLP should be optimized for effective

⁴⁷ See Yurok Tribe Opening Comments (R.20-08-021, CASF) at 9 (filed Oct. 14, 2022).

⁴⁸ See, e.g., Matthew Gregg, “Separate but unequal: How tribes, unlike states, face major hurdles to access the most basic public finance tools,” Brookings Institute (Dec. 3, 2021), <https://www.brookings.edu/articles/separate-but-unequal-how-tribes-unlike-states-face-major-hurdles-to-access-the-most-basic-public-finance-tools/>.

⁴⁹ NTIA, “Ensuring Robust Participation in the BEAD Program,” <https://www.ntia.gov/blog/2023/ensuring-robust-participation-bead-program> (last accessed Nov. 22, 2023).

⁵⁰ D.23-11-045 (R.20-08-021, CASF) (issued Nov. 6, 2023) at 25 (“In the LLP requirements and guidelines, [the final decision was modified to] include[] a definition for ‘eligible debt’ to identify the types of financial instruments that the DSR may support, and substituted this term for references to bonds and loans in the LLP requirements and guidelines.”). <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M497/K334/497334009.PDF>

utilization of limited funding to achieve extensive broadband deployment in conjunction with other applicable state and federal funding.”⁵¹

TURN and CforAT recommend that the Draft Initial Proposal should harmonize the Letter of Credit requirement with the CASF Broadband Loan Loss Reserve Program (LLP) in two ways. First, the Commission should expressly confirm that the LLP can be used to satisfy eligible subgrantees’ LOC and performance bond conditional waivers. TURN and CforAT submit that the LLP provides similar, if not better, accountability guarantees than those sought by the NTIA in administering the BEAD program. The LLR could protect federal investments from default up to and exceeding the equivalent LOC requirement.⁵²

Second, the Commission should create a fifth programmatic waiver specifically for tribal LLP participants.⁵³ As discussed above, the NOFO’s LOC requirements are particularly challenging for tribes to satisfy. The Commission should authorize tribal LLP participation as an alternative to meet the NTIA’s LOC waiver requirements.⁵⁴ The LLP’s Debt Service Reserve could be equivalent to a performance bond or LOC.⁵⁵

The NOFO intends for LLP-eligible entities, and eligible Tribal entities in particular, to be able to participate in the BEAD program fully. California would support and encourage broad and diverse provider participation by authorizing the use of the LLP to satisfy the LOC requirement. In consultation with NTIA, the Commission should confirm that such a waiver is

⁵¹ D.23-11-045 (R.20-08-021, CASF), Attachment 1 at 4.

⁵² *Id.* at 4-6.

⁵³ TURN and CforAT recognize that the Commission must receive approval for such waivers from NTIA and encourages the Commission to submit a request.

⁵⁴ *See* Yurok Tribe Loan Loss Reserve Fund Opening Comments (R.20-08-021, CASF) (filed Oct. 14, 2022) at 8 (noting tribes generally lacking discretionary funds and tax base).

⁵⁵ *See* D.23-11-045 (R.20-08-021, CASF), Attachment 1 at 6.

possible under the NTIA rules, and the Commission should modify the Letter of Credit section of the Draft Initial Proposal to not only adopt all four of NTIA’s waiver provisions but also authorize a waiver based on LLP participation by tribal applicants.

3. The Commission Should Revise the Matching Requirement to Afford Tribes an Opportunity to Seek Waivers and Ensure that Tribes are Not Deterred from Participating in BEAD.

The NOFO requires that subgrantees provide at least a 25 percent funding match for BEAD projects, with certain exceptions.⁵⁶ For example, where small and non-traditional providers in marginalized or low-income communities cannot raise sufficient capital to satisfy the matching requirement, the NOFO encourages the state to “consider ways to cover part or all of the provider’s match . . . or seek a match waiver” that would alleviate the burdens and promote opportunities for these small and non-traditional providers.⁵⁷ The NOFO acknowledges that the matching requirement “could deter participation in the BEAD Program by small and non-traditional providers, in marginalized or low-income communities, or could threaten affordability[.]”⁵⁸ To address this concern, the NOFO expressly exempts high-cost projects from the requirement and also allows in-kind contributions to satisfy the matching requirement.⁵⁹ Further, the NOFO permits waivers of the matching requirement at the state’s request based on

⁵⁶ See NOFO at 20.

⁵⁷ *Id.*

⁵⁸ *Id.* at 20, 22.

⁵⁹ *Id.* The NOFO explains that “NTIA encourages applicants to thoroughly consider potential sources of in-kind contributions that, depending on the particular property or service and the applicable federal cost principles,” and that in-kind contributions “could include employee or volunteer services; equipment; supplies; indirect costs; computer hardware and software; and use of facilities. In the broadband context this could include, consistent with federal cost principles, waiver of fees associated with access to rights of way, pole attachments, conduits, easements, or access to other types of infrastructure.” *Id.* at 22.

special circumstances that would serve the public interest and “effectuate the purposes of the BEAD Program.”⁶⁰

TURN and CforAT recommend that the Commission create an equity-based waiver process for the BEAD program’s matching requirement for tribal applicants and revise the Draft Initial Proposal to better explain the various funding sources tribal applicants can use for matching. As currently written, the Draft Initial Proposal incentivizes matching funds by prioritizing applications that minimize project outlays. However, it fails to provide any guidance for marginalized communities to seek a waiver or otherwise address their specific equity needs.⁶¹ The Draft Initial Proposal is similarly unclear regarding whether, and how, applicants can request alternative means to satisfy the matching requirement, such as through in-kind contributions or requests of other sources of state funding, i.e., the LLP discussed above.⁶²

The Commission should revise the Draft Initial Proposal to include provisions that clearly establish a procedure for applicants to seek a waiver of the matching requirement on equity grounds. This waiver should permit Commission staff to consider initiating the waiver process directly on behalf of tribal subgrantees during the negotiation phase, upon review of the project

⁶⁰ *Id.* at 22 (“NTIA will carefully balance the Program’s various objectives . . . and expects to grant waivers only in special circumstances, when waiver is necessary to advance objectives that are critical to the Program’s success”).

⁶¹ Initial Proposal Volume II at 32 (scoring applications for up to 15 points based on the amount of matching funds committed by an applicant). As previously noted, the matching requirement may impair the ability of some non-traditional providers to equitably access BEAD program funding opportunities and thus risks perpetuating or creating barriers that disproportionately impact certain communities. For example, the Yurok Tribe observed in comments that it “does not have a tax base to pay for large infrastructure projects; thus, the Tribe is reliant on other sources of funding, such as state grants” and encouraged the Commission to “consider waiving the matching requirement or funding the match requirement itself.” Yurok Tribe OIR Opening Comments (R.20-08-021, CASF) (filed Oct. 14, 2022) at 6-7.

⁶² *See* Initial Proposal Volume II at 44-45.

proposal, and upon review of other financial information made available through the application process. This would be consistent with a proposal made by the state of Colorado authorizing applicants to request waivers in special circumstances.⁶³ As part of this revision, the Commission should be clear that it will provide a full allotment of points for “Minimizing BEAD Outlay” to entities that secure an equity waiver when scoring applications. It would be inconsistent with the goals of the BEAD program to deter or penalize applicants for seeking waivers, particularly if a scoring penalty might result in reduced participation in the BEAD program.

This equity waiver would be crucial for meaningful Tribal participation in BEAD. In Figure 1 below, some Tribal lands (in green) appear to be located fully within high cost areas (in blue),⁶⁴ while others (such as the Tule River Reservation and the Chemehuevi Reservation) appear to be entirely outside California’s high cost areas. Yet other Tribal Lands, including the Hoopa Valley Reservation and the Yurok Reservation, appear to be located partially within high cost areas. Currently, tribal locations wholly or partly outside of high cost area categories would

⁶³ See Colorado BEAD Initial Proposal Volume 2 at 69-70 (Oct. 2023), https://drive.google.com/file/d/1Um_uLrR7IjTcdMbsOdW3QvrNxsskLxnl/view (“Waivers may be granted upon a determination that to do so is in the best interest of the state and furthers the program goal of expanding broadband service in Colorado, and that the proposed project would not be feasible or advisable without the requested waiver.”).

⁶⁴ These two maps were combined in an image editing program, not through mapping software, so all details of and conclusions drawn from Figure 1 are approximate. The colors from both maps were edited for improved visibility.

not be eligible for a waiver of the matching requirement for BEAD program-funded projects on part or all locations on their lands.

Figure 1. The BEAD High-Cost Census Block Group Map of California overlaid with the California Interactive Broadband Map, with the Tribal Lands layer enabled.



The Draft Initial Proposal should also make clear that tribal applicants can satisfy the matching requirement using any combination of state funding sources, eligible sources of federal funding, and in-kind contributions. To ensure that the Commission can satisfy the NOFO’s requirement to minimize the BEAD program outlay, the Commission should limit these waivers to instances

where the applicant can provide an equitable basis for its waiver request and meet each of the program’s other requirements. Further, the Commission Staff should work with tribal applicants who may require technical assistance during the negotiation phase to ensure that applicants have fully availed themselves of these alternative sources of satisfying the matching requirement.

C. The Commission Should Modify the Proposed Challenge Process to be More Equitable by Reducing the Burden on Community-Based Challengers.

In accordance with NTIA guidance, the Commission is obligated to create a process for modifying locations on the FCC’s National Broadband Map (Map) that are improperly identified as “served,” “underserved,” or “unserved” (collectively, a “challenge process”).⁶⁵ The challenge process includes two general phases: an initial “prepublication” phase and a subsequent “challenge” phase. During the prepublication phase, the Commission will act on its own to modify the National Broadband Map based on data not reflected in that Map to identify areas that have already secured broadband funding (and are therefore not eligible for BEAD funding).⁶⁶ During the “challenge” phase, eligible or permissible challengers can propose challenges to the determinations reflected in the Map, then eligible respondents may rebut those challenges, and the Commission makes a determination as to whether to sustain a challenge.⁶⁷

1. Section 5.1: Modifications to Reflect Data Not Present in the FCC National Broadband Map

NTIA guidance states that “[a]n Eligible Entity may modify the classification of locations identified as eligible for funding on the National Broadband Map” and that “[i]f an Eligible

⁶⁵ See U.S. Department of Commerce, NTIA, “BEAD Challenge Process Policy Notice” at 13 (May 12, 2022) (Challenge Process Policy Notice).

⁶⁶ See Challenge Process Policy Notice at 13.

⁶⁷ See *id.* at 13.

Entity plans to modify the classification of locations identified as eligible for funding, a description of the proposed modifications and associated justification must be included in the description.”⁶⁸ The Draft Initial Proposal adopts the NTIA’s Model Challenge Process with modifications regarding the treatment of areas served by DSL,⁶⁹ the treatment of areas served by low-speed wireless broadband,⁷⁰ and the treatment of locations that receive service materially below 25/3 Mbps speeds.⁷¹ TURN and CforAT support these modifications, which will allow funding to be authorized in areas that currently lack reliable broadband that meets minimum standards. While low-speed DSL and low-speed wireless technologies—or other technologies, for that matter—may be *capable* of providing 25/3 Mbps speeds, as the Draft Initial Proposal notes, the speeds subscribers *actually* receive are generally much lower.

TURN and CforAT particularly appreciate the Draft Initial Proposal’s acknowledgment that including these modifications will reduce “the administrative burden on challengers, providers, and CPUC staff to process challenges for locations already successfully challenged using equivalent evidence to that required for BEAD challenges,” and that the modifications will help ensure that ESJ communities are not once again left behind.⁷²

2. Section 5.2: Deduplication of Funding

The NOFO states that “an Eligible Entity may not treat as ‘unserved’ or ‘underserved’ any location that is already subject to an enforceable federal, state, or local commitment to

⁶⁸ See U.S. Department of Commerce, NTIA, “BEAD Initial Proposal Guidance” at 19 (July 2023), https://broadbandusa.ntia.doc.gov/sites/default/files/2023-07/BEAD_Initial_Proposal_Guidance_Volumes_I_II.pdf (NTIA Initial Proposal Guidance).

⁶⁹ See Initial Proposal Volume I at 8-9.

⁷⁰ See *id.* at 9-10.

⁷¹ See *id.* at 10-11.

⁷² *Id.* at 10.

deploy qualifying broadband.”⁷³ The Draft Initial Proposal includes a process to identify locations subject to enforceable state and federal commitments.⁷⁴ TURN and CforAT generally support the Draft Initial Proposal’s deduplication process. However, TURN and CforAT urge the Commission to ensure that any items identified as “enforceable commitments” are truly enforceable. The Commission should be skeptical of incumbent providers’ unsupported claims that they will complete projects on their own, with no oversight, as some providers have a history of applying for funds and subsequently rejecting the funding after it is awarded.⁷⁵ In some instances, providers have allegedly accepted funding but failed to meet their obligations.⁷⁶

3. Section 5.5: Challenge Process Design

a) Evidence and Review Approach

Based on TURN and CforAT’s discussions with other parties in this proceeding, we understand that some parties’ comments will address the real-world challenges that community members, municipalities, and nonprofits will have meeting the overly rigorous standards for challenging locations. Throughout this proceeding, TURN and CforAT appreciate the Commission’s focus on creating a challenge process that acknowledges not only the restrictions imposed by the NTIA and the Infrastructure Act but also the different levels of access to data among various potential challengers. In particular, incumbent providers have access to vast data

⁷³ NOFO at 36-37.

⁷⁴ See Initial Proposal Volume I at 11.

⁷⁵ See Joan Engebretson, “Verizon, AT&T Decline Broadband Connect America Funding” Telecompetitor (July 25, 2012), <https://www.telecompetitor.com/verizon-att-decline-connect-america-funding/>.

⁷⁶ See Jon Brodtkin, “AT&T took \$283 million but didn’t deploy required broadband, Mississippi says” Ars Technica (Oct. 1, 2020), <https://arstechnica.com/tech-policy/2020/10/att-took-283-million-but-didnt-deploy-required-broadband-mississippi-says/>.

regarding existing network performance that is unavailable to other challengers such as community members, municipalities, and nonprofits. The Draft Initial Proposal generally makes appropriate efforts to develop a process that works for all parties despite this imbalance of access to data. For example, the Draft Initial Proposal appropriately requires that once a challenger makes a valid area challenge, the existing provider must demonstrate that it serves every location in the challenged area rather than only showing that it serves the specific challenged locations.⁷⁷ This requirement acknowledges that incumbent providers have a substantial amount of data regarding the areas they serve and that challengers may not have the information, resources, or time to challenge every unserved location in an area.

While the Draft Initial Proposal generally establishes a reasonable challenge process, the draft process for challenging service in multi-dwelling units (MDUs) is unreasonable and potentially impossible to satisfy. As discussed in further detail below, the Commission should adjust this requirement.

b) Area and Multiple Dwelling Unit Challenges

While the Draft Initial Proposal adopts most of the language in NTIA’s Model Challenge Process,⁷⁸ its unique requirement for multiple dwelling unit (MDU) challenges is far more restrictive than NTIA’s. The Draft Initial Proposal directs that “[a]n MDU challenge requires challenges by at least three units or 10% of the unit count listed in the Fabric within the same broadband serviceable location, *whichever is larger*.”⁷⁹ By comparison, the Model Challenge

⁷⁷ See Initial Proposal Volume I at 20.

⁷⁸ See *id.* (citing NTIA, “BEAD Model Challenge Process” at 18-19 (Nov. 1, 2023) (Model Challenge Process)).

⁷⁹ *Id.* (emphasis added).

Process provided by NTIA imposes a much more reasonable requirement that:

[a]n MDU challenge requires challenges for one unit for MDUs having fewer than 15 units, for two units for MDUs of between 16 and 24 units, and at least three units for larger MDUs. Here, the MDU is defined as one broadband serviceable location listed in the Fabric. An MDU challenge counts towards an area challenge (i.e., six successful MDU challenges in a census block group may trigger an area challenge).⁸⁰

The Draft Initial Proposal is unclear why it includes language requiring a larger showing, which is not included in the NTIA guidance documents. In consultations with stakeholders, various community members, municipalities, and nonprofits have reported to TURN and CforAT that it will be difficult to collect information to support even the lower threshold of locations (i.e., three units or 10 percent of the unit count), given that unserved and underserved communities, and the organizations that advocate on behalf of those communities, have limited time and resources to educate themselves about the challenge process and to collect pertinent data.⁸¹ Collecting information on the larger number would be an even greater hurdle.

Under the proposed requirement, the difficulties would be greatest for MDUs with a large number of units. For example, the Oakland Housing Authority maintains two public housing properties containing close to 400 units: Lockwood Gardens (372 units) and Peralta Village (390 units).⁸² Under the proposed standard in the Draft Initial Proposal, a challenger would have to specifically identify almost *40 unserved or underserved units* in each of those properties to

⁸⁰ Model Challenge Process at 18. As a practical matter, the Model Challenge Process requirement generally requires that challengers challenge far less than 10 percent of an MDU's unit count. For example, for an MDU with fifteen units, a challenger need only provide a challenge for one unit, or 6.7% of the unit count. For an MDU with 24 units, a challenger need only provide a challenge for two units, or 8.3 percent of the unit count.

⁸¹ See Joint Consumers Comments on Draft Five-Year Plan at 11.

⁸² See Oakland Housing Authority, "Public Housing," http://www.oakha.org/residents/public_housing/pages/default.aspx (last accessed Nov. 27, 2023).

sustain a challenge; this is a far greater burden than would be required in the Model Challenge Process.⁸³

It is inappropriate and unreasonable for the Draft Initial Proposal to adopt unreasonably restrictive (and likely prohibitive) requirements for MDU challenges, particularly as it adopts most other provisions of the Model Challenge process in their entirety. TURN and CforAT respectfully recommend that the Commission modify the Draft Initial Proposal to include NTIA's requirements for MDU challenges as cited above. Alternatively, the Commission should remove the phrase "whichever is higher" from its separate requirement and instead include language that explicitly allows challengers to select the metric on which their challenge is based.

⁸³ Initial Proposal Volume I at 20 ("An area challenge is triggered if there are challenges to six or more broadband serviceable locations using a particular technology and a single provider within a census block group are challenged").

III. CONCLUSION

TURN and CforAT appreciate this opportunity to submit opening comments on the Draft Initial Proposal and support its adoption with modifications consistent with our recommendations above. TURN and CforAT look forward to ongoing work with stakeholders and policymakers to ensure that the forthcoming BEAD Program rules accelerate more equitable, reliable, resilient, safe, and affordable access to broadband for all California communities.

Respectfully submitted,

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