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

Rulemaking 23-02-016

**OPENING COMMENTS OF THE PUBLIC ADVOCATES OFFICE
ON THE ORDER INSTITUTING RULEMAKING TO
CONSIDER RULES TO IMPLEMENT THE BROADBAND EQUITY,
ACCESS, AND DEPLOYMENT PROGRAM**

PISE GOEBEL
ELIZABETH LOUIE
EILEEN ODELL
Public Utilities Regulatory Analysts

GAUTAM DUTTA
Attorney for the
Public Advocates Office

Public Advocates Office
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-3026
Email: Eileen.Odell@cpuc.ca.gov

California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-2108
Email: Gautam.Dutta@cpuc.ca.gov

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I. INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

Pursuant to Rule 14.3 of the California Public Utilities Commission’s (Commission) Rules of Practice and Procedure, the Public Advocates Office at the California Public Utilities Commission (Cal Advocates) submits these opening comments on the *Order Instituting Rulemaking Proceeding to Consider Rules to Implement the Broadband Equity, Access, and Deployment Program* (OIR).¹

As noted in the OIR, the Broadband Equity, Access, and Deployment Program (BEAD Program or BEAD) is a federal program established by the Infrastructure Investment and Jobs Act (IIJA) in November 2021.² The funding authorized under BEAD may be used for broadband deployment projects to eligible unserved, underserved, and community anchor institutions across the state. The National Telecommunications and Information Agency (NTIA), housed within the Department of Commerce, administers BEAD on the federal level. Agencies that administer the BEAD program on the state level are required to create a plan to ensure that *all eligible locations in the state* will be served with affordable broadband service before dedicating BEAD funding to eligible uses other than network deployment.³

These opening comments respond to selected issues posed in the OIR and are particularly focused on ensuring complete broadband access deployment to all eligible locations and the affordability of services from funded network projects. The BEAD Notice of Funding Opportunity (NOFO)⁴ requires that the Commission develop a plan to “ensure that affordable, reliable, high-speed internet is accessible at every location within [its] jurisdiction[.]”⁵ As further described below, the NOFO prescribes detailed

¹ California Public Utilities Commission (CPUC) Order Instituting Rulemaking (OIR) R.23-02-016, Proceeding to Consider Rules to Implement the Broadband Equity, Access, and Deployment Program, March 1, 2023 (hereinafter, BEAD OIR).

² BEAD OIR at 1, citing P.L. 117-58 §60102(b) (2021).

³ BEAD NOFO at 39.

⁴ The National Telecommunications and Information Administration’s (NTIA’s) Notice of Funding Opportunity (hereinafter, BEAD NOFO), released on May 13, 2022, *available at* <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf>.

⁵ BEAD NOFO at 8.

requirements the Commission must meet. The Commission must be mindful of the BEAD program's "default winner" provisions, under which the Commission must approve an otherwise eligible project, absent receiving a waiver, and the potential for applicants to "cherry-pick" the more desirable project locations to serve. To project proponents, "more desirable" may mean lower cost or higher revenue generating locations, leaving marginalized and disadvantaged communities, including those that have been historically redlined, rural communities, and tribal communities, behind.

Given the substantial investment BEAD represents, it is essential the Commission seize this opportunity to serve these communities, as this may be their last, best chance to gain access to broadband services essential for full participation in modern society. To ensure complete coverage of and delivery of affordable services to these communities, the Commission should:

- Use cost data from relevant, approved California Advanced Services Fund Broadband Infrastructure Grant Account projects, as well as information from the California State Broadband Cost Model, to develop and propose an Extremely High Cost per Location Threshold (EHCT) in a staff proposal or draft Initial Proposal issued for public comment.
- Require prospective subgrantees' proposals to serve all eligible locations in geographic areas no more granular than census blocks.
- Develop a process for "de-conflicting" applications that compete to serve the same locations that resembles the process by which the Commission assigns points to various criteria in the California Advanced Services Fund (CASF) Infrastructure Account project applications.
- Prioritize projects that prioritize affordability and minimize the BEAD Program outlay when deciding between competing Priority Broadband Projects.
- Prioritize projects that prioritize affordability and minimize the BEAD Program outlay when deciding between competing Other Last-Mile Deployment Projects.
- Require those entities authorized to challenge a location's eligibility (as stated in the Commission's Initial Proposal-- local governments, nonprofit organizations, or broadband service providers) to furnish

evidence substantiating location eligibility challenges that is at least as comprehensive as the evidence required to object to Federal Funding Account applications.

- Authorize CASF Infrastructure Account, CASF Broadband Public Housing Account, and Federal Funding Account funds to be used as matching grants for BEAD applicants that are unable to provide the required minimum 25 percent grant match.
- Require BEAD project proponents to offer both a generally available broadband plan affordable to middle-class families and an income-contingent low-income broadband plan as conditions of grant approval.
- Closely coordinate its BEAD Program processes with those implemented by the California Department of Technology for the State's Digital Equity Program to ensure Environmental and Social Justice Communities receive the benefits of BEAD, including furtherance of the Commission's Environmental and Social Justice (ESJ) Action Plan 2.0 Goal 3.4: Extend Essential Communications Services to ESJ Communities.

II. DISCUSSION

A. BEAD Overview

The BEAD program presents an unprecedented opportunity to achieve universal access to broadband service, and the call to action is clear: the state, represented by the Commission, must make a plan to extend reliable broadband service⁶ to every unserved and underserved location and eligible community anchor institution (CAI) in the state⁷

⁶ The BEAD NOFO defines "Reliable Broadband Service" as broadband service that the Broadband DATA Maps show is accessible to a location via fiber-optic technology, Cable Modem/ Hybrid fiber-coaxial technology, digital subscriber line (DSL) technology; or terrestrial fixed wireless technology utilizing entirely licensed spectrum or using a hybrid of licensed and unlicensed spectrum. BEAD NOFO at 15.

⁷ The BEAD NOFO defines "unserved" as a broadband-serviceable location that the Broadband DATA Maps show as (a) having no access to broadband service, or (b) lacking access to Reliable Broadband Service offered with (i) a speed of not less than 25 Mbps for downloads; and (ii) a speed of not less than 3 Mbps for uploads; and (iii) latency less than or equal to 100 milliseconds. BEAD NOFO at 17. Underserved locations lack access to speeds of 100 Mbps download and 20 Mbps upload. BEAD NOFO at 16. Eligible community anchor institutions are those CAIs that lack access to symmetrical gigabit speeds. BEAD NOFO at 12. The BEAD NOFO also notes: "For the purposes of the BEAD Program, locations served exclusively by satellite, services using entirely unlicensed spectrum, or a technology not specified by the [Federal Communications] Commission for purposes of the Broadband DATA Maps, do

and carry it out. California and the Commission have significant experience administering broadband deployment and adoption grant programs to draw upon, including the Commission’s California Advanced Services Fund (CASF). Many provisions of the BEAD NOFO resemble those of existing California grant programs. The Commission must seize this opportunity and bring the benefits of high-speed broadband to unserved and underserved Californians but most specifically, to marginalized, disadvantaged communities and low-income family households.

There are some ways in which the provisions of the NOFO differ from existing California programs, and its layered prioritization mandates are complex. To provide a backdrop for the discussion and recommendations herein, these comments first present a summary overview of the BEAD program timeline, the BEAD NOFO’s Challenge Process,⁸ and Subgrantee Selection Process requirements. These are the federal requirements to which the Commission must adhere when awarding BEAD grants and the subjects of a number of questions posed in the OIR.

1. BEAD Timeline

The following graphic (Figure 1), created by the National Telecommunications and Information Administration (NTIA, the federal BEAD administrator),² provides a high-level overview of the BEAD timeline.¹⁰ Figure 1 highlights the five overarching action steps the Commission must take to receive its full BEAD allocation:

not meet the criteria for Reliable Broadband Service and so will be considered “unserved.” BEAD NOFO at 28 (internal citations omitted).

⁸ The full roll out of the BEAD program includes challenge processes at a few junctures. The challenge process addressed in these comments is **not** the challenge process administered by the Federal Communications Commission related to Broadband DATA Map, which will inform the BEAD funding allocations. These comments focus on the challenge process BEAD program administrators like the Commission must hold after publishing its assessment of eligible locations in its Initial Proposal.

² The NTIA is the federal administrator of the BEAD program. This slide is featured in a deck called “The Broadband Equity Access and Deployment (BEAD) Program: Program Details for Applicants,” released May 2022, available at <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-06/June-1-Webinar-Presentation.pdf>.

¹⁰ California is an “Eligible Entity” under the terms of the BEAD NOFO (NOFO at 12), and the Governor selected the Commission as its program administrator. See CPUC BEAD Program webpage, available at <https://www.cpuc.ca.gov/industries-and-topics/internet-and-phone/broadband-implementation-for->

- Submission of a **Letter of Intent** to participate in the BEAD Program;
- Submission of a **Five-Year Action Plan** “that establishes the State or Territory’s broadband goals and priorities and serves as a comprehensive needs assessment that will inform the State or Territory’s Initial Proposal[;]”¹¹
- After states learn the final amount of their BEAD allocation, submission of an **Initial Proposal**, or first draft of the Commission’s plan “to ensure that every resident has access to a reliable, affordable, high-speed broadband connection, utilizing all funding available to be brought to bear to accomplish this goal.”¹² Approval of the Initial Proposal triggers the release of 20 percent of California’s ultimate allocation, allowing for funding of certain projects.¹³ The Commission will then administer the challenge process and subgrantee selection process it developed and described in its Initial Proposal (described further below).
- As noted in the graphic provided, the final overarching actions the Commission must take, submission of a **Final Proposal** and **Program Implementation**, should overlap, as the Final Proposal must include “[a] detailed plan that specifies the outcome of the [Commission’s] subgrantee selection process,” and “a timeline for implementation of the detailed plan and completion of each project and other eligible activity to be funded.”¹⁴

Figure 1 also highlights the points of program development at which the Commission’s proposals will be subject to NTIA review and approval.

[california/bead-program](#). To be clear with regard to which entity will be taking specific future actions, these comments will refer to the Commission when an Eligible Entity is the intended actor.

¹¹ BEAD NOFO at 25.

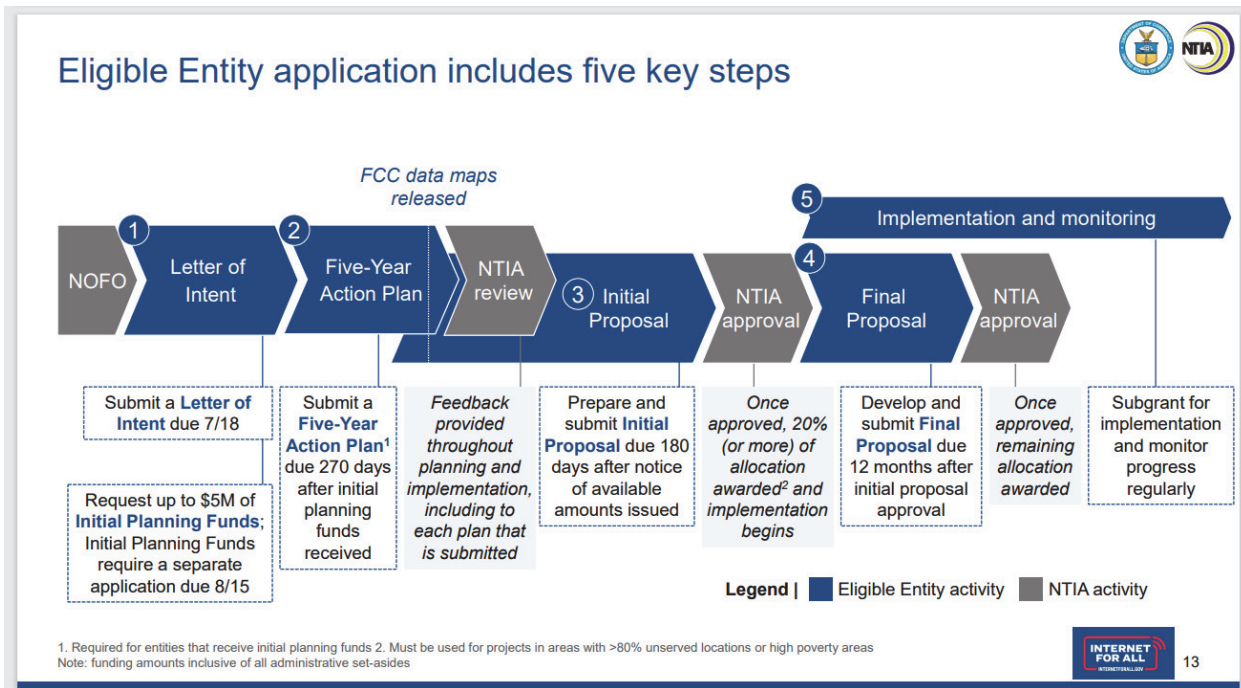
¹² BEAD NOFO at 30.

¹³ The Commission may use the initial 20 percent allocation to fully fund deployment projects that:

1. Consist of at least 80 percent unserved locations; and
2. Are in a location in which the percentage of individuals with a household income at or below 150 percent of the poverty line applicable to a family of the size involved (as determined under Section 673(2) of the Community Services Block Grant Act [42 U.S.C. § 9902(2)] that is higher than the national percentage of such individuals. BEAD NOFO at 46.

¹⁴ BEAD NOFO at 47.

Figure 1: Timeline of BEAD Application Process



California has already submitted its Letter of Intent to participate in the program and has requested and received Initial Planning Funds on December 7, 2022 (Item 1).¹⁵ As an optional step, the Commission has also already submitted challenges to the preliminary Federal Communications Commission’s (FCC) preliminary National Broadband Map, the map showing the service data upon which California’s BEAD allocation will be based.¹⁶ The Commission opened this Rulemaking on February 23, 2023.

2. BEAD Challenge Process

The Commission must “develop and describe in the Initial Proposal, a transparent, evidence-based, fair, and expeditious challenge process under which a unit of local government, nonprofit organization, or broadband service provider can challenge a determination” made by the Commission in its Initial Proposal as to whether a particular

¹⁵ CPUC BEAD Program webpage, available at <https://www.cpuc.ca.gov/industries-and-topics/internet-and-phone/broadband-implementation-for-california/bead-program>.

¹⁶ *Id.*

location or community anchor institution within the jurisdiction of the Eligible Entity is eligible for grant funds, including its status as unserved or underserved.¹⁷ While the Commission’s location eligibility determinations in its Initial Proposal must use the FCC’s then-current National Broadband Map, this challenge process is entirely separate from the challenge process the FCC administers for its National Broadband Map and will not impact the BEAD allocations that will be determined via that process. It is also different from the CASF challenge process in that it must occur *before* the Commission selects subgrantees, and so is not an opportunity to challenge individual project applications submitted by subgrantees.¹⁸

3. BEAD Subgrantee Selection Process

The BEAD NOFO provides the Commission with *limited* flexibility to design its own subgrantee selection process but provides required criteria and mechanisms for prioritization. This section provides a high-level summary of the subgrantee selection requirements as stated in the NOFO.

The major principals for the subgrantee selection process identified by the NOFO are: (1) “Complete coverage of unserved and underserved locations, followed by prioritization of eligible CAIs” and then (2) “Selection among competing proposals for the same location or location(s).”¹⁹ Requirements for application of these principles are summarized as follows:

- **Complete coverage of unserved locations and underserved locations, followed by prioritization of eligible community anchor institutions (CAIs):**

The Commission must “award funding in a manner that ensures the deployment of service to all unserved locations” in California; if the Commission “has sufficient funds to ensure deployment of service to all underserved locations within its jurisdiction, it

¹⁷ BEAD NOFO at 34.

¹⁸ Compare BEAD NOFO at 34 with Decision (D.)22-11-023, Adopting Modifications to the Broadband Infrastructure Grant Account, Att. 1 at A-31.

¹⁹ BEAD NOFO at 42.

must ensure such deployment as well[;]” and if the Commission has remaining funds, it should deploy Gigabit²⁰ service to California CAIs that lack it. The Commission is authorized to use funds on eligible non-deployment activities if it “can demonstrate it has a plan for bringing affordable, high-speed broadband service to all unserved and underserved locations within its jurisdiction,” but is “strongly urged” to dedicate funds to serving all eligible CAIs first.²¹

If the Commission “demonstrates that there are insufficient funds available to fund deployment to all unserved, underserved, or eligible CAI locations, [the Commission] must prioritize projects within each of those categories based on a strong preference for projects in high poverty areas or persistent poverty counties.” “High poverty areas” and “persistent poverty counties” are defined in the NOFO with reference to the federal poverty line.²²

- **Selection Among Competing Proposals for the Same Location or Locations:**

As stated above, the NOFO allows the Commission flexibility to design its own subgrantee selection process, under which the Commission may “alternatively solicit proposals for project areas it defines or ask prospective subgrantees to define their own proposed project areas. If [the Commission] allows prospective subgrantees to define proposed project areas, it must develop a mechanism for de-conflicting overlapping proposals ... to allow for like-to-like comparison of competing proposals.”²³ Within those parameters, and while ensuring the “complete coverage” noted above, the Commission is directed to apply the following prioritization criteria when applications compete to serve the same location(s):

²⁰ “Funded Network connections to Eligible Community Anchor Institutions shall be capable of delivering service at speeds not less than 1 Gigabit per second for downloads and 1 Gigabit per second for uploads.” BEAD NOFO at 64.

²¹ BEAD NOFO at 41.

²² BEAD NOFO at 41.

²³ BEAD NOFO at 38.

- **Priority Broadband Project/Non-Priority Broadband Project:**

The NOFO notes that the Commission’s “Priority Broadband Project” (PBP) is one that will use end-to-end fiber infrastructure to deliver service at every project location.²⁴ If there is only one PBP application competing for funding to serve a location(s), and that application fulfills all grant requirements and does not exceed the Commission’s EHCT (discussed further below), that entity is a default winner and the Commission must award funding, absent a waiver from the NTIA.²⁵ If no PBP is proposed for a location, the Commission may award a grant to an otherwise qualifying non-Priority Broadband Project (non-PBP).

- **Competing PBPs:**

If two or more otherwise eligible PBP applications compete to serve the same location(s), the Commission must apply the following Primary and Secondary Criteria, which must be worth no less than 75 percent and no more than 25 percent of the total weight accorded in the comparison, respectively.²⁶ Primary Criteria are Minimal BEAD Program Outlay, Most Affordable Price Offered for 1 Gigabit Plan, and Fair Labor Practices.²⁷ Secondary Criteria are Speed to Deployment, and any additional factors the Commission chooses to add (suggestions are open access, equitable workforce and job quality and local and Tribal coordination).²⁸

²⁴ BEAD NOFO at 14.

²⁵ BEAD NOFO at 42.

²⁶ BEAD NOFO at 42-43 & n.66.

²⁷ BEAD NOFO at 42.

²⁸ BEAD NOFO at 42-43; Explaining the “Open Access” criterion, the BEAD NOFO states at 44: “NTIA encourages Eligible Entities 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.” In defining the term “open access,” the BEAD NOFO provides:

“[O]pen access” refers to an 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. For this purpose, “just and reasonable wholesale rates” means rates that include a discount from the provider’s retail rates reflecting the costs that the subgrantee avoids by virtue of not providing retail service to the end user location (including, for example, marketing, billing, and collection-related costs). BEAD NOFO at 14.

- **Competing non-BPBs:**

If no PBPs but two or more otherwise eligible non-PBP applications compete to serve the same location(s), the Commission must apply the following Primary and Secondary Criteria, which must be worth no less than 75 percent and no more than 25 percent of the total weight accorded in the comparison, respectively.²⁹ Primary Criteria are Minimal BEAD Program Outlay, Most Affordable Price Offered for a 100/20 Megabits per second (Mbps) plan, and Fair Labor Practices.³⁰ Secondary Criteria are Speed to Deployment, Speed of Network and Other Technical Capabilities, and any additional factors the Commission chooses to add (suggestions are open access, equitable workforce and job quality and local and Tribal coordination).³¹

If the Commission receives no eligible and qualifying applications to serve an eligible location or set of eligible locations after soliciting proposals, the Commission “may engage with existing providers and/or other prospective subgrantees to find providers willing to expand their existing or proposed service areas.”³² However, this process must also be as transparent as possible and the Commission may not engage in this provider-specific outreach until after it has “has solicited proposals and failed to obtain one or more proposals to serve the location or locations at issue.”³³

B. Responses to Issues Posed in OIR

The OIR contains 14 questions on specific program requirements listed in the NOFO. Each response below responds to the OIR question of the same number.

²⁹ BEAD NOFO at 44, n.68.

³⁰ BEAD NOFO at 44-45.

³¹ BEAD NOFO at 45-46.

³² BEAD NOFO at 38.

³³ BEAD NOFO at 38.

- 1. The Commission should use cost data from relevant, approved California Advanced Services Fund Broadband Infrastructure Grant Account projects, as well as information from the California State Broadband Cost Model, to develop and propose an EHCT in a staff proposal or draft Initial Proposal issued for public comment.³⁴**

While, as noted above, the BEAD NOFO requires the Commission approve certain applications as default winners, absent a waiver from the NTIA,³⁵ the Extremely High Cost per Location Threshold (EHCT) is set at a level above which the Commission “may decline to select a proposal if use of an alternative technology meeting the BEAD Program’s technical requirements would be less expensive,” without first securing a waiver.³⁶ As noted in the OIR, the EHCT should be set to maximize use of the best available technology while ensuring that the Commission’s program can meet BEAD’s prioritization and scoring requirements.³⁷ The EHCT should allow the Commission to fund fiber deployment to the maximum number of eligible locations possible, while allowing for other technologies to be deployed in specific, very high-cost cases.

³⁴ The OIR’s Question 1 states at 5 (internal citations omitted):

Extremely High-Cost Threshold. The NTIA’s Notice of Funding Opportunity requires the CPUC to establish an “Extremely High Cost Per Location Threshold” in a manner that maximizes use of the best available technology while ensuring that the program can meet the prioritization and scoring requirements. The NTIA expects the Extremely High Cost Per Location Threshold to be set as high as possible to help ensure that end-to-end fiber projects are deployed wherever feasible. How should the Commission define the threshold for locations that constitute “extremely high cost” locations?

³⁵ E.g., “[i]n the event there is just one proposed Priority Broadband Project in a location or set of locations, and that proposal does not exceed the [EHCT], that proposal is the default winner, unless the Eligible Entity requests, and the Assistant Secretary grants, a waiver allowing the Eligible Entity to select an alternative project.” NOFO at 42.

³⁶ BEAD NOFO at 13.

³⁷ The OIR cites Section IV.B.6.b of the BEAD NOFO for these “prioritization and scoring criteria”. However, Section IV.B.6 pertains to the BEAD challenge processes and has no subsections. These comments assume the OIR meant to refer to Section IV.B.7.b of the BEAD NOFO (“Prioritization and Scoring in Selection of Last-Mile Broadband Deployment Projects”) – which refers to “prioritization” as the requirement that the Commission “shall award funding in a manner that ensures the deployment of service to all unserved locations within the Commission’s jurisdiction,” next ensuring funding to all underserved locations, and finally planning to fund eligible CAIs, if sufficient funding exists. Under Section IV.B.7.b, “scoring criteria” refers to the process the BEAD NOFO requires the Commission use when selecting between two otherwise eligible applications to serve the same location.

Ultimately, to ensure that all eligible locations are served, the EHCT must depend on the total BEAD allocation California receives, taking into consideration other broadband funding sources the Commission must put to the same goal, including CASF and FFA.

To develop the EHCT, the Commission should review cost data from approved CASF Broadband Infrastructure Grant Account projects that deployed end-to-end fiber to develop and propose an EHCT for party comment. For example, approved CASF applications and reporting data from projects such as the three fiber-to-the-home (FTTH) projects approved in Lassen and Plumas Counties via Commission Resolution T-17750 may provide data that, when aggregated and compared with other projects, can help the Commission narrow costs to an appropriate per-location threshold under which it could reasonably expect most projects to be funded by fiber.³⁸ The costs per location of each project approved in that resolution range from roughly \$80,500 per location to serve 138 locations with the Southern Lassen project³⁹ to nearly \$280,000 per location to serve seven households with the Mohawk Valley project.⁴⁰ The Commission must estimate the extent to which remaining unserved locations are in communities that more closely resemble Southern Lassen versus Mohawk Valley. The Commission must also determine the extent to which data from approved CASF project applications should be updated to reflect current costs and inflation, as the most recent Infrastructure Account grant application deadline was May 4, 2020.

Given the additional inputs needed to determine an EHCT, the Commission should consider whether it can use data from the California Broadband Cost Model (CBCM)⁴¹ to determine an extremely high-cost threshold per location that maximizes fiber deployment while ensuring deployment to as many unserved, underserved, and eligible community anchor institutions as funding will allow. The CBCM contains middle-mile and last-mile

³⁸ CPUC Resolution (Res.) T-17750.

³⁹ Res. T-17750 at App. C, C-3.

⁴⁰ Res. T-17750 at App. C, C-2.

⁴¹ See “California Broadband Cost Model (CBCM)” on the CPUC’s website at <https://www.cpuc.ca.gov/industries-and-topics/internet-and-phone/california-broadband-cost-model>.

investment data for FTTP networks built in California which can assist in developing the high-cost threshold.⁴²

2. If the Commission allows prospective subgrantees to propose project areas, it should require proposals to serve all eligible locations in geographic areas no more granular than census blocks.⁴³

As noted above and in Question 2 of the OIR, the BEAD NOFO allows the Commission the flexibility to:

[S]olicit proposals from prospective subgrantees at the geographic level of its choosing—for example, on a per-location basis, per-census block basis, per-town, per-county or another geographic unit. [The Commission] may alternatively solicit proposals for project areas it defines or ask prospective subgrantees to define their own proposed project areas.⁴⁴

The Commission “may seek proposals to serve unserved locations, underserved locations, and CAIs collectively or separately, so long as the [Commission] awards funding in a manner that prioritizes Unserved Service Projects and once it certifies that it will ensure coverage of all unserved locations within the Eligible Entity, prioritizes Underserved Service Projects.”⁴⁵

To fulfill its obligation to create a plan to deploy service to *all* unserved, and underserved locations and eligible community anchor institutions in the state, whether it is a predetermined project area or a prospective applicant’s proposed area, the Commission’s proposal should ensure that project applicants are required to serve all

⁴² CBCM Report, issued December 2020, at 15; available at https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/communications-division/documents/california-broadband-cost-model/california-state-broadband-cost-model_december-2020_12142020.pdf.

⁴³ The OIR’s Question 2 states at 5:

The Notice of Funding Opportunity gives flexibility to states to solicit proposals from prospective subgrantees at the geographic level of their choosing—for example, on a per-location basis, per-census block basis, per-town, per-county or another geographic unit. States may alternatively solicit proposals for project areas they define or ask prospective subgrantees to define their own proposed project areas. What is the best, or most appropriate, geographic level for subgrantee proposals?

⁴⁴ OIR at 3, quoting BEAD NOFO at 38.

⁴⁵ BEAD NOFO at 37.

reasonable and logical network connection locations in an area, rather than only the lowest-cost or highest-revenue locations. The Commission's choice of geographic level for project proposals should ensure that all locations are included in a given project proposal. Such an outcome can be achieved via a mechanism in which, if, for example, the Commission solicited project proposals from applicants, it should require applicants to submit applications on no smaller than a census block basis and require applications to propose to serve all eligible locations in the census blocks in which *any* project locations are located.

While preventing “cherry-picking” is a valid concern for all broadband programs that seek to ensure deployment to *all* unserved and underserved locations, it is particularly important here, where the BEAD NOFO describes scenarios in which an application may be considered a “default winner, unless the [Commission] requests and the [NTIA] grants, a waiver allowing the [Commission] to select an alternative project.”⁴⁶ While the Commission is authorized to “engage with existing providers and/or other prospective subgrantees to find providers willing to expand their existing or proposed service areas,” this may only occur after an initial solicitation leaves eligible locations without proposals.⁴⁷ Due to the default winner provisions, once an otherwise eligible application is received, it is unclear whether the Commission can condition its approval on the applicant's agreement to deploy to additional locations. Applying a requirement that applications must propose to serve all eligible locations within the chosen geographic area as a “gatekeeping” criterion, that is, a criterion required to be satisfied for an application to be approved, would prevent an application that fails to do this from being considered a “default winner.”

⁴⁶ The Commission is not required to seek a waiver to reject applications “that require[] a BEAD subsidy that exceeds the Extremely High Cost Per Location Threshold for any location to be served in the proposal if use of an alternative Reliable Broadband Service technology meeting the BEAD Program's technical requirements would be less expensive.” BEAD NOFO at 38.

⁴⁷ BEAD NOFO at 38.

3. The Commission should assign point values to Priority and Secondary criteria in BEAD project applications to de-conflict applications that compete to serve the same locations, if the Commission allows prospective subgrantees to define their own project areas.⁴⁸

The BEAD NOFO requires:

[I]f [the Commission] allows prospective subgrantees to define proposed project areas, [the Commission] must develop a mechanism for de-conflicting overlapping proposals (for example, by de-scoping some locations from a provider’s proposed project area) to allow for like-to-like comparison of competing proposals.”⁴⁹

Assuming that the Commission allows prospective applicants to define proposed project areas, the BEAD NOFO requires the Commission to use the Primary and Secondary Criteria, discussed further below, as the bases for comparison to resolve conflicts in which two or more otherwise eligible applications compete for funding to serve the same location or set of locations.⁵⁰ While the BEAD NOFO thus provides certain substantive bases for comparison, it does not dictate the process, noting only that Primary Criteria are to be weighted no less than 75 percent of the total weight possible (and so combined, Secondary Criteria cannot account for more than 25 percent of weight assigned).⁵¹

The Commission should consider assigning point values to each criterion, similar to the system used to determine the appropriate proportion of an application’s total project costs to be funded under CASF Infrastructure Grant Account Guidelines.⁵² In this case, whichever of the competing projects earned the most total points would be awarded

⁴⁸ The OIR’s Question 3 states at 6: “What mechanism should be used for overlapping proposals to allow for a like-to-like comparison of competing proposals?”

⁴⁹ BEAD NOFO at 38. To the best of Cal Advocates’ knowledge, the Commission has not made public a determination of whether it will create predetermined project areas for which applicants may bid or apply for funding or whether it will allow prospective applicants to propose their own project areas.

⁵⁰ BEAD NOFO at 20-42.

⁵¹ “The primary criteria must collectively account for no less than three-quarters of the total benefits available across all the criteria the [Commission] employs in choosing between or among competing proposals.” BEAD NOFO at n.66.

⁵² D.22-11-023, Adopting Modifications to the Broadband Infrastructure Grant Account, Att. 1 at A-7.

the grant to serve the contested locations, which may be de-scoped from the remaining competing proposals.

4. The Commission should favor projects that prioritize broadband affordability and minimize BEAD program funding outlay when priority broadband projects compete for the same locations.⁵³

The BEAD NOFO clearly states that projects that use end-to-end fiber optic technology are considered Priority Broadband Projects, and if otherwise qualifying, must be selected over other types of broadband projects, unless the cost per location of such proposals exceeds the EHCT.⁵⁴ Thus, the Commission’s subgrantee selection process “must first assess which locations or sets of locations under consideration are subject to one or more proposals that (1) constitute Priority Broadband Projects and (2) satisfy all other requirements set out in [the] NOFO with respect to subgrantees.”⁵⁵ If any such projects compete for the same locations, those projects must be compared based on the Primary and Secondary Criteria provided in the NOFO.⁵⁶ “Additional Prioritization Factors” are also suggested by the NOFO; the Commission may add those or other criteria to the list of Secondary Criteria, though the full weight accorded to Secondary Criteria still may not exceed 25 percent of total, as noted above.⁵⁷

The Commission should accord weight to each criteria used to compare Priority Broadband Projects as ranked and described in the table below, with the most weight added to those criteria that (1) ensure affordability of broadband services and (2) further the goal of ensuring the BEAD Program allocation improves service at as many eligible locations as possible. As an initial matter, the Commission should investigate whether items listed as “Additional Criteria” in the NOFO may be adopted as baseline criteria,

⁵³ The OIR’s Question 4 asks at 6 asks: “In addition to the Primary Criteria and Secondary Criterion required in the Notice of Funding Opportunity, which additional prioritization factors should be considered? How should they each be measured, and should they be weighted in prioritization?”

⁵⁴ BEAD NOFO at 42.

⁵⁵ BEAD NOFO at 42.

⁵⁶ BEAD NOFO at 42-44.

⁵⁷ BEAD NOFO at 45.

without which an application may not be approved, without running afoul of the NOFO’s prioritization requirements. For example, the Commission should request clarification from the NTIA as to whether the Local and Tribal Coordination, listed as a possible “Additional Criteria” that may be added to Secondary Criteria, may be required from all applicants.⁵⁸ While demonstration of community support for a proposed project is optional for Federal Funding Account and CASF Infrastructure applicants,⁵⁹ given the need to ensure maximum coordination across stakeholders to ensure universal service, the Commission should make this criterion required.

Table 1: Cal Advocates’ Proposed Ranking of Criteria for Competing Priority Broadband Projects

	Criteria	Rank	Justification for Priority Ranking
Primary Criteria	Minimal BEAD Outlay ⁶⁰	1	Given the strict broadband affordability requirements recommended below, including the baseline requirement that every applicant propose both a low-income qualified plan and a generally available broadband plan that is affordable for middle class families, Minimal BEAD Outlay should be prioritized the most heavily among competing applicants. This criterion ensures that the BEAD Program allocation can be stretched as far as possible, improving access for the greatest number of Californians.

⁵⁸ Requiring certain actions as baseline criteria, rather than as scoring criteria, prioritizes those actions by ensuring that any application that lacks fulfillment of that criteria is not considered a “default winner,” and by making sure that even those applicants that don’t anticipate competing with other applications to serve given locations incorporate that action.

⁵⁹ D.22-11-023, Att. 1 at A-26; D.22-04-055, App. A at A-19.

⁶⁰ Explaining the “Minimal BEAD Program Outlay” criterion, the BEAD NOFO states at 43:

The total BEAD funding that will be required to complete the project, accounting for both total projected cost and the prospective subgrantee’s proposed match (which must, absent a waiver, cover no less than 25 percent of the project cost), with the specific points or credits awarded increasing as the BEAD outlay decreases. In comparing the project’s BEAD outlay and the prospective subgrantee’s match commitments, Eligible Entities 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.

	Affordability of 1 GB/1 GB plan ⁶¹	2	If the Commission does not adopt a baseline requirement that all applicants adopt a generally available (not income-qualified) plan as recommended below, the Commission should award the affordability of the proponent's 1 GB/1 GB plan the most weight.
	Fair Labor Practices ⁶²	3	Not applicable

Table 1 (cont'd): Cal Advocates' Proposed Ranking of Criteria for Competing Priority Broadband Projects

	Criteria	Rank	Justification for Priority Ranking
Secondary Criteria	Open Access of Last Mile Infrastructure ⁶³	1	Providing greater weight to projects that propose last-mile open access guarantees is another way the NOFO states administrators like the Commission can prioritize making funded networks affordable. ⁶⁴ The Commission should most heavily weight this secondary criterion, prioritizing network affordability.
	Local and Tribal Coordination ⁶⁵	2	As noted above, the Commission should consider requiring this coordination from all applicants, if allowable under the terms of the NOFO.

⁶¹ Explaining the "Affordability" criterion, the BEAD NOFO states at 43: "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."

⁶² Explaining the "Fair Labor Practices" criterion, the BEAD NOFO states at 43:

Eligible Entities must give priority to projects based on a prospective subgrantee's demonstrated record of and plans to be in compliance with Federal labor and employment laws. New entrants without a record of labor and employment law compliance must be permitted to mitigate this fact by making specific, forward-looking commitments to strong labor and employment standards and protections with respect to BEAD-funded projects.

⁶³ Explaining the "Open Access" criterion, the BEAD NOFO states at 44: "NTIA encourages Eligible Entities 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."

⁶⁴ BEAD NOFO at 66.

⁶⁵ As noted above and discussed at length below, "[a]n Eligible Entity may decline to select a proposal that requires a BEAD subsidy that exceeds the Extremely High Cost Per Location Threshold for any location to be served in the proposal if use of an alternative Reliable Broadband Service technology meeting the BEAD Program's technical requirements would be less expensive." BEAD NOFO at 38.

	Speed to Deployment ⁶⁶	3	Not applicable
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5. The Commission should favor projects that prioritize broadband affordability and minimize BEAD Program funding outlay when other last-mile broadband projects compete for the same locations.⁶⁷

The BEAD NOFO provides that, if the Commission receives no Priority Broadband Project proposals to serve a location or set of location(s), but receives one otherwise qualifying application, that application is the default winner, and the Commission must approve it, absent requesting and being granted a waiver by the NTIA.⁶⁸ If the Commission receives two or more otherwise qualifying, non-priority broadband project applications competing to serve the same location(s), the Commission must apply the NOFO’s Primary and Secondary Criteria for “Other Last-Mile Broadband Deployment Projects.”⁶⁹

Consistent with Cal Advocates’ recommendation pertaining to Priority Broadband Projects noted above, the Commission should accord weight to each criteria used to compare other Last-Mile Broadband Projects as ranked and described in the table below, with the most weight added to those criteria that (1) ensure affordability of services and (2) further the goal of ensuring the BEAD Program allocation improves service at as many eligible locations as possible and (3) ensure Californians receive the best services

⁶⁶ Explaining the “Speed to Deployment” Criteria, the BEAD NOFO states at 43:

All subgrantees that receive BEAD Program funds for network deployment must deploy the planned broadband network and begin providing services to each customer that desires broadband services within the project area not later than four years after the date on which the subgrantee receives the subgrant from the Eligible Entity. Eligible Entities must give secondary criterion prioritization weight to the prospective subgrantee’s binding commitment to provide service by an earlier date certain, subject to contractual penalties to the Eligible Entity, with greater benefits awarded to applicants promising an earlier service provision date.

⁶⁷ The OIR’s Question 5 asks at 6 asks: “In addition to the Primary Criteria and Secondary Criteria required in the Notice of Funding Opportunity, which Additional Prioritization Factors should be considered? How should they each be measured, and should they be weighted in prioritization?”

⁶⁸ BEAD NOFO at 44.

⁶⁹ BEAD NOFO at 44.

possible from networks funded by the BEAD Program. Accordingly, the Commission should weight the competing applications against the Primary and Secondary Criteria as follows:

Table 2: Cal Advocates’ Proposed Ranking of Criteria for Competing Other Last-Mile Deployment Projects

	Criteria	Rank	Justification for Higher Ranking
Primary Criteria	Minimal BEAD Outlay	1	Given the strict broadband affordability requirements recommended below, including the baseline requirement that every applicant propose both a low-income qualified plan and a generally available plan that is affordable for middle class families, Minimal BEAD Outlay should be prioritized the most heavily among competing applicants. This criterion ensures that the BEAD Program allocation can be stretched as far as possible, improving access for the greatest number of Californians.
	Affordability of 100/20 Mbps plan	2	If the Commission does not adopt a baseline requirement that all applicants offer a plan that is affordable for middle class families and generally available (not income-qualified) as recommended below, the Commission should award the affordability of the proponent’s 100/20 Mbps plan the most weight.
	Fair Labor Practices	3	Not applicable
Secondary Criteria	Speed of Network and Other Technical Capabilities	1	Given that these non-Priority Broadband Project applications propose to use technology other than fiber, this Secondary Criterion should be weighted the most heavily to favor those projects that propose to deliver the best service to Californians.
	Open Access of Last Mile Infrastructure	2	As noted above, providing greater weight to last-mile open access guarantees is another way the NOFO states administrators like the Commission can prioritize making funded

			networks affordable. ⁷⁰ The Commission should heavily weight this secondary criterion.
	Local and Tribal Coordination	3	As noted above, the Commission should consider requiring this coordination from all applicants, if allowable under the terms of the NOFO.
	Speed to Deployment	4	Not applicable

6. The Commission Should Require Evidence to Substantiate Location Eligibility Challenges that is at Least as Comprehensive as the Evidence Required to Object to Federal Funding Account Applications.

The BEAD NOFO requires that the Commission “[i]dentify each unserved location and underserved location under the jurisdiction of the [Commission], including unserved and underserved locations in applicable Tribal Lands, using the most recently published Broadband DATA Maps[.]”⁷¹ This identification must be presented in the Commission’s Initial Proposal, and will serve as an initial statement of the locations the Commission determines are eligible for BEAD funding. The NOFO further requires BEAD program administrators, like the Commission, to describe in their respective Initial Proposals and then execute “a transparent, evidence-based, fair, and expeditious challenge process under which a unit of local government, nonprofit organization, or broadband service provider can challenge a determination” made by the Commission as to the eligibility of any location for BEAD funding.⁷²

As an initial matter, the Commission should make clear that the process identified here is the only opportunity administered by the Commission for the public to challenge project location eligibility under the BEAD Program. The Commission should not hold an additional challenge process by which entities may challenge specific applications

⁷⁰ BEAD NOFO at 66.

⁷¹ BEAD NOFO at 31.

⁷² BEAD NOFO at 34-35.

after the subgrantee selection process is initiated. Aside from there being no support for such a process in the NOFO, given that the Commission is hoping to receive applications that propose to serve every eligible location in the state, an additional challenge process after the subgrantee selection process could endanger the Commission's ability to hold the required challenge process, the subgrantee selection process, and prepare its Final Proposal within the timeframe required by the NOFO.⁷³

For the process by which the Commission accepts challenges to its location eligibility determinations, the Commission should require "definitive evidence"⁷⁴ of a location's status as served, unserved, or underserved, including at a minimum, the following information from challengers, consistent with the Federal Funding Account's project objection process,⁷⁵ as listed below. Modifications to the Federal Funding Account's objection process are proposed to address the need to substantiate challenges from parties asserting a location is *not adequately served* and should be eligible for funding, in addition to the FFA's rules that are specific to those asserting a location is *already served* and thus should be deemed ineligible:

- An attestation that all information provided with the challenge is true and accurate in accordance with Rule 1 of the Commission's Rules of Practice and Procedure.
- An attestation as to the specific broadband speeds, levels of reliability, or network capabilities the challenger alleges are available at the challenged location(s), and any evidence of speed tests conducted, including the dates, times and locations and infrastructure at which the tests were conducted, to substantiate this attestation. For example, challengers may provide screenshot(s) of results of CalSPEED speed tests, which can be accessed at <http://www.calspeed.org/index.html>, or other commercially available speed tests (e.g., <https://speedof.me>).⁷⁶

⁷³ The Final Proposal, required to detail the "outcome of the subgrantee selection process," is due no later than 365 days from the date the Initial Proposal is approved, meaning the Commission has one year to hold its challenge process, select subgrantees, and prepare its Final Proposal. BEAD NOFO at 2.

⁷⁴ D.22-04-055, Adopting Federal Funding Account Rules, App. A at A-21.

⁷⁵ *Id.* at A-22.

⁷⁶ See D.22-22-023 Modifying the CASF Broadband Infrastructure Grant Account Rules, Att.1 at A-36 for Commission use of CalSPEED or other commercially available testing service results as evidence of service status for applications the CASF Infrastructure Grant Account.

Challengers may submit evidence including trouble reporting or outage data to substantiate claims of lack of service reliability.⁷⁷

- The geographic location of all households or locations for which the challenge is filed. This information must be provided in a plain-text, comma-separated values (CSV) file that contains geolocated street address information, including latitude and longitude coordinates.
- If a challenger alleges that a location is served, rather than unserved or underserved, the challenger must provide the number of subscribers and the level of broadband service subscribed to in the area being disputed, including billing statement information to verify subscribership. The Commission should require challengers to furnish this information without redactions and allow them to file these documents under seal; and
- If a challenger alleges that a location is served, rather than unserved or underserved, the challenger must provide at least two of the following: (1) permits, (2) easements, or (3) pole attachment applications submitted and approved when infrastructure was built, and (4) pictures of provider infrastructure in the area (i.e., wires, huts, vaults, etc.). For example, street-view pictures of poles on which the attached communications infrastructure can be identified.

7. The Commission should authorize CASF Infrastructure Account, CASF Broadband Public Housing Account (BPHA), and Federal Funding Account (FFA) funds to be used as matching funds for BEAD Subgrantees that are unable to provide the required minimum 25 percent grant match.⁷⁸

The BEAD NOFO requires that, except in certain circumstances, including with regards to project proposals in designated “high-cost areas,” state administrators of the

⁷⁷ The BEAD NOFO states that, for example, while Digital Subscriber Line (DSL) services fall within the definition of “reliable broadband service,”

NTIA acknowledges concerns that, in some cases, DSL arrangements fail to provide consistent access to advertised speeds. To the extent a particular location is identified on the Broadband DATA Maps as served by DSL at speeds that warrant treatment of that location as “served” or “underserved” but is not in fact reliably served at such speeds, this would be a proper basis for challenging the relevant location’s service status during the challenge process created by the Eligible Entity. BEAN NOFO at 15, n.13.

⁷⁸ The OIR’s Question 7 asks at 6-7:

The IIJA expressly provides that matching funds for the BEAD Program may come from federal regional government entities and from funds that were provided to an Eligible Entity

BEAD Program subgrantee selection processes “shall provide, require its subgrantee to provide, or provide in concert with its subgrantee, matching funds of not less than 25 percent of project costs.”⁷⁹ While most federal funds are not eligible to be used as matching funds, the NOFO provides that funds are eligible if they were provided to an Eligible Entity or a subgrantee for the purpose of deploying broadband service under the Families First Coronavirus Response Act,⁸⁰ the CARES Act,⁸¹ the Consolidated Appropriations Act, 2021⁸² or the American Rescue Plan Act of 2021.^{83,84}

The Commission should allow state funding from the CASF Infrastructure Grant Account and BPHA and the FFA to be used as matching funds for BEAD Projects. CASF is funded via surcharges on California customer bills, and so would be an eligible source for matching funds. Though not discussed at length in these Comments, BEAD funds may be used to “[i]nstall[] internet and Wi-Fi infrastructure or provid[e] reduced-cost broadband within a multi-family residential building[;]”⁸⁵ to the extent such projects also comply with BPHA rules, the Commission should make such funds available for project matches. To the extent that the FFA is funded by the American Rescue Plan Act of 2021, FFA funds should also be made available as sources of matching grants. Finally, the Commission should investigate the extent to which funds guaranteed by the Commission’s Loan Loss Reserve Fund may be used as matching funds, once the program is operational; the NOFO allows that “[l]oan funding issued through a federal agency, such as through the USDA ReConnect Program, may also be used as match

or a subgrantee for the purpose of deploying broadband service under the Families First Coronavirus Response Act, the CARES Act, the Consolidated Appropriations Act of 2021, or the American Rescue Plan Act of 2021, to the extent permitted by those laws. What state funding should also be allowed to be used as matching funds?

⁷⁹ BEAD NOFO at 20.

⁸⁰ Public Law 116-127, codified at 134 Stat. 178.

⁸¹ Public Law 116-136, codified at 134 Stat. 281.

⁸² Public Law 116-260, codified at 134 Stat. 1182

⁸³ Public Law 117-2, codified at 135 Stat. 4.

⁸⁴ BEAD NOFO at 21.

⁸⁵ See BEAD NOFO at 33.

funding[,]” but is silent as to the general eligibility of matches consisting of funds guaranteed by (or loans issued by) state agencies. Allowing matching funds from these Commission programs is reasonable as each of these programs shares with BEAD the same goal of eliminating the digital divide. Using these programs’ funds as matches for BEAD grants may make it easier for non-traditional providers to participate in BEAD, while ensuring that the BEAD allocation can be used to serve as many eligible locations as possible.

8. Responses to Issues Posed Regarding the Statewide Middle Mile Project⁸⁶

The Commission should incentivize the use of the statewide middle mile project by BEAD Projects. The Commission may award points to those projects that propose to leverage the statewide middle mile project, when in reasonable proximity to the project area, as an additional Secondary Criteria (assuming the Commission adopts a points-based de-conflicting system, as described above). Alternatively, the Commission may require all project proposals to include consideration of leveraging the statewide middle mile project, when in reasonable proximity to the project area, as well as a statement explaining the proponent’s decision in this area. Awarding points to projects that propose use of the statewide middle mile network here would be similar to the process described in the FFA rules.⁸⁷ Alternatively, the second methodology contemplates a baseline (i.e., “gatekeeping”) requirement for *all* project proponents to consider use of the statewide middle mile project. For example, the CASF Infrastructure Account requires all projects to interconnect with the statewide middle mile project where reasonable and feasible.⁸⁸

⁸⁶ The OIR’s Questions 8 asks at 7:

How should the Commission prioritize subgrantee project proposals that plan on utilizing the statewide open-access middle mile network? Should the Commission require applicants proposing to build their own middle mile infrastructure with BEAD funds to make their network open access? In the event the middle mile portion of an application significantly overlaps the statewide middle mile network, should the applicant be required to consult with the California Department of Technology?

⁸⁷ D.22-04-055, Adopting Federal Funding Account Rules, App. A, A-7.

⁸⁸ D.22-11-023, Modifying the CASF Broadband Infrastructure Account Rules, Att. 1 at A-20.

Projects that propose using BEAD funds for middle mile buildout should be required to keep that middle mile infrastructure open access for the life of the asset. Aside from ensuring enduring public benefits from publicly funded projects, this requirement is consistent with requirements for the Federal Funding Account⁸⁹ and the CASF Infrastructure Account.⁹⁰ Maintaining this consistency between program terms will aide those receiving matching grants from these programs, who will need to comply with all program requirements.

Finally, it may be reasonable for project proponents whose proposed BEAD-funded middle mile that significantly overlap with the statewide middle mile project to be required to consult with the California Department of Technology, the lead agency for the statewide middle miles project, to ensure the middle mile funding is consistent with state goals for the statewide middle mile project. If there is significant overlap between the proposed project's middle mile and the statewide middle mile, this may indicate that the additional middle mile may be unnecessary or an inefficient use of public funds.

Consultation with the California Department of Technology is required under the CASF Infrastructure Account rules for all projects with CASF-funded middle mile. However, limiting the consultation requirement for BEAD to those projects with middle mile components with “significant overlap” with the statewide middle mile project may be reasonable here given the difference in size of funding allocation (and so expectation of number of applications) between the two programs. Additionally, more of the statewide middle mile project routes are now known or will be known by the time BEAD program rules are adopted, allowing for an easier assessment of “significant overlap,” the definition of which should be subject to public comment. The Commission should also confer with the California Department of Technology and grantees that have undertaken such consultation previously to determine the usefulness and administrative burden of consulting with California Department of Technology before making such consultation a

⁸⁹ D.22-04-055, Adopting Federal Funding Account Rules, App. A, A-9.

⁹⁰ D.22-11-023, Modifying the CASF Broadband Infrastructure Account Rules, Att. 1 at A-12.

blanket requirement for all projects that request BEAD funding for middle mile infrastructure.

9. Ministerial Review⁹¹

At this time, Cal Advocates makes no recommendation regarding whether the Commission's ultimate grantee selection process should include a ministerial review process. Cal Advocates may respond to other parties' opening comments on this issue or respond to this issue in future comments in this rulemaking after the Commission provides more information as to the intended format of its grant issuance program.

10. The Commission should require grantees to offer a low-income qualified broadband service plan and a generally available broadband plan that is affordable to middle class families, and should apply the Commission's gain on sale rules to networks funded by the BEAD Program.⁹²

- a) The Commission should require BEAD project proponents to offer both a generally available broadband plan that is affordable to middle class families and an income-qualified low-income broadband plan as conditions of grant approval.**

As a critical component of the extensive grant conditions imposed by the NOFO, the Commission should require that subgrantees offer two affordable broadband plans for the life of the funded infrastructure: (1) an income-qualified low-income broadband plan, satisfying the requirement that the Commission establish a definition for a "low-cost broadband service option" required of all grantees;⁹³ and (2) a broadly available (i.e., not income-qualified) broadband plan that is affordable for middle-class families. The NOFO requires that each BEAD Program administrator "must include in its Initial and Final Proposals a middle-class affordability plan to ensure that *all* consumers have access

⁹¹ The OIR's Question 9 asks at 7: "Should the Commission include a ministerial review process whereby the Commission delegates to staff the ability to approve BEAD subgrants that meet certain criteria? What should those criteria be?"

⁹² The OIR's Question 10 at 7 asks: "What conditions should the Commission impose on BEAD subgrantees-- for example, workforce development (e.g., job training) or affordable plans?"

⁹³ BEAD NOFO at 66.

to *affordable* high-speed internet.”²⁴ The NOFO also requires state administrators like the Commission to adopt a definition of “low-cost broadband service option” with parameters that best serve the needs of the residents; administrators must require subgrantees to offer at least one such low-cost broadband service plan option.²⁵

The Commission should require that all broadband deployment projects funded by the BEAD Program offer a broadband plan to low-income qualified Californians at a cost of no more than \$15 to the consumer, inclusive of all recurring state and provider fees and surcharges, for the life of the funded infrastructure.²⁶ These plans should be available to low-income Californians throughout the state and so eligibility should be based on standards that take into consideration the high cost of living in California as well as the variability of the costs of living and incomes across the state.

The Commission should require subgrantees to offer income-qualified plans to all households in the project area with incomes at or below 80 percent of the statewide median income or with incomes at or below the county threshold designated as low-income by the Department of Housing and Community Development’s list of state income limits adopted pursuant to Section 50093 of the Health and Safety Code. Residents of publicly supported housing developments, farmworker housing, and other properties categorically eligible for Broadband Public Housing Account grants should also be categorically eligible for the BEAD-required low-income plans. These eligibility criteria are consistent with those approved for the low-income broadband plans required of CASF Infrastructure Account grantees – and, barring additional changes to the CASF Infrastructure Account rules – will be applicable to the low-income broadband plans required of all BEAD subgrantees using CASF Infrastructure Account funds as matches, should the Commission approve the use of such funds for matches. Plans should offer eligible low-income subscribers service at speeds of no less than 100/20 Mbps, with 100

²⁴ BEAD NOFO at 66. (Emphasis in original.)

²⁵ BEAD NOFO at 66.

²⁶ See R.20-09-001, Public Advocates Office Opening Comments on the Proposed Decision Adopting Federal Funding Account rules at 2 (served Mar. 22, 2022).

milliseconds (ms) or less of latency and should have no data caps.⁹⁷ Should the FCC update its definition of “broadband” to include a speed standard that exceeds 100/20 Mbps, the speed standard for these plans should increase to match the FCC’s definition.⁹⁸

In addition to requiring subgrantees to offer low-income qualified broadband plans costing no more than \$15 per month to eligible low-income families, the Commission should require all subgrantees with projects in areas that include middle class families to offer a generally available to all customers, *i.e.*, not income contingent or income qualified, broadband plan that is affordable to middle-class families. The NOFO does not define middle-class, and while this service plan should not be income-qualified, the Commission will still need to define “middle-class” in order to determine whether the rates at which these plans are offered are affordable to the target population. The Commission should adopt an inclusive definition of middle-class that takes into account California’s relatively high cost of living and variations in incomes and costs of living across the state. For example, Pew Research Center defines “middle class” as those households earning “two-thirds to double the U.S. median household income.”⁹⁹ To make this definition specific to California and to the variation in incomes and costs of living experienced,¹⁰⁰ the Commission should apply the “two-thirds to double” range to the area median incomes specified by county by the California Department of Housing

⁹⁷ See R.20-08-021, Public Advocates Office Opening Comments on the Assigned Commissioner’s Ruling Inviting Comments on Potential Modifications to the CASF Broadband Infrastructure Grant Account at 4, filed Jun. 27, 2022.

⁹⁸ See In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, Fourteenth Broadband Report at 2, issued Jan. 19, 2021.

⁹⁹ Pew Research Center website, “Are you in the American middle class? Find out with our income calculator,” available at <https://www.pewresearch.org/fact-tank/2020/07/23/are-you-in-the-american-middle-class/>.

¹⁰⁰ See California Department of Housing and Community Development website, “Income Limits,” <https://www.hcd.ca.gov/grants-and-funding/income-limits>, and the attached report that contains the published limits, available at <https://www.hcd.ca.gov/grants-and-funding/income-limits/state-and-federal-income-rent-and-loan-value-limits>.

and Community Development for a family of three¹⁰¹ in the *county* in which the project is located. The rate that project proponents must offer for this plan must be affordable for the lowest earning middle-class household in the area in order for it to adequately address middle class affordability. Therefore, the affordability of the proposed rate should be assessed against the *bottom* of the range of middle-class, or two-thirds of the applicable area median income. If the project area crosses county lines, the plan should be affordable to the lowest-earning middle-class residents of the county that has the lower area median income.

As noted above and as a prerequisite to adopting this proposal, the Commission must determine what price is “affordable” for that segment of the population, taking into consideration that the broadband plan required should be sufficient to satisfy average household needs. While the Commission has not set a standard for what is considered an “affordable” rate for broadband, *e.g.*, a total monthly bill not exceeding a given percent of disposable median household income, the tools created and data gathered pursuant to the Commission’s Affordability Rulemaking¹⁰² should be used as a starting place to determine a rate that is affordable to all middle-class households in a project area.

As an example of a generally available, low-cost broadband plan option the Commission has previously considered, the Commission’s proposed decision regarding Federal Funding Account rules required all grantees to offer a generally available low-cost broadband plan that included certain minimum standards, including that the plan cost no more than \$40 per month, not include data caps, and “offer speeds that are sufficient for a household with multiple users to simultaneously telework and engage in remote learning,” defined in that context as 50/50 Mbps.¹⁰³ The Federal Funding Account final

¹⁰¹ According to federal census data, the average household size in California from 2017-2021 was 2.92. <https://www.census.gov/quickfacts/CA> This number is rounded to three in this proposal, allowing for HCD income limits, determined based on number of whole people living in a household, to be directly applied.

¹⁰² See R.18-07-006, Order Instituting Rulemaking to Develop Methods to Assess the Affordability Impacts of Utility Rate Requests and Commission Proceedings, and the tools developed under that OIR, available at <https://www.cpuc.ca.gov/industries-and-topics/electrical-energy/affordability>.

¹⁰³ R.20-09-001, Proposed Decision Adopting Federal Funding Account Rules at 64, issued Mar. 2, 2022.

decision¹⁰⁴ is unclear as to why this requirement was not ultimately adopted for that program, but the Commission should pursue such a requirement in this case, at minimum speeds greater than 50 Mbps download, allowing parties to comment on the appropriate rate and plan components. Requiring subgrantees to offer a plan that satisfies average household needs and that is affordable to a middle-class household in California is the most direct way to ensure the benefits of BEAD funding are delivered to middle-class Californians.

C. The Commission should require project proponents to agree to be bound by the Commission’s gain on sale rules as a condition of receiving a grant from the BEAD Program.

The Commission should require subgrantees to agree to be bound by the Commission’s gain on sale rules if and when BEAD-funded infrastructure is transferred as a condition of accepting a BEAD grant: “A utility receives a gain on sale when it sells an asset such as land, buildings or other tangible or intangible assets at a price higher than the acquisition cost of the non-depreciable asset or the depreciated book value of the depreciable asset.”¹⁰⁵ Gain on sale rules are intended to ensure that the entity that bears the risk of an investment receives the rewards of the success of that investment on sale. Here, BEAD is a publicly funded program, with the risk of the investment borne by the public. Therefore, as Cal Advocates has previously recommended with regards to projects funded by the CASF Infrastructure Account:

[i]n the case of depreciable assets, the Commission should receive 100% of the gains-on-sale consistent with gain-on-sale regulations established in D.06-05-041.³¹ In the case of non-depreciable assets, the Commission should receive a percentage of the total gains-on-sale equal to the percentage of the grant’s contribution relative to the total project cost.¹⁰⁶

¹⁰⁴ D.22-04-055, Adopting Federal Funding Account Rules.

¹⁰⁵ D.06-05-041, Opinion Regarding Allocation of Gains on Sale of Utility Assets at 8.

¹⁰⁶ R.20-08-021, Public Advocates Office Opening Comments on the Assigned Commissioner’s Ruling Inviting Comments on Potential Modifications to the CASF Broadband Infrastructure Grant Account at 4, filed June 27, 2022, citing D.06-05-041, p. 96, Ordering Paragraph 1 (internal citations omitted).

Any proceeds from asset sales that revert to the Commission through application of gain-on-sale rules should be deposited in an account to be used solely for additional broadband deployment grants issued under Commission programs. Entities seeking to transfer ownership of BEAD funded infrastructure should be required to file a Tier 3 advice letter, seeking approval of the proposed transfer and distribution of any gain on sale via the Commission’s resolution process.

1. Grant Applications¹⁰⁷

At this time, Cal Advocates makes no recommendation with regards to how many grant application cycles are held in a calendar year. Cal Advocates may respond to this issue in response to other parties’ opening comments or in future comments in this rulemaking.

2. Payments¹⁰⁸

At this time, Cal Advocates makes no recommendation with regards to how the Commission structures the reimbursement payments issued under the BEAD Program. Cal Advocates may respond to this issue in response to other parties’ opening comments or in future comments in this rulemaking.

¹⁰⁷ The OIR’s Question 11 asks at 7: “How many application cycles should there be in a calendar year?”

¹⁰⁸ The OIR’s Question 12 asks at 7: “What payment milestones should the BEAD subgrantee program adopt?”

3. The Commission must closely coordinate its BEAD Program processes with those implemented by the California Department of Technology for the State’s Digital Equity Program to ensure ESJ communities receive the benefits of BEAD.¹⁰⁹

The Commission must closely coordinate the BEAD Program with the related Digital Equity Program,¹¹⁰ also authorized under the IJJA,¹¹¹ to ensure that Environmental and Social Justice (ESJ) Communities receive the intended benefits of the programs; this extensive coordination aligns with the Commission’s ESJ Action Plan 2.0 Goal 3.4: Extend Essential Communications Services to ESJ Communities.¹¹² The Digital Equity Act itself notes that “achieving digital equity is a matter of social and economic justice [...]”¹¹³ While the BEAD Program serves primarily (though not exclusively) as a network deployment grant program, the Digital Equity Act recognizes that more than network infrastructure is required to fully address the digital divide. As stated in the Digital Equity Act Statewide Planning Grant NOFO:

Many on the wrong side of [the digital] divide require equipment, digital skills, financial resources, and more to realize the Internet’s full potential. Those who lack these resources face substantial barriers to digital equity, even in places where fast broadband connections are physically available. This digital divide is particularly acute for communities of color, Tribal nations, and lower-income areas, and spans both urban and rural areas of the country.¹¹⁴

¹⁰⁹ The OIR’s Question 13 states at 7: “Impacts on environmental and social justice communities, including the extent to which BEAD Program subgrants will impact achievement of any of the nine goals of the Commission’s Environmental and Social Justice Action Plan.”

¹¹⁰ The NTIA’s Digital Equity Statewide Planning Grant NOFO, released on May 12, 2022, is available at <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/DE%20PLANNING%20GRANT%20NOFO.pdf>. Within the context of the program, “digital equity” means the condition in which individuals and communities have the information technology capacity that is needed for full participation in the society and economy of the United States. Digital Equity Statewide Planning Grant NOFO at 5, n.1, citing the Infrastructure Act § 60302(10).

¹¹¹ Digital Equity Statewide Planning Grants NOFO at 5.

¹¹² CPUC Environmental and Social Justice Action Plan 2.0 at 5, available at <https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/news-and-outreach/documents/news-office/key-issues/esj/esj-action-plan-v2jw.pdf>.

¹¹³ Digital Equity Act at § 60303(5).

¹¹⁴ Digital Equity Statewide Planning Grant NOFO at 5.

To that end, the Commission should use this rulemaking to support and coordinate with the California Department of Technology, the agency designated as the lead state agency for the Digital Equity Programs. The Five-Year Action Plan, Initial and Final Proposals prepared for BEAD should incorporate and be complimentary to the Statewide Digital Equity Plan the California Department of Technology is tasked with preparing.¹¹⁵

Extending essential communications to ESJ Communities is critical for public safety and healthcare access, work, schooling, and participation in democratic processes. Specific BEAD and Digital Equity Program requirements or recommended actions that will help ensure the programs deliver affordable access to high-speed broadband to ESJ Communities are:

- Adopting a requirement that all BEAD subgrantees offer an income-qualified low-income broadband plan for no more than \$15 per month, using the California-specific income eligibility criteria identified above, and a generally available low-cost broadband plan that will address middle class affordability;¹¹⁶
- Adopting a subgrantee selection process that prevents project proponents from cherry-picking only the lowest-cost and highest-revenue producing locations to serve, perpetuating historical disparities in access to high-speed broadband service;
- Prioritization of unserved, underserved, and community anchor institutions in high-poverty areas and persistent poverty counties in awarding of broadband deployment grants if the Commission determines that insufficient funds are available to deploy to all such locations throughout the state.¹¹⁷

4. Other

The Commission should consider the following additional recommendations when preparing a Scoping Memo for this proceeding:

- The Commission should ensure that the public and parties to this rulemaking are aware of which aspects of the BEAD Program will be subject to the formal rulemaking process and which aspects will be

¹¹⁵ BEAD NOFO at 10.

¹¹⁶ See Section 10, above, for Cal Advocates' recommendation in this area.

¹¹⁷ BEAD NOFO at 41.

taken administratively, outside of the rulemaking process. The Commission's Scoping Memo should provide a road map of how the Commission intends to fulfill its responsibilities under BEAD, regardless of whether the listed activities will occur as a formal aspect of this rulemaking or otherwise. For example, the BEAD NOFO requires the Commission to accept public comment on its Proposals before submitting to the NTIA. Cal Advocates does not recommend that this task be incorporated into rulemaking processes due to the additional burden proceeding participation imposes on stakeholders; however, this is the type of requirement that the public should have forewarning regarding steps required to participate. The Commission should make clear which aspects of the NOFO's requirements will require party status for stakeholder engagement.

- To support non-traditional applicants for broadband deployment grants, the Commission should prepare a centralized online resource bank for electronic information and tools prospective applicants may use in their own network planning processes. The Commission has a number of sources and tools available, but they are spread out across its various funding program webpages.

III. CONCLUSION

The Commission has an unprecedented opportunity to achieve universal access to broadband in California. To ensure the BEAD Program achieves its aim of delivering reliable broadband service to all unserved, underserved, and eligible community anchor institutions in the state, the Commission should adopt the recommendations herein.

Respectfully submitted,

/s/ GAUTAM DUTTA

Gautam Dutta
Attorney for

Public Advocates Office
California Public Utilities Commission
505 Van Ness Street
San Francisco, CA 94102
Telephone: (415) 703-2108
E-Mail: Gautam.Dutta@cpuc.ca.gov

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