



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

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

Rulemaking No. 23-02-016
(Filed February 23, 2023)

**REPLY COMMENTS OF COMMUNITY LEGAL SERVICES
ON BROADBAND EQUITY, ACCESS, AND DEPLOYMENT
(BEAD) DRAFT INITIAL PROPOSAL VOLUMES I AND II**

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I. INTRODUCTION

Pursuant to the November 7, 2023 *Administrative Law Judge’s Ruling Issuing Staff Proposal*, Community Legal Services (“CommLegal”) respectfully submits the following reply comments on the Draft Initial Proposal Volumes I (“Vol. I”)¹ and II (“Vol. II”).²

II. DISCUSSION

A. VOLUME I

1. Section 4 – Community Anchor Institutions (Volume I, Requirement 6)

Parties have noted discrepancies in the lists of unserved, underserved, and Community Anchor Institution (“CAI”) eligible locations included in the Appendices to Draft Initial Proposal Volume I. The Corporation for Education Network Initiatives in California (“CENIC”) cites to specific examples of CAIs in Appendix 4 that, in fact, do have 1 Gbit/s service and even 100 Gbit/s service.³ CENIC further notes that many CAIs may choose not to subscribe to available

¹ California Public Utilities Commission, Draft of *Initial Proposal Volume I* (“Vol. I”), November 2023, accessed at <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M520/K752/520752666.PDF>.

² California Public Utilities Commission, Draft of *Initial Proposal Volume II* (“Vol. II”), November 2023, accessed at <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M520/K763/520763574.PDF>.

³ November 27, 2023 *Opening Comments of the Corporation for Education Network Initiatives in California (CENIC) on the Staff Proposal* (“CENIC Opening Comments”) at 2.

Gigabit service for reasons such as fiscal constraints or perceived value, but since they do have access to required service levels, they should not be eligible locations for BEAD funding.⁴ Rural County Representatives of California (“RCRC”) also found that some eligible locations were omitted while others were duplicated and cautions the CPUC from over relying on the data used to generate the appendices and to “instead ensure that a facility that meets the Initial Proposal’s definition of a CAI be eligible for its connectivity needs.”⁵ Similarly, CalBroadband explains that efforts to identify qualifying CAIs should be “narrowly tailored” in order to “maximize the reach of those funds” and that “[s]pecifically, the Commission should rigorously evaluate whether such locations are truly community hubs that require gigabit symmetrical Internet access.”⁶

CommLegal discussed the need to apply the IIA definition narrowly and to limit eligible CAIs to locations “that facilitate[] greater use of broadband service by vulnerable populations, including low-income individuals, unemployed individuals, and aged individuals.”⁷ CommLegal noted that the data for CAI available service appeared inconsistent and incomplete⁸ and argued that many large, wealthy hospitals do not need BEAD funds to build additional broadband infrastructure and would not use it to allow access to the community at large and should, therefore, be removed from the CAI list.⁹

⁴ CENIC Opening Comments at 2-3.

⁵ November 27, 2023 *Opening Comments of Rural County Representatives of California to Administrative Law Judge’s Ruling Issuing Staff Proposal* (“RCRC Opening Comments”) at 3.

⁶ November 27, 2023 *Comments of the California Broadband & Video Association on Administrative Law Judge’s Ruling Issuing Staff Proposal* (“CalBroadband Opening Comments”) at 56.

⁷ November 27, 2023 *Opening Comments of Community Legal Services on Broadband Equity, Access, and Deployment (BEAD) Draft Initial Proposal Volumes I and II* (“CommLegal Opening Comments”) at 2.

⁸ *Id.* at 3-5.

⁹ *Id.* at 2-3.

Given the numerous discrepancies with the CAI list noted in party comments, Commission staff should carefully revise the list of eligible institutions to ensure that only those locations that will truly promote community access to broadband can receive the limited BEAD funding.

2. Section 5 – Challenge Process (Volume I, Requirement 7)

a. Licensed Fixed Wireless Modification

The Draft Initial Proposal Vol. I proposes to modify the status of locations with “underserved” levels of broadband provided by Licensed Fixed Wireless (“LFW”) at or below 30/5 Mbps speeds to “unserved” status, stating that LFW speeds vary significantly based on environmental and network conditions, so there is a “decreasing [] likelihood that service delivered to consumers will meet the claimed thresholds, especially in future years as network utilization increases.”¹⁰ CommLegal supports this modification, due to the high probability that these “borderline services” are unreliable and will not be able to keep up with accelerating consumer demand, the growing bandwidth need of internet services, or the developing standards of what constitutes minimum acceptable broadband speeds.¹¹ CalBroadband notes that “recent estimates suggest that these fixed wireless providers typically only have sufficient excess capacity to actually serve 10-15 percent of the homes and businesses in that market,”¹² meaning that they will not be able to keep up with growing demand as the future generation of consumers utilize more internet bandwidth for more activities with more devices.

CTIA, however, takes issue with this modification, stating that

¹⁰ Vol. I at 10.

¹¹ CommLegal Opening Comments at 7-8.

¹² CalBroadband Opening Comments at 53.

The IJJA’s definition of “unserved” refers to the availability of access to “reliable broadband service,” offered at a speed of not less than 25 Mbps download and 3 Mbps upload, as determined in accordance with the “Broadband DATA Maps.” The IJJA recognizes fixed wireless broadband as a “Reliable Broadband Technology,” and – beyond the 25/3 Mbps speed requirement – it meets or exceeds speeds 100/20 Mbps at locations throughout the nation, including in California.¹³

CTIA concludes that modifying fixed wireless service of 30/5 Mbps to be “unserved” would be inconsistent with the IJJA requirements.

Although CommLegal is concerned about the many communities that could be left with essentially obsolete “borderline service” if areas served by unreliable fixed wireless are not supported with BEAD funds, it is important that the Draft Initial Proposal properly comport with IJJA requirements in order to receive NTIA approval. Party comments provide some valuable insights to help reclassify those areas with the most unreliable and unsustainable “fixed wireless” technology as “unserved,” while still properly following IJJA requirements. Geolinks explains that Vol. I may have a misunderstanding of the difference between *actual* fixed wireless, which the BEAD NOFO defines as “reliable Broadband Service,” and *cellular* “fixed wireless,” which is not included. According to Geolinks, “fixed wireless technology uses point-to-point or point-to-multipoint connections dependent on specific radio antenna locations.”¹⁴ These terrestrial fixed wireless systems are not mobile and cannot be accessed from any location in an area but only at fixed points and “should be envisioned as being similar to an invisible wire.”¹⁵ On the other hand, cellular companies use “transmitters that deliver connectivity to a broad area. This enables the service to be mobile and is why one can use a cell phone from almost any

¹³ November 27, 2023 *Comments of CTIA on Broadband Equity, Access, and Deployment Program Initial Proposal* (“CTIA Opening Comments”) at 3-4.

¹⁴ November 27, 2023 *Comments of California Internet, L.P. (U-7326-C) DBA Geolinks on Broadband Equity, Access, and Deployment (BEAD) Program – Initial Proposal Volumes 1 and 2* (“Geolinks Opening Comments”) at 2.

¹⁵ *Id.*

location.”¹⁶ Even though cellular companies offer their service to a “fixed” location (*e.g.* homes or offices), it is still a mobile wireless service, and “any issues that might come with use of a mobile network would apply to a fixed connection over a mobile network.”¹⁷

Similarly, Wireless Internet Service Providers Association (“WISPA”) states that Vol I. errs by “conflating the smaller subset of Fixed Wireless Access (‘FWA’) provided by *cellular providers* and the larger universe of FWA providers, or Wireless Internet Service Providers (‘WISPs’)” and clarifies that “many WISPs are not also cellular providers.”¹⁸

The relevant portion of the BEAD NOFO definition for “Reliable Broadband Service” includes “terrestrial fixed wireless technology utilizing entirely licensed spectrum or using a hybrid of licensed and unlicensed spectrum.”¹⁹ Fixed wireless is by definition “the operation of wireless communication devices or systems used to connect two fixed locations (*e.g.*, building to building or tower to building) with a radio or other wireless link” and where “point-to-point signal transmissions occur through the air over a terrestrial microwave platform rather than through copper or optical fiber.”²⁰ The point-to-point nature between two terrestrial locations of the definition of fixed wireless precludes the broadcast nature of cellular “fixed wireless” systems, especially those that incorporate satellites. Therefore, “Mobile wireless is not included in the BEAD NOFO’s definition of Reliable Broadband Service.”²¹

¹⁶ Geolinks Opening Comments at 2.

¹⁷ *Id.*

¹⁸ November 27, 2023 *Comments of WISPA – Broadband Without Boundaries* (“WISPA Opening Comments”) at 1-2 (*emphasis in original*).

¹⁹ National Telecommunications and Information Administration (“NTIA”) Notice of Funding Opportunity, Broadband Equity, Access, and Deployment Program (“BEAD NOFO”) at 15 (*emphasis added*) (accessed at <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf>).

²⁰ https://en.wikipedia.org/wiki/Fixed_wireless (*emphasis added*).

²¹ Geolinks Opening Comments at 4.

Given the distinction between *cellular* “fixed wireless,” which has all the reliability problems and “no-signal” issues familiar to cell phone users, and actual terrestrial fixed wireless, which is capable of reliable high-speed data transmission even with interference and obstructions and in adverse weather conditions and non-line-of-sight links over great distances,²² the concerns meant to be targeted by the Licensed Fixed Wireless modification in Vol. I primarily apply to cellular fixed wireless. This type of service was not meant to be included under the BEAD NOFO definition, so reclassifying areas served by such technology is appropriate. Vol. I should clarify that broadband services provided over cellular networks to fixed locations are not considered “Reliable Broadband Service” and eligibility maps should be revised accordingly.

b. Speed Test Requirements

In opening comments, some parties discuss concerns with the reliability and accuracy of broadband speed test results.²³ CalBroadband notes the “inherent difficulty of ensuring that speed tests contain accurate, verifiable information” and recommends either not using speed tests at all or ensuring the reliability of speed test evidence by requiring, among other things:

- For individual challenges that are aggregated by a local government or nonprofit, require the local government or nonprofit to submit only consumer speed tests that have at least some indicia of reliability;
- Require that speed tests be accompanied by a certified attestation from the customer that states the following: *“I hereby certify, under penalty of perjury, that the download and upload speed indicated in this submission are the true and correct speeds to which I subscribe at the location where the speed tests included in this submission were measured. The entry of my name above constitutes my electronic signature to this certification. Persons making willful false statements in this form can be punished by fine or imprisonment under 18 U.S.C. § 1001.”*²⁴

²² November 27, 2023 *Opening Comments of Tarana Wireless, Inc. on BEAD Staff Proposal* (“Tarana Opening Comments”) at 5.

²³ CalBroadband Opening Comments at 50-54; WISPA Opening Comments at 3.

²⁴ CalBroadband Opening Comments at 54 (citation omitted).

CommLegal opposes suggestions to eliminate user-generated speed test results from the challenge process. While such tests are not perfect, they are the easiest to understand and use metrics for consumers to evaluate their service quality and submit reports. Parties that recommend removing the speed test option do not provide any viable alternatives for customers to demonstrate that they are not receiving the required speeds assumed to be available in their area.

Instead, CommLegal supports modifications to ensure more accurate speed test reporting so that submitting and reviewing challenges proceeds efficiently, without placing an undue burden on customers. CalBroadband’s recommendation for only submitting speed tests that have some “indicia of reliability” is reasonable in principle, but does not include any specific criteria to determine reliability and so is not a reasonable standard to adopt. In our opening comments, CommLegal discussed specific requirements that would increase the accuracy of speed tests by addressing issues with customer network hardware and the consistency of results.²⁵ Our recommendations will help provide greater “indicia of reliability” for consumer-generated speed test. CommLegal also supports requiring an attestation by the consumer verifying the speed test results, but again CalBroadband’s specific recommendation is not appropriate. The language of their suggested attestation is confusing and vague, where it seems that the consumer is being asked to certify that the speed test results are the speeds to which they subscribe, contrary to the very purpose of their challenge – to demonstrate that they are *not* receiving the speeds they should be. The attestation should instead read as follows:

I hereby certify, under penalty of perjury, that the download and upload service speeds indicated in this submission are the true and correct speeds to which I subscribe, and the download and upload speed test results indicated in this submission are the true and

²⁵ CommLegal Opening Comments at 9-14.

correct speeds which were recorded at the location where *I receive service*~~the speed tests included in this submission were measured~~. The entry of my name above constitutes my electronic signature to this certification...

As discussed in our opening comments, customers should also attest to certain facts regarding how the speed test was conducted. With these requirements in place, speed test results will provide reliable evidence of actual delivered speeds.

c. Affordability and Accessibility

The Greenlining Institute (“GLI”) discusses the importance of affordability when evaluating broadband service accessibility and highlights how competition lowers consumer costs while increasing service quality.²⁶ GLI urges the development of “a process that allows for additional competition to be introduced into low-income urban communities in California to increase service quality and affordability for consumers.”²⁷

CommLegal recognizes the necessity to consider affordability of broadband service to determine economic accessibility. In our opening comments, we recommended incorporating an affordability component to the “availability” challenge.²⁸ Such a provision would encourage competition in areas where broadband service may technically be available but at unaffordable prices that make it inaccessible and allow pressure from competition to lower costs and increase quality.

Additionally, although new service deployed with BEAD funds may have “affordable” service offerings, the low-income requirements must properly identify eligible households that face financial barriers to broadband adoption. Cal Advocates notes that the Draft Initial Proposal

²⁶ November 27, 2023 *Opening Comments of the Greenlining Institute on Administrative Law Judge’s Ruling Issuing Staff Proposal to Proceeding to Consider Rules to Implement the Broadband Equity, Access, and Deployment Program* (“GLI Opening Comments”) at 3.

²⁷ *Id.* at 4.

²⁸ CommLegal Opening Comments at 8-9.

uses federal standards to determine low-income eligibility but that such levels of income are not appropriate in a high cost-of-living state such as California.²⁹ Instead, Cal Advocates recommends that the Draft Initial Proposal adopt the low-income criteria in the Commission’s own Environmental and Social Justice Action Plan 2.0 (ESJ Action Plan), which defines “low-income households” as “those with household incomes at or below 80 percent of the statewide median income or with household incomes at or below the threshold designated as low income by the Department of Housing and Community Development's list of state income limits.”³⁰

Affordability is a relative concept and is difficult to define for a country as large and economically diverse as America. The Commission and other State agencies have developed California-specific metrics that better reflect the particular affordability challenges faced by residents and have applied these standards in many Commission and State programs. Therefore, using the 80 percent median/Department of Housing and Community Development threshold definition of “low-income” is not only more appropriate for the BEAD program in California, but will also allow BEAD to coordinate with other development and investment efforts that target economic disparities in California.

B. VOLUME II

1. Section 5 – Deployment Subgrantee Selection (Volume II, Requirement 8)

a. Section 5.3.2 – Scoring Criteria

In Vol. II, Commission Staff proposes to make available a total of 100 points both for Priority Broadband Projects, which will deploy end-to-end fiber, and for Other Last-Mile

²⁹ November 27, 2023 *The Public Advocates Office Opening Comments on the Assigned Administrative Judge’s Ruling Issuing Staff Proposal* (“Cal Advocates Opening Comments”) at 4-5.

³⁰ *Id.* at 6.

Broadband Deployment Projects.³¹ As Vol. II notes, the three primary criteria, affordability, labor standards, and minimal BEAD outlay, must together account for 75 percent of the available points,³² while secondary criteria and additional prioritization factors will account for the rest of the available 25 percent.³³

i. Primary Criteria

In opening comments, the California Broadband & Video Association (“CalBroadband”) recommends that Vol. II’s suggested point allowance of 40 points for Affordability and 15 points for Minimal BEAD outlay be switched so that 40 points are available for the minimal BEAD outlay criterion and 15 points for the Affordability criterion.³⁴ CommLegal is opposed to CalBroadband’s proposed switch. While ensuring minimal BEAD outlay per location is important, affordability should have a higher weight when comparing competing projects. If residents cannot afford the service plans offered, they will not benefit from the BEAD-funded construction of broadband infrastructure. Additionally, each applicant, aware of the potentially competitive nature of the BEAD program, should naturally submit its most economical proposal, thus both (1) increasing the applicant’s chance of winning the grant and (2) decreasing BEAD outlay.

Further, CalBroadband complains that under Vol. II’s proposed method, “applicants that propose simply to meet the 25% minimum required threshold for subgrantee match would automatically receive 10 points, with the remaining 5 points only available if an applicant proposes a substantial 50% match.”³⁵ CalBroadband seems to not realize that the matching

³¹ Vol. II at 33.

³² *Id.* at 31 (citing BEAD NOFO, Section IV.B.6.b, page 43), 33.

³³ *Id.* at 33.

³⁴ CalBroadband Opening Comments at 61.

³⁵ *Id.* at 7 (citing Vol. II at 32).

requirement may be met by (1) the Eligible Entity, (2) the subgrantee, or (3) a combination of contributions from the Eligible Entity and the subgrantee.³⁶ Therefore, Vol. II's proposed method to award points for the "amount of matching funds *committed by the applicant*"³⁷ would not give points for simply meeting the 25% threshold. Although, the Vol. II's proposed method needs to be tweaked to meet the BEAD NOFO requirements, granting points to applicants who make at least a 25% match with their own funds is appropriate.

In contravention of the BEAD NOFO requirements,³⁸ neither the method proposed in Vol. II nor the method proposed by CalBroadband factors in the grant amount requested per location. Both Vol. II's and CalBroadband's suggested methods are solely based on the percentage of matching funds *provided by applicants*, which does not at all reveal the amount of BEAD outlay requested per broadband serviceable location. The total cost per broadband serviceable location could vary widely between applications, which would make the impact of a certain percentage of match vary as well. Here is an example using two applications that propose to connect the same 100 locations with fiber and to provide a 35% match with applicant funds. Applicant one proposes a cost of \$2,000 per location, which would equal \$200,000. With the 35% match, the total BEAD outlay would be \$130,000. Applicant two proposes a cost of \$2,500 per location, which would equal \$250,000. With the 35% match, the total BEAD outlay would be \$162,500. Even though the total BEAD outlay would be \$32,500 less with applicant one,

³⁶ "Except in certain specific circumstances described herein . . . , for each broadband deployment project utilizing BEAD grant funding, each Eligible Entity 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." BEAD NOFO at 3.

³⁷ Vol. II at 32.

³⁸ "**Minimal BEAD Program Outlay.** 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." BEAD NOFO at 43, 44-45 (*emphasis added*).

under either Vol. II's or CalBroadband's method, each application would receive the same number of points.

On the other hand, any matching funds will already be factored into the minimal BEAD outlay in the scoring method proposed by CommLegal,³⁹ which both calculates the cost per serviceable location *after* the match and additionally rewards applicants able to make a larger match using their own funds. Using the example set out above, under CommLegal's proposed method, applicant one would receive more of the 10 points available for cost efficiency, but both applicant one and applicant two would receive the same number of points for the matching portion of the points available under the Minimal BEAD Outlay criterion.

The main point is to prioritize projects with less BEAD outlay. To this end, the BEAD NOFO states,

If the Eligible Entity is considering competing proposals that are materially identical, and one includes a higher proposed total cost but a larger match, whereas the other includes a lower proposed total cost and smaller match, *the key consideration for comparative purposes is the amount of the subsidy required, not the proportion of the stated cost that the prospective subgrantee is willing to match.*⁴⁰

On the other hand, the NTIA does direct Eligible Entities to “establish a competitive process designed to maximize the public benefits achieved through the subgrant process *by increasing subgrantee-provided match* and reducing costs to consumers.”⁴¹ CommLegal continues to recommend the approach set out in our opening comments but with language added to clarify

³⁹ “CommLegal suggests that the Commission offer a total of 15 points for this criterion, as proposed in Vol. II, but that the points be awarded as follows: The Commission will calculate the BEAD program outlay per broadband serviceable location for each project area. The most cost-efficient application for each project area will receive 10 points. All other applications will receive a percentage of the 10 points available based on their relative distance from the most cost-efficient proposal. In addition, Applicants will receive 3 points for meeting the 25 percent match requirement, 4 points for a 26%-49% match, and 5 points for a 50% or greater match.” CommLegal Opening Comments at 17.

⁴⁰ BEAD NOFO at 21 n.21.

⁴¹ *Id.* at 37 (*emphasis added*).

that points for the match will only be awarded for funds contributed by the subgrantee, as follows:

The Commission will calculate the BEAD program outlay per broadband serviceable location for each project area. The most cost-efficient application for each project area will receive 10 points. All other applications will receive a percentage of the 10 points available based on their relative distance from the most cost-efficient proposal. In addition, Applicants will receive the following points for the percentage of their own matching funds committed: 3 points for a 25 percent match, 4 points for a 26%-49% match, and 5 points for a 50% or greater match.

Under CommLegal’s clarified proposed method, (1) total BEAD outlay will be given the most potential points and (2) applicants will be incentivized to increase the match that they provide with their own funds. Thus, the two components of the Minimal BEAD Outlay criterium required by the BEAD NOFO will be met.

ii. Secondary Criteria

In selecting among Other Last-Mile Broadband Deployment Projects only, the Commission is required to give some weight to “the speeds, latency, and other technical capabilities of the technologies proposed.”⁴² The BEAD NOFO describes the requirements for this criterion as follows:

Speed of Network and Other Technical Capabilities. Eligible Entities must weigh the *speeds, latency, and other technical capabilities* of the technologies proposed by prospective subgrantees seeking to deploy projects that are not Priority Broadband Projects. Applications proposing to use technologies that exhibit *greater ease of scalability* with lower future investment (as defined by the Eligible Entity) and *whose capital assets have longer useable lives* should be *afforded additional weight* over those proposing technologies with higher costs to upgrade and shorter capital asset cycles.⁴³

To fulfill this requirement, Vol. II proposes the following:

⁴² BEAD NOFO at 45.

⁴³ *Id.* (emphasis added).

For Other Last-Mile Broadband Deployment Projects only, applicants will be awarded a total of 4 points for offering a plan below the top pricing tier that can achieve 500 Mbps downstream service speed. For every commitment of 100 Mbps slower for the downstream service speed, 1 point will be deducted from the 4-point maximum.⁴⁴

As we stated in opening comments, this proposed scoring scheme for this criterion does not meet the BEAD NOFO requirements because it only weighs downstream speed, so we suggested that the Commission follow the method laid out in New Jersey’s draft proposal by offering a total of 4 points for this criterion, as proposed in Vol. II, but awarding the points as follows:⁴⁵

Non-fiber applications will be awarded up to 4 points based on certified speed and latency performance commitments, as well as on length of useful life of the proposed infrastructure and future scalability (as described in the table below)

Minimum downstream / upstream speed (Mbps)	Maximum latency (milliseconds)	Points awarded
1000/250	100	3
400/100	100	2
200/50	100	1
100/20	100	.5

Non-fiber applicants will also be awarded 1 additional point if they certify a useful network life of 10+ years.

Although in opening comments Tarana Wireless, Inc. (“Tarana”) made a suggestion,⁴⁶ which is similar to CommLegal’s and which is an improvement to the method suggested in Vol. II, Tarana’s suggested method still does not meet the NOFO’s requirement to give additional weight

⁴⁴ Vol. II at 32.

⁴⁵ CommLegal Opening Comments at 18-19.

⁴⁶ “[A]pplicants will be awarded up to 4 points for offering a plan capable of surpassing the 100/20 Mbps performance floor. A score of 4 points is granted for a network speed equal to or exceeding 1000 Mbps (download) and 250 Mbps (upload) with a latency under 100 milliseconds (“ms”). Achieving a network speed of at least 400 Mbps (download) and 200 Mbps (upload) with latency under 100 ms results in 3 points. For network speeds meeting or surpassing 200 Mbps (download) and 50 Mbps (upload) with latency under 100 ms, 2 points are awarded. A network speed greater than 100 Mbps (download) and 20 Mbps (upload) with latency under 100 ms earns 1 point. Finally, meeting the criteria of exactly 100 Mbps (download) and 20 Mbps (upload) with a latency under 100 ms results in 0 points.” Tarana Opening Comments at 6.

to applications “whose capital assets have longer useable lives.”⁴⁷ Therefore, CommLegal continues to support the scoring method we suggested in opening comments, which is detailed above. This suggested division of points will ensure that the BEAD NOFO requirements are met as to this criterion while keeping the point scheme the same as suggested in Vol. II.

iii. Additional Prioritization Factors

In opening comments, we recommended that the Commission add a prioritization factor that promotes open access to (1) harmonize the language in Vol. II, (2) be consistent with NTIA’s vision for the BEAD Program, and (3) help ensure that public funds are used for public benefits.⁴⁸ Along with CommLegal, Cal Advocates also (1) noted that although Vol. II indicated that open access would be prioritized, the scoring criteria does not reflect this and (2) suggested that open access be prioritized.⁴⁹ TURN and CforAT take it a step further and suggest that “[t]he Commission should *require* BEAD program-funded middle and wholesale last-mile projects to provide open access for the life of the infrastructure.”⁵⁰ Like TURN and CforAT, CommLegal supports publicly funded infrastructure being open access based on the ‘public benefits, including competition, cost efficiencies, and long-term scalability’ open access offers that ‘will enable more Californians to be served over time.’⁵¹ That being said, CommLegal continues to support open access being prioritized, but not mandated, for the BEAD program, according to our recommendation in opening comments. Some subgrantees may be prepared to expend a high proportion of their own funds to build BEAD-subsidized networks, but these potential

⁴⁷ BEAD NOFO at 45.

⁴⁸ CommLegal Opening Comments at 20-21.

⁴⁹ Cal Advocates Opening Comments at 15-17.

⁵⁰ November 27, 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* (“TURN and CforAT Opening Comments”) at 3 (*emphasis added*).

⁵¹ *Id.* at 3 (quoting D. 21-01-003 (R. 20-08-021, CASF) at FOF #21 and citing D. 21-01-003 (R. 20-08-021, CASF) at 18; D. 22-11-023 (R. 20-08-021, CASF), Attachment A, at 11).

subgrantees are less likely to participate if open access is mandated. Moreover, the BEAD NOFO indicates that the NTIA would like open access to be rewarded, but not mandated, for this program. While the BEAD NOFO encourages Eligible Entities to include open access as an additional prioritization factor,⁵² the program does not allow a single secondary scoring criterium to be afforded more weight than a primary criterium.⁵³ Mandating open access would contravene this requirement. Although we understand TURN and CforAT's reasons for advocating for open access to be required, the BEAD program does not allow that. Therefore, we continue to support open access being prioritized to harmonize the language in Vol. II, to be consistent with NTIA's vision for the BEAD Program, and to help ensure that public funds are used for public benefits.

III. CONCLUSION

CommLegal appreciates the opportunity to provide comments in this proceeding and looks forward to continued participation in the development of rules for the BEAD program in California.

December 7, 2023

Respectfully Submitted,

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⁵² BEAD NOFO at 46.

⁵³ NTIA and US Department of Commerce, "Tricky Topics to Watch Out for in the Initial Proposal" at 5 (accessed at https://broadbandusa.ntia.gov/sites/default/files/2023-09/BEAD_Initial_Proposal_-_Tricky_Topics.pdf).