

**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  
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Rulemaking 23-02-016

**REPLY COMMENTS OF USTELECOM – THE BROADBAND ASSOCIATION ON  
THE FIVE-YEAR ACTION PLAN BROADBAND, EQUITY, ACCESS, AND  
DEPLOYMENT (BEAD) PROGRAM**

B. Lynn Follansbee  
VP – Strategic Initiatives & Partnerships

USTelecom – The Broadband Association  
601 New Jersey Avenue, N.W. Suite 600  
Washington, D.C. 20001  
Phone: (202) 326-7300  
Email: [lfollansbee@ustelecom.org](mailto:lfollansbee@ustelecom.org)

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**I. INTRODUCTION**

USTelecom-The Broadband Association (USTelecom) submits these comments in response to the Broadband Equity, Access, and Deployment (BEAD) Initial Plan Volume 2 issued by the California Public Utilities Commission (CPUC) which sets out the programmatic requirements for subgrantees wishing to participate in California’s BEAD program.<sup>1</sup> USTelecom is the leading association of communications providers, technology innovators, and suppliers who deliver affordable, reliable, and secure 21<sup>st</sup> century broadband internet service to urban and rural communities in California and across the country. At a time when Californians are relying on broadband networks for everything from remote work and distance learning to telemedicine and precision agriculture, USTelecom members are working every day to invest in new technologies and networks throughout the state to deliver faster speeds at competitive prices. These companies create and support high-paying jobs and stimulate significant economic opportunity for communities throughout California. USTelecom is working with NTIA on

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<sup>1</sup> See California Public Utilities Commission Initial Proposal Volume 2, Broadband Equity, Access, and Deployment (BEAD) Program (Nov. 7, 2023). (*CPUC BEAD Initial Proposal Vol.2*)

implementation of the BEAD funding and will continue to be engaged to ensure there is no delay in awarding this critical funding for deployment of broadband infrastructure in California.

USTelecom members appreciate the opportunity to comment on the proposed Volume 2 of the CPUC BEAD plan, however, there are certain modifications that we believe would improve on the process to not only ensure a more robust competitive program, but also to better align the program with the implementing statute and NTIA guidance. As explained below, California should rely on ACP participation and a comparability test to meet BEAD's affordability requirements and affordability should not be scored on a sliding scale. To the extent California adopts its proposed low-cost and middle-income affordability plans, providers should be able to adjust prices to capture inflation, cost of living increases and other costs outside of the providers control such as taxes. California should also not include open access prioritization. California should rely on NTIA's comprehensive reporting requirements and provide a practical approach to letters of credit. In addition to some suggested changes that could be made to benefit the programmatic requirements, it is important to note that there are still some issues upon which further guidance is expected from NTIA. Those issues, as discussed below, are still under consideration and are the subject of ongoing advocacy. Any state submitting its BEAD Initial Plan at this juncture should not incorporate design elements that do not allow for the flexibility to change subject to further NTIA guidance.

## **II. AFFORDABILITY**

USTelecom agrees that addressing affordability is important, and it is required by NTIA to be the primary scoring criteria. However, states must do so in a way that does not violate federal law and, unfortunately, the CPUC's draft Initial Plan Volume 2 includes a policy proposal that runs afoul of federal law by stating that full points are available only for subgrantee

proposals that include price points of \$50 or less for a 1/1 Gbps plan and that applications get fewer points for every dollar over \$50.<sup>2</sup> The draft also requires providers to offer a plan of \$30 or less for low-income consumers and a \$15 per month for all income-qualified customers if ACP funding is expended and no successor program guaranteeing an equivalent subsidized price of service for eligible customers is established.<sup>3</sup> These proposed requirements equate to impermissible rate regulation.

Indeed, NTIA recently issued guidance stating that the middle-class affordability requirement “is *not* a mandated ISP service offering with defining eligible criteria; it is a **strategy designed and implemented by the Eligible Entity**.”<sup>4</sup> This guidance is consistent with Congress’ clear directive to bar rate regulation as part of the BEAD program. In the Infrastructure, Investment and Jobs Act (IIJA) section creating the BEAD program, Congress included a provision titled, “NO REGULATION OF RATES PERMITTED,” which established that “[n]othing in this title may be construed to authorize” NTIA “to regulate the rates charged for broadband service.”<sup>5</sup> This directive extends to California’s – and every other Eligible Entity’s – BEAD program, as Congress mandated that NTIA review and approve each Eligible Entity’s proposal for BEAD implementation.<sup>6</sup> Thus, NTIA may not approve any proposal that caps rates for BEAD broadband service without engaging in prohibited rate regulation.<sup>7</sup> Given

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<sup>2</sup> See *CPUC BEAD Initial Proposal Vol. 2* at 31.

<sup>3</sup> See *id.* at 194.

<sup>4</sup> NTIA’s Tricky Topics to Watch Out for in the Initial Proposal, released September 2023, at page 22, available at [https://broadbandusa.ntia.doc.gov/sites/default/files/2023-09/BEAD\\_Initial\\_Proposal\\_-\\_Tricky\\_Topics.pdf](https://broadbandusa.ntia.doc.gov/sites/default/files/2023-09/BEAD_Initial_Proposal_-_Tricky_Topics.pdf).

<sup>5</sup> Infrastructure Act § 60102(h)(5)(D).

<sup>6</sup> See *id.* § 60102(e)(3)(D)(II) (requiring NTIA to approve an Eligible Entity’s Initial Proposal) and § 60102(e)(4)(D)(II) (requiring NTIA to approve an Eligible Entity’s Final Proposal).

<sup>7</sup> By locating the provision barring rate regulation in the subsection addressed to low-cost broadband service options, Congress signaled that rate caps are not an acceptable mechanism to promote affordability. *Id.* § 60102(h)(5).

this guidance, and that, as discussed below, any such attempts to set rates are preempted by blackletter law, the first two states to submit their BEAD Initial Proposals Volume 2 to NTIA, Virginia and Louisiana, removed any set reference to pricing from their final Volume 2.<sup>8</sup> Thus, there are also other, lawful, better ways for California to ensure affordability for all residents, including following the examples set by Virginia and Louisiana.

*Low-cost option.* For the low-cost option, in addition to its requirement that providers participate in the Affordable Connectivity Program (ACP),<sup>9</sup> California should make clear that a provider can satisfy the low-cost service option requirement by offering its own low-cost service plan that it demonstrates is affordable by use of the Federal Communication Commission’s (FCC) “reasonable comparability” rate benchmarks<sup>10</sup> and on which eligible subscribers could use their ACP benefit to offset some or all of the cost of that offering. If the rates fall within the benchmark, they are “affordable.” This sound path was taken by Virginia and Louisiana and should also be taken by California.

Using the reasonable comparability benchmark for BEAD-funded projects not only compliant with the terms of the IIJA and blackletter preemption law, but it also makes good

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<sup>8</sup> Compare [Virginia Draft Initial Proposal Volume 2](#) at 45 (requiring low-cost offering of \$30), 47 (requiring \$50 100/20 Mbps offering to satisfy middle class affordability for full points) with [Virginia Final Initial Proposal Volume 2](#) at 49 (removing reference to requisite \$30 low-cost offering and instead requiring provider to justify why their proposed rate is affordable), 52, 12 (removing reference to \$50 offering and instead relying on the FCC’s Urban Rate Survey); [Louisiana Draft Initial Proposal Volume 2](#) at 95 (requiring low-cost offering of \$30), 96 (requiring \$100 1G offering to satisfy middle class affordability for full points) with [Louisiana Final Initial Proposal Volume 2](#) at 101 (removing reference to requisite \$30 low-cost offering and instead requiring the provider demonstrate their proposed rate is affordable), 103, 30 (removing reference to \$100 offering and instead relying on FCC Urban Rate Survey).

<sup>9</sup> Over 20 million low-income households already participate in ACP today and USTelecom has been on Capitol Hill urging continuation of this critical program.

<sup>10</sup> Under the methodology adopted by the FCC, the reasonable comparability benchmark is the estimated average monthly rate in urban areas *plus twice the standard deviation of rates for terrestrial fixed broadband service plans at specified speed tier*. See 2023 Urban Rate Survey – Fixed Broadband Service Methodology, available at <https://www.fcc.gov/economics-analytics/industry-analysis-division/urban-rate-survey-data-resources>.

policy sense. First, in addition to targeting low-income households through use of the ACP, consistency with this benchmark ensures that subgrantees' overall prices are reasonable. Second, it provides a clear way to assess affordability by use of an objective metric as opposed to more subjective factors. Third, using the reasonable comparability benchmark also maximizes efficiencies because the methodology is well-established and updated by the FCC annually. Finally, the reasonable comparability benchmark would provide consistency. Many providers already use the benchmark for their offerings given their participation in CAF II, the CAF II Auction, RDOF, and other USF programs. Leveraging the benchmark would allow providers to adhere to one standard versus compliance with a hodgepodge of state-specific standards.

Additionally, California could require applicants to confirm that their proposed rates for broadband service in a BEAD-funded area are comparable to rates charged in non-BEAD areas where there are multiple broadband providers. This will help ensure affordability by reference to pricing in more competitive markets.

*Future Flexibility is Necessary.* California's proposal should include some level of flexibility for providers with regard to these rates. The Biden Administration estimates that most BEAD-funded networks will not be deployed until 2030.<sup>11</sup> Providers will likely be submitting their proposals in or around 2024. Requiring any sort of pricing commitment, in conjunction with the timeframe for actual build out, would mean that providers will be locking in their rates 10 or 11 years in advance, an impractical and unrealistic request. Indeed, requiring providers to maintain a rate for any amount of time amounts to unfair market interference. Furthermore, many of the factors that cause rates to increase are beyond a provider's control. For example,

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<https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/26/fact-sheet-biden-harris-administration-announces-over-40-billion-to-connect-everyone-in-america-to-affordable-reliable-high-speed-internet/>

typical market adjustments due to inflation are a factor as are taxes. Given that California’s proposed rates are required to be all inclusive with taxes included, if the local or state government raises taxes it may require the provider should be permitted to adjust accordingly.

California should instead follow the lead of Virginia and Louisiana. Both states allow providers to make reasonable yearly adjustments. Virginia allows providers to make yearly adjustments of up to 4% on committed prices based on the Consumer Price Index (CPI).<sup>12</sup> Louisiana allows providers to adjust their generally available offerings consistent with the FCC’s reasonable comparability benchmark<sup>13</sup> and the low-cost offering consistent with the (CPI).<sup>14</sup>

*Scoring.* California’s proposed affordability scoring is also problematic. California’s draft Initial Plan Volume 2 proposes to award full points only for artificially low (and unlawful) reference points. Applications with higher price points lose points.<sup>15</sup> Such a design only promotes a “race to the bottom” and encourages applicants to only propose a \$50 plan, even if somewhat unrealistic, in hope of winning the grant. This is precisely the defect in the FCC’s RDOF auction that resulted in certain winners recently claiming they could not afford to build and are now seeking more funding within only a couple years of winning the auction.<sup>16</sup> Indeed, it is hard to image that experienced providers with the operational expertise necessary not only to build but to maintain these networks would commit to offering such artificially low prices 10 to 11 years into the future. While USTelecom appreciates the state’s desire to ensure its BEAD

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<sup>12</sup> Virginia Final Initial Proposal Volume 2 at 10, 50.

<sup>13</sup> Louisiana Final Initial Proposal Volume 2 at 30.

<sup>14</sup> *Id.* at 102.

<sup>15</sup> See CPUC BEAD Initial Proposal Vol. 2 at 31.

<sup>16</sup> See Emergency Petition of the Coalition of RDOF Winners, WC Docket No. 19-126 (Aug. 16, 2023); also see Public Notice, *FCC Rejects Applications of LTD Broadband and Starlink for Rural Digital Opportunity Fund Subsidies* (Aug. 10, 2022), <https://docs.fcc.gov/public/attachments/DOC-386140A1.pdf>.

dollars go as far as possible, this myopic focus on achieving the lowest price possible was another defect in the RDOF auction that has led to many bidders being rejected after winning a significant number of locations, including LTD Broadband which was the biggest winner at auction, winning \$1.3 billion across fifteen states.<sup>17</sup> LTD was ultimately rejected by the FCC<sup>18</sup> and those 528,000 locations are likely still waiting for broadband.

*Requiring Set Rates Is Preempted.* Finally, in addition to being prohibited by the Infrastructure Act, California’s proposal to require service be offered at specified rates is preempted by federal law for multiple reasons. First, it conflicts with the federal policy of nonregulation of broadband.<sup>19</sup> The FCC has determined that broadband is subject to light-touch regulation as an information service under the Federal Communications Act,<sup>20</sup> and that classification forecloses federal and state officials alike from imposing common carriage regulations on broadband providers, including restrictions on rates.<sup>21</sup> Second, California’s proposal is preempted because federal law occupies the field of interstate broadband regulation,

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<sup>17</sup> See *In the Matter of Rural Digital Opportunity Fund Phase I Auction (Auction 904) Closes; Winning Bidders Announced; FCC Form 683 Due January 29, 2021*, AU Docket No. 20-34, WC Docket 19-126, WC Docket No. 10-90, Public Notice, DA 20-1422, (Dec. 7, 2020), <https://docs.fcc.gov/public/attachments/DA-20-1422A1.pdf>.

<sup>18</sup> See Public Notice, *FCC Rejects Applications of LTD Broadband and Starlink for Rural Digital Opportunity Fund Subsidies* (Aug. 10, 2022), <https://docs.fcc.gov/public/attachments/DOC-386140A1.pdf>.

<sup>19</sup> See generally *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88, 98 (1992) (stating that federal law preempts state law where that state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990))).

<sup>20</sup> See *Restoring Internet Freedom*, Declaratory Ruling *et al.*, 33 FCC Rcd 311 (2017).

<sup>21</sup> See *Charter Advanced Servs. v. Lange*, 903 F.3d 715, 719 (8th Cir. 2018) (“[A]ny state regulation of an information service conflicts with the federal policy of nonregulation,” so that such regulation is preempted by federal law.” (quoting *Minn. PUC v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007)); *N.Y. State Telecomms. Ass’n v. James*, 544 F. Supp. 3d 269, 280-83 (E.D.N.Y. 2021), *appeal docketed*, 21-1975 (2d Cir. 2021) (finding, at the preliminary injunction stage, that conflict preemption bars New York state law requiring broadband providers to offer low-income consumers service at or below price ceilings).



foreclosing the possibility of state regulation.<sup>22</sup> While California may implement the directives of Congress and NTIA under BEAD as an Eligible Entity, that authority does not provide license to go further and restrict the rates that broadband providers may charge. Finally, Congress has expressly prohibited states from regulating rates for wireless broadband, including for fixed wireless broadband service, that may also be part of BEAD deployment.<sup>23</sup>

Preemption applies even though the proposed language would be part of the CPUC BEAD program and not a standalone regulation, because the CPUC would be acting in a regulatory capacity. The Supreme Court has held that preemption will apply where the government acts as a regulator but not when it acts as a market participant.<sup>24</sup> A federal appeals court has concluded that a state action framed as a condition on funding nonetheless is regulation that may be preempted if the answer to either of the following questions is “no:” “First, does the challenged funding condition serve to advance or preserve the state’s proprietary interest in a project or transaction, as an investor, owner, or financier? Second, is the scope of the funding condition ‘specifically tailored’ to the proprietary interest?”<sup>25</sup> Here, the answer to both questions is clearly “no.” The proposed approach is intended to compel providers to make broadband service less expensive for residents, i.e., it is intended to set rates, not to advance the interests of

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<sup>22</sup> See *James*, 544 F. Supp. 3d at 284-88 (“Because the [New York law] regulates within the field of interstate communications, it triggers field preemption.”); see generally *Arizona v. United States*, 567 U.S. 387, 399 (2012) (stating that “States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance”).

<sup>23</sup> 47 U.S.C. § 332(c)(3)(A) (stating that “no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service” absent express FCC permission grantable only in limited circumstances).

<sup>24</sup> *Bldg. & Constr. Trades Council v. Associated Builders & Contrs.*, 507 U.S. 218, 226-227 (1993) (*Boston Harbor*); see also *Am. Trucking Ass’ns v. City of Los Angeles*, 569 U.S. 641, 650 (2013) (distinguishing “the State acting in a regulatory rather than proprietary mode”).

<sup>25</sup> *Hotel Empl. & Rest. Empl. Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206, 216 (3d Cir. 2004).

the State as a market participant. Thus, the condition neither advances the state's proprietary interest nor is it in any way tailored to that interest.

### **III. PROGRAM DESIGN**

In its draft proposal, California seeks comment on whether applicants should be permitted to design their own project areas based on Census Block Groups (CGBs) or whether they should be based on established political boundaries.<sup>26</sup> Given that the BEAD program seeks to achieve broadband service for the most rural and remote parts of the country project areas applicant providers should be allowed to design their own project areas composed of unserved and underserved locations that they select – not confined by large areas such as CGBs, because providers are best positioned to design their own networks. Indeed, the logic behind the portion of the IJA that allows for a small amount of overlap with already served areas (20%) is to ensure that projects cover a significant area at scale, leverage existing infrastructure, and are comprehensive.

The likely result of choosing to define project areas by set political boundaries is that those areas are too large an application area which will lead to California receiving fewer applications because the areas that need service are fragmented pockets of broadband. Providers, not states, are in the best position to design project areas that will make the most cost-effective use of their existing infrastructure, minimize the new permits and rights of way needed, and thus speed deployment. Allowing providers to design projects with built-in efficiencies will help minimize the amount of BEAD funding needed per location, thereby extending the reach of the State's BEAD allocation to enable end-to-end fiber deployments to as many unserved and underserved locations as possible.

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<sup>26</sup> See *CPUC BEAD Initial Proposal Vol. 2* at 36-39.

Enabling providers to design their own project areas comprised of logical groupings of eligible *locations* encourages competition for BEAD funding by ensuring that companies of all sizes can compete. More competition will stretch BEAD allocations further. A state should not pre-select project areas based on larger artificial geographic units that do not reflect existing network resources. Forcing providers to deploy to all locations in such large state-defined project areas will effectively disqualify some providers or force them to extend beyond what they can manage from a financial, operational, or human resources perspective.

The state programs in Arkansas and Louisiana demonstrate how project area rules can make a difference. In pre-BEAD state broadband programs, the Arkansas broadband grant program used State-defined project areas while the Louisiana GUMBO program allowed applicants to define their own project areas. The results were that in Arkansas 16 of 36 project areas only received one application and not all projects could be funded because of the high request of funding per location, whereas in Louisiana over 170 applications for 23 companies were received across 58 parishes and 77 projects were funded with deployments serving 68,000 locations in over 50 parishes.

#### **IV. OPEN ACCESS SCORING**

Scoring criteria which rewards open access risks hurting, rather than helping, California's BEAD program.<sup>27</sup> The IJJA did not include an open access requirement, and should it be required or prioritized at all, it should be given very little weight, if any. Open access networks create an incentive for a provider to construct a network without necessarily planning to operate all or portions of the network, instead relying on another provider to serve the customers. However, this is not a viable model in the high-cost, less densely populated areas where BEAD

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<sup>27</sup> See CPUC BEAD Initial Proposal Vol. 2 at 17.

funding will go to. Providers are not going to be incentivized to resell another provider's service, much less compete with another provider for those customers when there is a relative lack of density. Thus, applicants proposing open access BEAD projects are likely to be those without the operational or managerial expertise to operate the network on an ongoing basis. The stakes are too high here to risk a network that is built but not operated because the open access model is not viable in these areas. Prioritizing open access creates that risk.

## V. LABOR REQUIREMENTS

USTelecom notes that the CPUC proposal requires that subgrantees comply with Davis-Bacon prevailing wage law,<sup>28</sup> however, the U.S. Department of Labor has made clear that, “the broadband assistance programs under [BEAD] do not generally require the payment of Davis-Bacon prevailing wages,”<sup>29</sup> because the BEAD provisions of the IJA are not a Davis-Bacon and Related Act.<sup>30</sup> Therefore, there is no situation under which a state can require subgrantees to certify compliance with the federal Davis-Bacon requirements. While states may require subgrantees to report information on employee counts, job titles, and wage information, the reporting obligation does not impose an obligation to pay employees a particular wage. The reporting requirement is informational only, and not an authorization from Congress to require compliance with the federal Davis-Bacon law. As such, in its final draft the CPUC should

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<sup>28</sup> See *CPUC BEAD Initial Proposal Vol. 2* at 118.

<sup>29</sup> See U.S. Department of Labor Wage and Hour Division, Fact Sheet #66A: Bipartisan Infrastructure Law (available at <https://www.dol.gov/agencies/whd/fact-sheets/66a#:~:text=The%20BIL%2C%20which%20President%20Biden,state%20and%20local%20infrastructure%20construction.>)

<sup>30</sup> See U.S. Department of Labor Wage and Hour Division, Government Contracts Compliance Assistance, List of Current Davis-Bacon, and Related Acts (available at [https://www.dol.gov/agencies/whd/government-contracts/.](https://www.dol.gov/agencies/whd/government-contracts/))

instead clarify that California's prevailing wage laws are the applicable requirements for purposes of the California BEAD program.

## **V. LETTER OF CREDIT**

USTelecom appreciates the opportunity to comment on the letter of credit requirements given that California has not yet incorporated NTIA's recent guidance on the subject.<sup>31</sup> The BEAD Letter of Credit requirements could be a gating requirement and undermine the success of the program and the overall goal of continued investment in next-generation broadband. First, the current requirement will result in at least \$1 billion dollars (and up to \$2 billion) of BEAD funding going to banks in the form of fees required to issue letters of credit. This will result in less money for broadband deployment. Second, the letter of credit requirement will likely result in less private investment in broadband because providers have a finite amount of capital which they use to fund their deployments and the letter of credit will reduce their available capital. Thus, providers may have to delay or abandon their deployment plans in certain areas.

In its final proposal, California should reflect NTIA's recently issued Letter of Credit waiver and allow for alternatives to satisfying the requirement by allowing i) either a letter of credit or a performance bond; ii) the letter of credit (or performance bond) to be reduced to 10% if the provider is going to be reimbursed in increments of 6 months or less; iii) the letter of credit (or performance bond) to be retired with deployment where the LOC is 25%; and iv) a credit union to issue the LOC.<sup>32</sup> It is important to note that NTIA considers this waiver a floor and therefore states still do have the option to waive the Letter of Credit requirements as states like Virginia and Ohio have already done.

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<sup>31</sup> See <https://broadbandusa.ntia.gov/funding-programs/policies-waivers/BEAD-Letter-of-Credit-Waiver>.

<sup>32</sup> See *Id.*

USTelecom suggests that like Virginia,<sup>33</sup> California should consider asking NTIA to allow it to modify the letter of credit requirements consistent with the attached waterfall proposal (attachment A). The waterfall provides a staged approach that balances appropriate risk management using more objective criteria when assessing the need for a letter of credit requirement that would unreasonably divert limited capital for BEAD projects when unnecessary. It also provides for fairness and administrative ease for the state as the requirements are transparent to all and clearly set forth. Thus, all California needs to do is ensure the proper documentation is provided—it does not require an in-depth independent financial evaluation. This alternate solution ensures that the government’s investment is protected while also setting the program up for optimal success.

Another alternative would be for California to follow Ohio’s lead in their draft BEAD Initial Plan Volume 2 wherein Ohio seeks a waiver from the letter of requirement and proposes alternatives.<sup>34</sup> Ohio rightly explains that the waiver is necessary to ensure that providers of all sizes are not barred from participating in BEAD if they can otherwise prove financial stability. Ohio expects that a waiver for letter of credit requirements will help ensure wider participation from ISPs, increase competition, and thereby improve the quality of bids, which combined may ultimately help bolster effective BEAD outlay to reach universal service. Instead of a blanket requirement for letters of credit, Ohio will assess the financial, technical, and operational qualifications of the applicant to evaluate whether the applicant has sufficient financial stability to undertake the proposed project.<sup>35</sup> Ohio proposes that it may require a performance bond, letter

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<sup>33</sup> See Virginia Final Initial Proposal Volume 2 at 19-21.

<sup>34</sup> See State of Ohio Initial Proposal, Volume 2, Broadband Equity, Access, and Deployment (BEAD) Program at 90 (Oct. 2023).

<sup>35</sup> See *Id.*

of credit, or other financial assurance if it determines that the completion of the project requires additional security based on its assessment of the complete application.<sup>36</sup> USTelecom is supportive of this approach and notes that the waterfall approach referenced above is an excellent guide for making such evaluations and encourages California to consider following this approach.

At a minimum, California should propose to phase down the 10% Letter of Credit requirements consistent with the RDOF program—for every 25% milestone the provider reaches, it can reduce its letter of credit by one year’s worth of BEAD funding.<sup>37</sup> This will help maximize the dollars for deployment versus dollars for bank fees.

## **VI. CLASSIFICATION OF AWARDS AS FIXED AMOUNT SUBAWARDS**

While further guidance from NTIA on the applicability of the Part 200 Uniform Guidance likely is forthcoming, NTIA indicated in its Request for Comment that it plans to categorize all BEAD awards as fixed amount subawards. It is important that for BEAD purposes, all awards are deemed fixed amount subawards, notwithstanding any specific reimbursement language in the subgrant agreement or state regulation. This is critical to help ensure adherence to NTIA’s guidance on Part 200.

## **VII. CONCLUSION**

The challenges associated with rural broadband connectivity are reduced with an enduring public-private sector commitment and partnership. Working with experienced and competent providers and creating a program that does not attempt to regulate or create barriers to entry will ensure participation by the greatest number of providers. Failure to do so would take a

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<sup>36</sup> *See Id.*

<sup>37</sup> *See In the Matter of The Rural Digital Opportunity Fund Auction (Auction 904), Rural Digital Opportunity Fund, Order, AU Docket No. 20-34, WC Docket No. 19-126, DA 20-5, para. 98 (Jan. 30, 2020).*

step in the wrong direction and undermine California’s efforts to close the digital divide. When the CPUC issues its final draft to NTIA, USTelecom recommends that it consider implementing these changes to its process. Thank you for putting the state’s BEAD Initial Plan Volume 2 out for public comment. USTelecom and our members stand ready to work with the state of California and the CPUC team to connect all communities and, once and for all, close the digital divide.

Sincerely,

A handwritten signature in blue ink that reads "B. Lynn Follansbee".

B. Lynn Follansbee  
VP – Strategic Initiatives & Partnerships

USTelecom – The Broadband Association  
601 New Jersey Avenue NW Suite 600  
Washington, DC 20001  
Phone: (202) 326-7300  
Email: [lfollansbee@ustelecom.org](mailto:lfollansbee@ustelecom.org)

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