

**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 23-02-016

**REPLY COMMENTS OF THE CALIFORNIA BROADBAND & VIDEO ASSOCIATION
ON ADMINISTRATIVE LAW JUDGE'S RULING ISSUING STAFF PROPOSAL**

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The California Broadband & Video Association (“CalBroadband”) respectfully submits these reply comments in response to the comments filed on the proposed Initial Proposal Volume I and Volume II rules prepared by California Public Utilities Commission (“Commission”) Staff (“Staff Proposal”) for the Broadband Equity, Access, and Deployment (“BEAD”) Program.

I. INTRODUCTION

Parties agree that the Staff Proposal includes some components that will help the Commission achieve the principal BEAD Program goal of connecting all unserved and underserved locations in California. However, many parties also agree that the Commission should make key changes to the Staff Proposal before its submission to the National Telecommunications and Information Administration (“NTIA”) to increase the likelihood of achieving universal service to all Californians and other BEAD Program goals. The Commission should revise the Staff Proposal with alternate approaches to the Commission’s BEAD Program implementation as discussed in CalBroadband’s opening comments, which are supported by the record and the views of other stakeholders.

Some commenters’ proposals only compound concerns about a fair, open, equitable, and competitive subgrantee selection process by imposing conditions that would squander limited funding and deter participation by qualified, experienced Internet service providers (“ISPs”).

Other proposals are beyond the proper scope of this proceeding and have no basis in the Infrastructure Investment and Jobs Act (“IIJA”) or NTIA’s BEAD Notice of Funding Opportunity (“NOFO”).¹ CalBroadband respectfully urges the Commission to reject suggestions to add new subgrantee obligations or funding conditions to the Staff Proposal, particularly when they are inconsistent with the IIJA and NOFO, based on claims that are unfounded or irrelevant to CalBroadband members, or ultimately could undermine the BEAD Program’s success.

Making the following changes to Volumes I and II of the Staff Proposal will ensure alignment with the IIJA, NOFO, and BEAD Program goals:

- Maximize the reach of California’s limited BEAD funding allocation by: (1) prioritizing provider matches; (2) allowing applicants to design their own project areas; and (3) declining to set an Extremely High Cost Per Location Threshold (“EHCT”), or, in the alternative, basing the EHCT on applications the Commission receives;
- Decline to impose unnecessary and counterproductive policy conditions on BEAD awards, including with respect to: (1) affordability-related proposals that amount to rate regulation; (2) weighting of certain labor commitments; and (3) open access or 72-hour backup power requirements, including as scoring criteria;
- Conduct a “transparent, evidence-based, fair, and expeditious” challenge process, as required by the NOFO, by: (1) providing a 45-day period for challenge submissions, followed by a 45-day period for rebuttals to any challenges; and (2) rejecting proposals to accept “Affordability Challenges” or lower the threshold requirement for Multi-Dwelling Unit (“MDU”) Challenges; and
- Provide parties the opportunity to review and comment on any subsequent revisions to the Staff Proposal, including a redline of any changes requested by NTIA.

II. EXTEND THE REACH OF BEAD FUNDING

Stakeholders agree that the Commission must carefully consider how to extend the reach of its BEAD funding allocation to connect all unserved and underserved locations in California,

¹ NTIA, *Broadband Equity, Access, and Deployment Program Notice of Funding Opportunity* 34 (May 13, 2022) (“NOFO”), <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf>.

given the anticipated multi-billion dollar funding gap.² Many parties support CalBroadband’s recommendations addressing this critical issue, including to (1) give greater weight to Minimal BEAD Outlay; (2) allow applicants to design their own project areas; and (3) decline to set the EHCT, or, in the alternative, base the EHCT on applications received.

A. Commenters agree that the Staff Proposal must do more to incentivize provider matching funds.

The Commission has “rightfully” recognized that “its BEAD funds are not unlimited,” and that “it must be a zealous guardian of its funds . . . to achieve universal service.”³ However, parties share CalBroadband’s concern that the Staff Proposal does not adequately consider, let alone prioritize, Minimal BEAD Outlay in its proposed scoring rubric.⁴ As CalBroadband and other commenters explain in their opening comments, declining to incentivize greater provider matching funds would leave billions of dollars in private co-investment on the table and undermine the goal of connecting all unserved and underserved locations.

As an initial matter, the Staff Proposal’s current approach is inconsistent with the NOFO’s requirement that states “establish a competitive process designed to maximize the public benefits achieved through the subgrant process *by increasing subgrantee-provided match.*”⁵ Moreover, the Staff Proposal’s approach misses the best, most efficient opportunity for the Commission to “zealous[ly]” maximize the reach of its BEAD funding allocation. For example, in explaining its

² Cal Advocates Comments at 13; WISPA – *Broadband Without Boundaries* (“WISPA”) Comments at 7.

³ WISPA Comments at 7.

⁴ See, e.g., CalBroadband Comments at 6-8; WISPA Comments at 7; AT&T Comments at 14-15; see also CalBroadband Policy Brief, *Closing California’s Digital Divide – The Opportunity and Challenge of BEAD 1* (Aug. 2, 2023), https://assets-global.website-files.com/63f95a12b9746cfb59832b95/64cae0870c20ec4dab934cc3_Policy%20Brief%201%20-%20Article%201%20BEAD.pdf (“Creating broadband connectivity for unserved households as the first priority for state and federal resources is more than just a requirement of BEAD, the prioritization of resources to connect these communities also represents the most equitable use of this funding.”).

⁵ NOFO at 37 (emphasis added); see also CalBroadband Comments at 7.

support for Minimal BEAD Outlay as a primary scoring criterion, Community Legal Services (“CLS”) reasons that “fewer BEAD funds expended per location helps expand the reach of the limited BEAD funding.”⁶ CLS also notes that, as the NOFO also recognizes, greater provider matching funds mean that subgrantees will have “skin in the game” and be more likely to spend BEAD funds “prudently.”⁷ And as WISPA explains, “reprioritizing ‘Minimal BEAD Outlay’ as the primary focus” of the Staff Proposal’s scoring rubric offers an “opportunity to realize cost savings.”⁸

For these reasons, the Commission should adopt CalBroadband’s recommendation to allocate significantly more points (i.e., 40-50 percent of the total available points) to the Minimal BEAD Outlay scoring criterion, which other commenters also support.⁹ The Commission can readily do this by reallocating some of its proposed Affordability points to the Minimal BEAD Outlay scoring criterion, as AT&T also recommends.¹⁰ Finally, consistent with commenters’ suggestions to “reconsider the match percentages that would be required to earn full, partial, or no points,”¹¹ CalBroadband reiterates that the Commission should utilize a scaled approach that awards *no* points for meeting the 25 percent minimum statutory match requirement and more

⁶ CLS Comments at 26.

⁷ *Id.*; see also NOFO at 20 (explaining that matching contributions “demonstrate commitment to a particular project”).

⁸ WISPA Comments at 7.

⁹ CalBroadband Comments at 6; WISPA Comments at 7 (recommending that the Commission provide 40 points to Minimal BEAD Outlay); AT&T Comments at 15 (recommending that the Commission “redistribute at least 10 Affordability points to the Minimal BEAD Program Outlay scoring Criteria”).

¹⁰ CalBroadband Comments at 6; AT&T Comments at 15.

¹¹ AT&T Comments at 15.

points to applicants proposing greater matches.¹² This approach will allow the Commission to stretch BEAD funds even further.

B. Commenters strongly support allowing applicants to define their own project areas.

Most parties agree with CalBroadband’s recommendation that the Commission select “Option 1: Applicants define Project Areas” to facilitate the development of more efficient BEAD proposals.¹³ The Staff Proposal itself notes that “this approach recognizes that applicants . . . are frequently best suited to determine the most economically viable grouping of locations into a single geographic unit for application.”¹⁴ Indeed, CalBroadband and other commenters echo that providers are “in the best position to design their project areas to use existing infrastructure most cost-effectively” and maximize use of existing permits and rights-of-way.¹⁵

By contrast, adopting the alternative proposal to base project areas on established political boundaries (i.e., school districts and Tribal boundaries) would be misguided and impractical, creating challenges that could limit participation in the BEAD Program and lead to higher costs per location.¹⁶ The Corporation for Education Network Initiatives in California (“CENIC”) explains that these concerns are not merely hypothetical since “[i]n some places, geographic boundaries for school districts can be vast . . . [and] cover[] . . . [hundreds of] square miles.”¹⁷

¹² CalBroadband Comments at 8.

¹³ See, e.g., CTIA—The Wireless Association (“CTIA”) Comments, Attachment B at 2; Corporation for Education Network Initiatives in California (“CENIC”) Comments at 3; City and County of San Francisco (“CCSF”) Comments at 3; Rural County Representatives of California (“RCRC”) Comments at 5.

¹⁴ See Staff Proposal Volume II at 37.

¹⁵ AT&T Comments at 3; see also CalBroadband Comments at 9-10.

¹⁶ See CENIC Comments at 3; AT&T Comments at 3-6; RCRC Comments at 5.

¹⁷ CENIC Comments at 3 (also explaining that, in some places, a significant part of the area may be managed by agencies of the federal and state governments, making it even more complex and challenging for prospective bidders to use project areas based on established political boundaries).

Providers may not be able to cover such large, pre-defined areas, particularly without being able to account for factors like “topography, terrain, environmental factors, and right-of-way considerations.”¹⁸ Moreover, basing project areas on established political boundaries would “prevent[] applicants from considering necessary business and network design factors.”¹⁹ The result, as the City and County of San Francisco (“CCSF”) suggests, is that funds will be less “efficiently targeted to the locations with the greatest need,” compared to an approach that allows applicants to draw their own project areas.²⁰

Accordingly, CalBroadband urges the Commission not only to adopt Option 1 for its approach to project areas, but also to specify further that applicants will be permitted to define project areas without reference to Census Block Groups. AT&T explains that, as with pre-selected school district or Tribal land boundaries, these “large state-defined project area[s]” could “effectively disqualify some applicants or force them to extend beyond what they can manage from a financial, operational, or human resources perspective.”²¹ By providing maximum flexibility to applicants to define their own project areas, the Commission will increase provider participation in the BEAD Program and connect as many unserved and underserved locations as possible.²²

¹⁸ CTIA Comments, Attachment B at 2.

¹⁹ CENIC Comments at 5; *see also* CalBroadband Comments at 9-11; AT&T Comments at 3-4.

²⁰ CCSF Comments at 3.

²¹ AT&T Comments at 4; *see also* WISPA Comments at 8 (suggesting that “using . . . pre-existing and artificial area boundaries may present more challenges than solutions”).

²² *See* WISPA Comments at 8 (“Bounding grant areas by census blocks or political subdivisions . . . may not best serve to increase the number of providers able to participate in the final round of subgrantee selection.”); *id.* at 10 (explaining that the “ability to aggregate locations that do not conform to geopolitical or census boundaries also may lead to more locations being the subject of applications, as less attractive and hard-to-serve locations could be grouped together alongside those locations that are more likely to be applied for”).

Consistent with the NOFO’s directive that states establish a “fair, open, equitable, and competitive selection process” and otherwise “[p]rotect[] the [i]ntegrity” of this process,²³ CalBroadband also concurs with suggestions that the Commission use a “more transparent and objective process” to de-conflict overlapping project areas, rather than utilizing opaque negotiations.²⁴ More broadly, the Commission should avoid using non-public negotiations to extract additional commitments from subgrantees, as explained in CalBroadband’s opening comments.²⁵

C. The Commission should decline to set the EHCT, or, in the alternative, base the EHCT on applications received, as the vast majority of commenters recommend.

Many parties suggest that the Commission’s approach to the EHCT should account for the anticipated funding gap to achieve universal service.²⁶ Consistent with this view, CalBroadband recommends that the Commission consider not setting the EHCT at all: the sheer number of unserved and underserved locations and the limited amount of available BEAD funding may mean that any EHCT is effectively mooted, particularly with end-to-end fiber projects being prioritized “wherever feasible,” as the NOFO requires.²⁷

If the Commission nonetheless sets an EHCT, at a minimum, it should base the EHCT on applications received and set that threshold as high as possible to prioritize end-to-end fiber

²³ NOFO at 35.

²⁴ *See, e.g.*, AT&T Comments at 6.

²⁵ CalBroadband Comments at 14-16.

²⁶ *See, e.g.*, Tarana Wireless Comments at 7 (noting the Staff Proposal’s “admi[ssion] that the CPUC will struggle to achieve service to unserved BSLs [broadband serviceable locations]”); Small LECs Comments at 3 (proposing to set the EHCT based on a determination of whether the totality of fiber project applications received “fit within the \$1.86 billion budget”).

²⁷ NOFO at 13 n.6.

projects whenever feasible, as parties overwhelmingly support.²⁸ Rural County Representatives of California (“RCRC”) explains that waiting to set the EHCT until applications have been received will allow the Commission to “determine how best to maximize the limited resources available without placing artificial limits on applicants.”²⁹ Additionally, as Cal Advocates discusses, and consistent with CalBroadband’s opening comments, having access to “timely, real-world assessments of the costs and risks of broadband deployment” in applicant proposals, including “the most up to date information on materials and labor costs,” will provide the Commission “with a sense of provider appetite for project locations and technologies” and allow the Commission to maximize fiber investments.³⁰

III. DECLINE TO IMPOSE UNNECESSARY AND COUNTERPRODUCTIVE CONDITIONS ON BEAD AWARDS

The Commission should reject proposals to go beyond the Staff Proposal and impose additional subgrantee obligations and funding conditions that are inconsistent with BEAD Program requirements and would deter participation by qualified providers. Specifically, the Commission should decline to: (1) adopt affordability-related proposals that amount to rate regulation; (2) give disproportionate weight to certain labor commitments; or (3) impose open access or 72-hour backup power requirements as eligibility conditions or scoring criteria.

Moreover, the Commission should stay focused on its BEAD Program implementation and decline to address topics that have no basis in the IJJA and NOFO and no support in the record. The Greenlining Institute and #OaklandUndivided (“Greenlining”), for example, propose “racial

²⁸ See, e.g., Cal Advocates Comments at 22; AT&T Comments at 7; Small LECs Comments at 2; RCRC Comments at 5-6; Communications Workers of America District 9 (“CWA”) Comments at 12.

²⁹ RCRC Comments at 5.

³⁰ Cal Advocates Comments at 22; see also CalBroadband Comments at 13 (explaining that the Staff Proposal’s alternative approach of setting the EHCT prior to the application window would require the Commission to rely on mere hypotheticals and potentially inapposite data and models).

and economic equity provisions within the final rules” based on broad and harsh, but unsubstantiated, allegations of digital redlining that have no bearing on CalBroadband’s members.³¹ A few other parties repeat inflammatory allegations of redlining or other discriminatory deployment practices,³² which have no merit with regard to CalBroadband members, have no relevance to the proposed BEAD Program selection criteria, and are easily disproven by data showing that cable broadband is widely available regardless of income or demographics.³³ These sweeping—and incorrect, with regard to CalBroadband members—accusations should not be given any weight in the Commission’s BEAD Program implementation.

A. Commenters agree that the Commission should ensure that its affordability-related proposals do not violate the IIA’s prohibition on rate regulation.

Many parties share CalBroadband’s concern that some of the Staff Proposal’s affordability-related proposals amount to rate regulation,³⁴ which the IIA expressly prohibits.³⁵ Specifically, CalBroadband and these parties oppose proposals to score the Affordability criterion against arbitrary prices, particularly when applicants’ commitment to such prices are

³¹ Greenlining Comments at 4 (citing a single source from 2017 about another ISP’s fiber deployments).

³² See CLS Comments at 7; Cal Advocates Comments at 12, 21.

³³ See California Cable and Telecommunications Association Comments on Assigned Administrative Law Judge’s Ruling, R.20-09-001, at 2 (July 2, 2021) (explaining in “digital redlining” phase of broadband infrastructure OIR how the Commission’s own data reflect almost 95 percent of California residents had access to broadband service at 100 Mbps download speeds); Comments of NCTA—The Internet and Television Association, FCC Docket 22-69, at 5-8 (Feb. 21, 2023), <https://www.fcc.gov/ecfs/document/1022108466107/1> (providing extensive data in FCC digital discrimination rulemaking demonstrating how cable broadband networks are available across providers’ service areas to homes and businesses regardless of income level, race, ethnicity, color, religion, or national origin).

³⁴ See, e.g., CTIA Comments, Attachment B at 4-5; AT&T Comments at 8-9; Small LECs Comments at 6-7.

³⁵ 47 U.S.C. § 1702(h)(5)(D).

effectively a condition of receiving a score that has the potential to compete to win the project.³⁶ CalBroadband similarly opposes rate-setting proposals suggested by other commenters. For example, although Cal Advocates’ proposal to require a “generally available” middle-class affordability plan offering 100/20 Mbps service for no more than \$84 per month is more realistic than the Staff’s proposal to price such service at \$30 per month or symmetrical gigabit service for \$50 per month,³⁷ they still are impermissible pricing mandates. Moreover, that the Staff Proposal and Cal Advocates both consider their respective price points for 100/20 Mbps service to address “middle-class affordability”³⁸ – despite a difference of over \$50 per month – demonstrates how conflicting methodologies and arbitrary value judgments lead to pricing mandates that are out of step with a competitive broadband market and the operational costs of maintaining service over time. In the end, these proposals collapse under their own weight and should not be adopted.

In addition, as AT&T explains, “[p]rice locks for extended periods are unprecedented and would clearly be a form of unnecessary and intrusive rate regulation, as well as disincentivize

³⁶ See Staff Proposal Volume II at 31 (proposing pricing benchmarks of \$50/month inclusive of all taxes and fees for symmetrical 1 Gbps service (for priority projects) and \$30/month inclusive of all fees for 100/20 Mbps service (for non-priority projects) for purposes of Affordability scoring).

³⁷ See *id.*; Cal Advocates Comments at 6, 10-11. Cal Advocates notes that “[a] number of providers already achieve or beat this price point for a 100/20 Mbps broadband plan,” but that is not the point. Cal Advocates Comments at 11. Such prescriptive price requirements should not be imposed as BEAD Program conditions because they are arbitrary, unlawful under the IJA, and unnecessarily complicated to administer. See *id.* at 10 (explaining how Cal Advocates calculated its \$84 price point by applying a “two percent of household income standard to two-thirds of median household income for a family of three in the lowest earning counties in California,” among other subjective assumptions).

³⁸ Compare Cal Advocates Comments at 6 (proposing that the Commission modify its middle-class affordability plan by requiring providers to offer 100/20 Mbps service for no more than \$84/month), and Staff Proposal Volume II at 197-98 (explaining that the Commission will address middle-class affordability in part through its Affordability scoring criterion, which evaluates whether applicants commit to offer 100/20 Mbps service at \$30/month or symmetrical gigabit service for \$50/month).

investment and enhancements to the services provided.”³⁹ Indeed, if adopted, these price cap rate regulation proposals would jeopardize the long-term sustainability of BEAD-funded networks, potentially resulting in networks that depend on ongoing subsidies just to remain viable or that outright fail.⁴⁰ Instead of risking these outcomes for Californians, the Commission should follow the lead of many other states by awarding full points under the Affordability criterion to applicants that commit to offer symmetrical 1 Gbps service (for priority projects) or 100/20 Mbps service (for non-priority projects) to BEAD-funded locations at a cost that does not exceed the cost for the same service in unsubsidized areas of the state—or at a cost that does not exceed the Federal Communications Commission’s (“FCC’s”) reasonable comparability benchmark based on the Urban Rate Survey (“URS”), as AT&T and CTIA also suggest.⁴¹ In addition to “avoid[ing] consumer confusion,”⁴² this approach would provide an “objective, fact-based, competitive price reference, and an administratively simple way” to score the Affordability criterion without violating the IJA.⁴³

Consistent with this approach, the Commission should adopt CalBroadband’s recommendation to consider the low-cost broadband service option requirement met if the applicant commits to offering low-income households that meet the eligibility requirements for ACP (i.e., “Eligible Subscribers,” as defined in the NOFO⁴⁴) a price that is:

(1) consistent with either the low-cost offerings the applicant currently (at the time of application) makes available in unsubsidized areas within the state, or the low-cost

³⁹ AT&T Comments at 10.

⁴⁰ CalBroadband Comments at 23 & n.63.

⁴¹ AT&T Comments at 12-13; CTIA Comments, Attachment B at 5-6; *see also* CalBroadband Comments at 24-26 & nn.64-71 (listing states that have adopted CalBroadband’s recommended approach to scoring of the Affordability criterion).

⁴² CTIA Comments, Attachment B at 6.

⁴³ AT&T Comments at 13.

⁴⁴ NOFO at 12.

offerings available from other providers in unsubsidized areas within the state (including for applicants without an existing low-cost option); *and*

(2) below the maximum ceiling of the residential rates provided in the FCC’s “reasonable comparability” benchmark (based on its annual URS) for the service tier with specified speeds of 100/20 Mbps, as an additional, objective mechanism to ensure affordability.⁴⁵

AT&T and CTIA also join CalBroadband in opposing the Staff Proposal’s requirement that subgrantees “offer the low-cost broadband service option at a price of \$15 per month for all income-qualified customers if ACP funding is expended and no successor program guaranteeing an equivalent subsidized price of service for eligible customers is established.”⁴⁶ That price is arbitrary, unsupported by economic data (or any justification at all), and would result in significant financial uncertainty for BEAD Program participants.⁴⁷

No matter how the Commission defines the low-cost option, it should maintain its proposal to permit price adjustments to account for inflation and expand such adjustments to include any governmental fees that are or may become applicable to broadband service.⁴⁸ As AT&T and CTIA

⁴⁵ CalBroadband Comments at 28; *see also* CalBroadband Policy Brief, *Increasing Broadband Availability and Improving Affordability by Leveraging Federal Guidance and Incorporating Programmatic Flexibility 2* (Sept. 12, 2023), https://assets-global.website-files.com/63f95a12b9746cfb59832b95/65023f52c9b83c721d2e8a1e_Policy%20Brief%20%20-%20Article%201%20BEAD.pdf (explaining how “federal requirements for low-cost service options can readily be satisfied by leveraging existing plans specifically designed to reach eligible low-income customers”).

⁴⁶ Staff Proposal Volume II at 193; *see* AT&T Comments at 8-9 (explaining that the IIJA does not permit broadband rate regulation, and that California law preempts state agencies from regulating broadband prices); CTIA Comments, Attachment B at 8 (explaining that the Commission’s proposal goes “well beyond” current ACP requirements and “far exceeds” requirements applicable to the Commission’s Federal Funding Account program); CalBroadband Comments at 30-31.

⁴⁷ CalBroadband Comments at 30-31; CTIA Comments, Attachment B at 8.

⁴⁸ *See* CalBroadband Comments at 28-31.

highlight, NTIA has made clear that states are permitted to allow for reasonable cost adjustments over time.⁴⁹

B. The Commission should reject proposals to award more points for labor commitments that are merely *optional* in the NOFO.

Communications Workers of America District 9 (“CWA”) proposes that the Commission provide greater weight to forward-looking labor measures (i.e., by allocating 80 percent of the points for Fair Labor Practices to forward-looking measures, and only 20 percent of points for records of past compliance) and clarify how it will consider certain labor-related factors.⁵⁰ CWA also proposes requiring some applicants to disclose information related to their customer service and operations workforce and subcontractors.⁵¹ While CalBroadband supports calls for greater clarity with respect to the Staff Proposal’s proposed point allocation for the Fair Labor Practices scoring criterion, CalBroadband opposes the proposal to disproportionately weight forward-looking labor commitments, particularly when applicants may not have finalized certain details related to their workforce after network deployment.

As CalBroadband explained in its opening comments, the Commission should refrain from awarding more points for commitments that the NOFO unambiguously treats as *optional*.⁵² Doing so is also unnecessary when rigorous competition for a scarce broadband workforce, as the Staff Proposal acknowledges, already means that workers are benefitting from a “competitive

⁴⁹ AT&T Comments at 9 (citing NTIA, *Frequently Asked Questions and Answers Version 5.0 BEAD Program*, available at https://broadbandusa.ntia.gov/sites/default/files/2023-11/Broadband_Equity_Access_Deployment_Program_Frequently_Asked_Questions_Version_5.0.pdf); see also CTIA Comments, Attachment B at 7.

⁵⁰ CWA Comments at 11.

⁵¹ *Id.* at 14.

⁵² CalBroadband Comments at 32 (citing NOFO at 57).

compensation environment” and are protected by California’s strong labor laws.⁵³ In all events, the Commission should provide applicants flexibility to achieve a highly skilled workforce—without prescriptive, one-size-fits-all requirements that could discourage participation by qualified providers in the BEAD Program.

C. The Commission should reject proposals to require or give preference to open access commitments.

Some parties propose incorporating open access as a scoring criterion, with some going so far as to suggest that it be made a mandatory condition of BEAD Program funding.⁵⁴ CalBroadband strongly opposes these proposals, which are inconsistent with the BEAD Program rules and ultimately will not benefit consumers.

As an initial matter, imposing open access as a condition of BEAD funding would violate the NOFO by taking an *optional* scoring criterion and elevating it above the primary scoring criteria that *must* be considered in the subgrantee selection process.⁵⁵ As NTIA’s recent guidance provides, states cannot weight a single secondary criterion more than a primary criterion.⁵⁶ Treating open access as a gating *requirement* would be inconsistent with this guidance, no matter how many points would be awarded to open access under the scoring rubric.

⁵³ *Id.* at 36-37 (citing Staff Proposal Volume II at 67).

⁵⁴ *See, e.g.*, CLS Comments at 20 (supporting open access being an additional prioritization factor); Greenlining Comments at 5 (supporting open access requirements being included in the scoring rubric and further proposing that the Commission require that “any and all middle-mile infrastructure projects utilizing BEAD Program funds comply with open-access requirements as a precursor to receiving funding”); TURN & CforAT Comments at 3 (proposing that the Commission “require BEAD program-funded middle and wholesale last-mile projects to provide open access for the life of the infrastructure”).

⁵⁵ *See* NOFO at 44.

⁵⁶ NTIA, *Tricky Topics to Watch Out for in the Initial Proposal 5* (Sept. 2023), https://broadbandusa.ntia.gov/sites/default/files/2023-09/BEAD_Initial_Proposal_-_Tricky_Topics.pdf.

Moreover, while some parties take it as an article of faith that open access networks lower prices and benefit consumers,⁵⁷ this business model has never been successful in the United States, as CalBroadband has previously explained in its comments in this proceeding.⁵⁸ It is well-documented that open access obligations remove incentives for individual last-mile providers to innovate, invest in technology upgrades, and otherwise differentiate their services based on performance, resulting in competition based mainly on branding and speculation that third parties may be interested in reselling service.⁵⁹ Far from benefitting consumers, a preference or requirement for open access would run serious risks of squandering BEAD funds on unneeded networks with no realistic business case for long-term viability, in addition to deterring qualified providers from participating in the BEAD Program. The Commission should therefore retain the Staff Proposal’s approach and decline to consider open access in its scoring rubric.

⁵⁷ See, e.g., Greenlining Comments at 5; CLS Comments at 20.

⁵⁸ See Reply Comments of the California Broadband & Video Association, R.23-02-016, at 20-21 (May 8, 2023) (“CalBroadband Reply Comments”); *id.* at 21 n.77.

⁵⁹ See Wolfgang Briglauer et al., *Speeding Up the Internet: Regulation and Investment in the European Fiber Optic Infrastructure*, 1 Int’l J. Indus. Org. 613 t.3 (2018) (finding that fiber access regulation significantly reduces the number of homes passed by the incumbent operator’s fiber network); GSMA, *Wholesale Open Access Networks 2* (July 2017), https://www.gsma.com/spectrum/wp-content/uploads/2017/07/GSMA_SWN-8-pager_R3_Web_Singles.pdf (explaining that “government mandated wholesale networks have been much slower to expand coverage, perform upgrades and to embrace new technologies such as 3G and 4G, and they can be expected to prompt less innovation than network competition,” and describing less-than successful attempts to build such mobile networks in five countries); Christopher S. Yoo, *U.S. vs. European Broadband Deployment: What do the Data Say?*, Faculty Scholarship at Penn Carney Law (June 3, 2014), https://scholarship.law.upenn.edu/faculty_scholarship/1453 (finding that from 2007 to 2012—a critical period for broadband network buildout—the average electronic communications sector investment per household in the United States was nearly double the amount spent in Europe).

D. The Commission should reject proposals to require applicants to provide 72 hours of backup power.

Some parties propose requiring 72 hours of backup power as a condition of BEAD Program funding or incorporating this factor in the scoring criteria for *all* BEAD applications.⁶⁰ The Commission should reject these proposals.

As CalBroadband noted in its opening comments, providers' incentives are already aligned with the state's to deliver the most robust, reliable broadband service to their customers, which may include backup power at appropriate points in their networks.⁶¹ But as CTIA explains, and contrary to Cal Advocates' suggestion, backup power is neither necessary nor feasible at all sites—which the Commission's prior decisions have specifically recognized.⁶² The NOFO requires an assessment of climate and weather-related risks, not prescriptive resiliency requirements irrespective of whether they are actually necessary or appropriate in each project area.⁶³ And this is for good reason: imposing a uniform 72-hour backup power mandate – or scoring criteria that make such commitments effectively mandatory⁶⁴ – would significantly increase deployment costs, add significant permitting and operational challenges that would deter qualified applicants, and decrease the reach of limited BEAD funds.

IV. CONDUCT A CHALLENGE PROCESS CONSISTENT WITH THE NOFO

CalBroadband reiterates that the Commission should: (1) provide enough time for applicants to rebut challenges, as other parties recommend, and (2) reject modifications that are

⁶⁰ Cal Advocates Comments at 17; TURN & CforAT Comments at 7.

⁶¹ CalBroadband Comments at 36.

⁶² CTIA Comments, Attachment B at 9-10 (citing D.20-07-011); *contra* Cal Advocates Comments at 17.

⁶³ NOFO at 62-64.

⁶⁴ As discussed above, states cannot weight an optional or secondary criterion more than a mandatory primary criterion. Requiring 72-hour back up power as a gating factor would violate this BEAD Program rule. *See supra* Part III.C.

inconsistent with NTIA guidance and would jeopardize the Commission’s ability to accurately and efficiently identify served, unserved, and underserved locations in California.

A. Commenters agree that the Commission must provide sufficient time for challenge rebuttals.

As CalBroadband and other parties have explained, the Commission must ensure that providers have “sufficient time to thoroughly review [challenge] submissions, . . . and prepare necessary responses.”⁶⁵ The proposal to provide only 15 days for rebuttals is not nearly enough time for providers to do so. But the solution is not to add to these logistical challenges by requiring providers to provide a reasonable explanation for an extension on rebuttals, as CWA suggests.⁶⁶

The fairer and more administrable approach is to simply keep the challenge and rebuttal windows each open for the full 45-day allotment for each phase, consistent with the 120-day overall challenge process timeline specified by NTIA.⁶⁷ Experience in other states has shown that the challenge process is extremely time-consuming and difficult to complete even under that timeframe. The challenge process is the foundation on which the rest of the BEAD Program depends. Rushing to complete it under arbitrary, artificial time constraints will only lead to a greater likelihood of inaccuracies and inefficient spending of already limited BEAD funding. Accordingly, the Commission should provide the full 45-day allotment for each phase of the challenge process.

⁶⁵ AT&T Comments at 1; *see also* CalBroadband Comments at 49.

⁶⁶ CWA Comments at 6.

⁶⁷ *See* NTIA, *BEAD Challenge Process Policy Notice* 21 (Sept. 7, 2023), https://www.ntia.gov/sites/default/files/2023-09/bead_challenge_process_policy_notice.pdf (“NTIA Challenge Process Policy Notice”).

B. The Commission should reject proposals to permit challenges based on affordability and proposals to lower the threshold trigger for MDU challenges.

CalBroadband and the majority of parties agree that the Staff Proposal’s DSL and fixed wireless modifications, which would treat areas served by these technologies as unserved or underserved for BEAD funding purposes, will allow Californians to benefit from future-proof broadband technologies, consistent with the BEAD Program’s goals.⁶⁸ But some commenters support or propose other modifications that the Commission should reject as unnecessary and inconsistent with the BEAD Program rules.

First, CWA proposes that the Commission create an “affordability challenge for instances where all available broadband subscription options remain unreasonably costly,” by determining the dollar amount that it would consider to be unreasonable and then designating locations as “underserved” based on pricing of available services.⁶⁹ Similarly, CLS proposes that the Commission consider whether broadband service is “*economically* available” as part of Availability Challenges, suggesting without any basis that an “affordable price” for all Californians (not just the income-constrained) is “\$30/month for 100/20 Mbps or \$80/month for 1 Gbps symmetrical service.”⁷⁰

CalBroadband strongly opposes these proposals, which are clearly impermissible under both the IIJA and NOFO and would directly undermine the BEAD Program goal of providing universal coverage to Californians living in objectively unserved and underserved locations, as

⁶⁸ See, e.g., Cal Advocates Comments at 17; CWA Comments at 17-19; CLS Comments at 6-8; Greenlining Comments at 13-14; RCRC Comments at 2; TURN & CforAT Comments at 19.

⁶⁹ CWA Comments at 5.

⁷⁰ CLS Comments at 8-9.

defined by Congress and NTIA.⁷¹ As NTIA has unambiguously reiterated in its guidance, states *may not* change the definitions of “unserved” or “underserved” from those set forth in the IIA, which is completely absent of any concept of “economic” availability (separate and aside from the fact that the CLS-proposed definition of such a concept is plainly unrealistic) and plainly limited to the level of service (i.e., speed and latency) available at a location.⁷² Thus, both the IIA’s and NTIA’s guidance foreclose *any* possibility of states treating a *served* location as “unserved” or “underserved” based on the pricing of broadband services, and the Commission should reject these proposals on the basis that they unambiguously conflict with all relevant federal authority.

These proposals also would amount to impermissible rate regulation for the reasons explained above. Additionally, CWA’s and CLS’s proposals confuse the issue of broadband *availability* with broadband *adoption*, which the IIA addresses through other means, such as digital equity plans, the ACP benefit, and the low-cost broadband option for “Eligible Subscribers.” As such, these proposals would fundamentally and impermissibly re-configure the BEAD Program and therefore must be rejected.

CalBroadband also has serious concerns that these proposals would impose a heavy administrative burden on Commission Staff and prospective subgrantees. As with the Staff Proposal’s proposed Area and MDU Challenges, adopting Affordability Challenges, or considering such challenges under the umbrella of Availability Challenges, would require the Commission to develop evidentiary and rebuttal requirements and review an exponentially higher number of challenges and rebuttals in a limited timeframe, potentially jeopardizing the

⁷¹ See NOFO at 7; *id.* at 16, 17 (defining “unserved location” and “underserved location”).

⁷² See NTIA Challenge Process Policy Notice at 10.

Commission’s ability to accurately and expeditiously direct funding to unserved and underserved locations.

Second, several parties propose that the Commission lower the threshold trigger for MDU Challenges, such that even a single challenge would result in an entire MDU being designated unserved, regardless of the size of the MDU.⁷³ These attempts to shift the burden of proof by establishing unwarranted presumptions about the availability of service are inconsistent with the IJA and NOFO and conflict with NTIA’s reasoned guidance on this already *optional* challenge module.⁷⁴ Such a proposal would *clearly* have the effect of impermissibly reclassifying these locations as “unserved,” which as discussed above conflicts with the IJA and NTIA’s guidance.⁷⁵ Moreover, it would undermine the entire reason for the BEAD challenge process in the first place—to *accurately* identify BEAD-eligible locations—by potentially relying on a *single* challenge to reclassify the status of an undefined number of locations. In turn, entertaining these challenges would impose significant additional obligations on Staff who, per the NOFO, must notify providers that an Area or MDU Challenge has been triggered, identify all locations subject to the challenge, and then review all challenge and rebuttal evidence to resolve the challenge. CalBroadband reiterates that the Commission should not adopt the optional Area or MDU Challenge modules or any other proposals that would unnecessarily compromise the

⁷³ See, e.g., Greenlining Comments at 12-13 (proposing that a single challenge within an MDU should be sufficient to establish that an MDU is unserved); CCSF Comments at 2 (proposing same); CWA Comments at 5 (proposing that the Commission adopt a “bulk reclassification” of all MDUs within high-poverty and highly unconnected census tracts as “underserved,” until rebutted).

⁷⁴ NTIA, *BEAD Model Challenge Process* at 23-24 (Nov. 1, 2023), <https://www.ntia.gov/sites/default/files/2023-09/bead-model-challenge-process.zip> (requiring “challenges for one unit for MDUs having fewer than 15 units, for two units for MDUs of between 16 and 24 units, and at least three units for larger MDUs” to trigger an MDU challenge).

⁷⁵ See NTIA Challenge Process Policy Notice at 10.

Commission’s ability to conduct the challenge process in a fair and expeditious manner, as required by the IIJA and the NOFO.

V. PROMOTE TRANSPARENCY BY PROVIDING PARTIES THE OPPORTUNITY TO REVIEW AND COMMENT ON FUTURE STAFF PROPOSAL REVISIONS

CalBroadband understands that, following the Commission’s submission of its Initial Proposal to NTIA, the Commission will issue a Proposed Decision in the first quarter of 2024.⁷⁶ The Commission should continue to promote transparency in its BEAD Program implementation by providing parties the opportunity to review and comment on its Proposed Decision, which should include a redline of any “curing edits” that the Commission receives from NTIA after submitting its Initial Proposal. Other states have adopted this approach for the curing process and published a redline of NTIA’s initial edits that were subsequently considered and incorporated by the state.⁷⁷ This transparent process will keep prospective subgrantees and the public informed about California’s implementation of the BEAD Program and encourage further feedback from stakeholders in furtherance of the BEAD Program’s goals.

VI. CONCLUSION

CalBroadband’s members recommend adopting the recommendations described herein and in CalBroadband’s opening comments to ensure that California’s BEAD Program is implemented in a manner that is fair, reasonable, and consistent with the IIJA and NOFO, and that will allow the Commission to effectively and efficiently fulfill the BEAD Program goal of connecting all unserved and underserved Californians to reliable, high-speed broadband service.

⁷⁶ Assigned Commissioner’s Scoping Memo and Ruling, R.23-02-016, at 8 (July 14, 2023).

⁷⁷ See, e.g., Virginia Department of Housing and Community Development, *BEAD Initial Proposal*, <https://www.dhcd.virginia.gov/vati> (providing a link to the Commonwealth’s BEAD Initial Proposal Volume 2 with NTIA’s requested curing edits).

Respectfully submitted,

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