



STATE OF CALIFORNIA

GAVIN NEWSOM, Governor **FILED**

## PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298

04/05/24  
08:00 AM  
R2302016

April 5, 2024

**Agenda ID #22499**  
**Quasi-Legislative**

TO PARTIES OF RECORD IN RULEMAKING 23-02-016:

This is the proposed decision of Commissioner Darcie L. Houck. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's May 9, 2024 Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.

Parties of record may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.

/s/ MICHELLE COOKE

Michelle Cooke

Chief Administrative Law Judge

MLC:smt

Attachment

Decision **PROPOSED DECISION OF COMMISSIONER DARCIE L. HOUCK**  
(Mailed 4/5 /2024)

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

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

Rulemaking 23-02-016

**DECISION APPROVING VOLUME ONE OF THE BROADBAND  
EQUITY, ACCESS, AND DEPLOYMENT PROGRAM RULES**

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**DECISION APPROVING VOLUME ONE OF THE BROADBAND  
EQUITY, ACCESS, AND DEPLOYMENT PROGRAM RULES****Summary**

In this decision, the California Public Utilities Commission (Commission) revises and adopts Volume One of the Initial Proposal (Volume One) for the Broadband Equity, Access, and Deployment (BEAD) Program. Volume One focuses on the rules for changing determinations regarding whether a broadband serviceable location is served, unserved or underserved, based on whether it meets the definition of reliable broadband service.

The Commission submitted its Initial Proposal to the National Telecommunications and Information Administration (NTIA) on December 27, 2023. During its review, the NTIA provided the Commission with final curing instructions for Volume One on March 8, 2024.

The Commission's Challenge Process shall begin no later than 60 calendar days after the issuance of this decision, and no sooner than seven (7) calendar days after the publication of the Eligible Locations. The Commission delegates to its Communications Division Staff (Staff) the authority to dispense with challenges. Staff shall serve notice of the publication of the Eligible Locations. Per the NTIA's Model Challenge Process, which this Commission adopts, the Challenge Phase shall begin following the conclusion of the seven (7) day publication period of the Eligible Locations and last for a period of 30 calendar days. Evidentiary Review will take place during the 14 calendar days following the conclusion of the Challenge Phase. Internet service providers shall be notified of challenges and shall have 30 calendar days after the conclusion of Evidentiary Review to submit their rebuttals (Rebuttal Phase) to those challenges. Information and data required for challenges and rebuttals is

contained in Appendix A. The cured version of Volume One is included in Appendix B.

After the Rebuttal Phase ends, Staff shall have 30 calendar days to make a final determination for the Commission. The Commission has 120 days from the initiation of the Challenge Process to submit its determinations. The Commission delegates these tasks to Staff. Not later than 60 calendar days after the NTIA approves the Commission's final determination, Staff shall publish the Final Eligible Locations.

This rulemaking remains open.

## **1. Background**

On February 23, 2023, the Commission initiated this Order Instituting Rulemaking (OIR) to consider rules to determine grant funding, eligibility and compliance for funds distributed to California under the federal Broadband Equity, Access, and Deployment (BEAD) Program, created by the Infrastructure Investment and Jobs Act of 2021.<sup>1</sup> Among the law's numerous provisions, the IJA establishes the \$42.45 billion BEAD Program, administered by the National Telecommunications and Information Administration (NTIA).

California is eligible to receive approximately \$1.86 billion in BEAD funding, based on the federal government's calculation of California's share of unserved locations nationally.

After receiving BEAD funding from the NTIA, a state may award subgrants competitively to subgrantees to carry out the following broadband deployment activities: 1) unserved service projects; 2) underserved service projects; 3) projects connecting eligible community anchor institutions;

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<sup>1</sup> P.L. 117-58 §60102(b) (2021).

4) broadband data collection, mapping, and planning; 5) installing internet and Wi-Fi infrastructure or providing reduced-cost broadband within a multi-family residential building; 6) broadband adoption programs; and 7) other activities determined by NTIA, including administrative activities undertaken by the State.

### **1.1. Procedural Background**

As noted above, on February 23, 2023, the Commission initiated this OIR.

On April 17, 2023, the following parties filed comments in response to the OIR:

- Cellco Partnership and MCImetro Access Transmission Services, LLC (Verizon);
- Next Century Cities;
- Small Business Utility Advocates (SBUA);
- CTIA;
- Schools, Health & Libraries Broadband Coalition;
- AT&T Mobility, and Pacific Bell Telephone Company dba AT&T California (AT&T);
- The Corporation for Education Network Initiatives in California (CENIC);
- The Center for Accessible Technology (CforAT) and the Electronic Frontier Foundation (EFF);
- California Internet, L.P. dba GeoLinks (GeoLinks);
- California Broadband & Video Association;<sup>2</sup>
- The Small LECs;<sup>3</sup>

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<sup>2</sup> Membership of the California Broadband & Video Association includes parties to this proceeding, such as Charter, Comcast and Cox.

<sup>3</sup> The following 13 small Local Exchange Carriers commonly are called the Small LECs: Kerman Telephone Co., Foresthill Telephone Co., Hornitos Telephone Company, Pinnacles Telephone Co., Volcano Telephone Company, Winterhaven Telephone Company, Happy Valley Telephone Company, Sierra Telephone Company, Inc., The Siskiyou Telephone Company, The

*Footnote continued on next page.*

- Yurok Tribe;
- Comcast Phone of California, LLC (Comcast) and Cox California Telcom, LLC (Cox);
- City and County of San Francisco;
- The Public Advocates Office at the California Public Utilities Commission (Cal Advocates);
- Labor Network for Sustainability, United Steelworkers District 12, United Steelworkers Local 675, Communications Workers of America District 9, Jobs with Justice San Francisco;
- Bright House Networks Information Services (California), LLC, Time Warner Cable Information Services (California), LLC, Charter Fiberlink CA-CCO, LLC (Charter);
- Race Telecommunications, LLC (Race Telecommunications);
- The Utility Reform Network (TURN);
- Wireless Infrastructure Association;
- WISPA – Broadband Without Boundaries (WISPA);<sup>4</sup>
- Cal.Net, Inc. (Cal.Net);
- ACA Connects – America’s Communications Association (ACA Connects);
- Fiber Broadband Association;
- UNITE-LA, Inc;
- INCOMPAS;
- Community Legal Services; and
- The Greenlining Institute, California Community Foundation, and #OaklandUndivided.

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Ponderosa Telephone Co., Calaveras Telephone Company, Cal-Ore Telephone Co., and Ducor Telephone Company.

<sup>4</sup> Formerly known as the Wireless Internet Service Providers Association



On May 8, 2023, the following parties filed reply comments:

- Next Century Cities;
- Community Legal Services;
- WISPA;
- California Broadband & Video Association;
- AT&T;
- Race Telecommunications;
- Yurok Tribe;
- TURN;
- CTIA;
- Cal Advocates;
- CENIC;
- Cal.Net;
- CforAT;
- Communications Workers of America District 9, Jobs with Justice San Francisco, Labor Network for Sustainability, United Steelworkers Local 675, United Steelworkers District 12, and California Labor for Climate Jobs;
- The Greenlining Institute, California Community Foundation, and #OaklandUndivided;
- GeoLinks; and
- SBUA.

A prehearing conference was held on May 31, 2023, to address the issues of law and fact, determine the need for hearing, set the schedule for resolving the matter, and address other matters as necessary.

On July 14, 2023, the assigned Commissioner issued a Scoping Memo and Ruling setting forth the issues within the scope of this rulemaking, the need for hearing, schedule, category, and other matters necessary to scope this

proceeding, pursuant to Public Utilities Code Section 1701.1 and Article 7 of the Commission's Rules of Practice and Procedure (Rules).

On July 21, 2023, the following parties filed comments in response to the questions in the Scoping Memo:

- SBUA;
- California Broadband & Video Association;
- The Greenlining Institute;
- Cal.Net;
- Cal Advocates;
- AT&T;
- ACA Connects;
- GeoLinks;
- Rural County Representatives of California (RCRC);
- AVX Networks; and
- CforAT, #OaklandUndivided, TURN, and California Community Foundation.

On July 28, 2023, the following parties filed reply comments on the Scoping Memo:

- Anza Electric Cooperative, Inc;
- California Broadband & Video Association;
- iFoster Inc;
- SBUA; and
- UNITE-LA, Inc., United Parents and Students, California Community Foundation, TURN, #OaklandUndivided, CforAT, and Communities in Schools of Los Angeles.

On July 17, 2023, the assigned Administrative Law Judge (ALJ) issued for comment a draft version of the BEAD Program Five-Year Action Plan that the Commission was required to submit to the NTIA by August 27, 2023.<sup>5</sup>

On August 7, 2023, the following parties filed comments:

- Community Legal Services;
- California Broadband & Video Association;
- CENIC;
- California Alliance for Digital Equity (CADE);<sup>6</sup>
- The Greenlining Institute;
- Cal Advocates;
- WISPA;
- City and County of San Francisco;
- SBUA;
- TURN and CforAT;
- GeoLinks; and
- USTelecom.<sup>7</sup>

On August 11, 2023, the following parties filed reply comments:

- California Broadband & Video Association;
- The Greenlining Institute;
- Community Legal Services;

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<sup>5</sup> The NTIA's BEAD Notice of Funding Opportunity (NOFO), Section IV.B.3.b details 13 requirements that must be responded to in an Eligible Entity's Five-Year Action Plan.

<sup>6</sup> According to its Motion for Party Status, filed July 20, 2023, CADE's membership includes the following entities, some of which already are parties in this proceeding: California Community Foundation, Common Sense Media, Media Alliance, Michelson Center for Public Policy, NextGen Policy California, #OaklandUndivided, RCRC, and The Children's Partnership.

<sup>7</sup> According to its Comments, USTelecom is a trade association representing service providers and suppliers for the communications industry, including broadband, voice, data, and video over wireline and wireless networks. USTelecom's membership includes at least one party to this proceeding: AT&T.

- Cal.Net;
- CforAT and TURN;
- Cal Advocates; and
- SBUA.

On October 26, 2023, the Commission hosted a workshop for parties and interested entities, including Tribal and local government representatives, to discuss the development and implementation of BEAD rules.<sup>8</sup>

On November 7, 2023, the assigned ALJ issued via ruling a Staff Proposal for public comment.<sup>9</sup> The Staff Proposal contained a draft of both Volume One and Volume Two of the Initial Proposal the Commission must submit to the NTIA (Volume Two is not addressed in this decision). The ruling made available much of the data and other information used to develop the Staff Proposal, including five appendices.<sup>10</sup> Finally, the ruling asked parties to comment on any statements made during the October 26, 2023 workshop.

On November 27, 2023, the following parties filed comments:

- SBUA;
- The Small LECs;

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<sup>8</sup> Rule 7.5(a)(2) of the Commission's Rules of Practice and Procedure requires for quasi-legislative proceedings that the Commission host "[a]t least one workshop providing an opportunity for the parties to the proceeding to have an interactive discussion on issues identified in the scoping memo..."

<sup>9</sup> Rule 7.5(a)(1) of the Commission's Rules of Practice and Procedure requires, for quasi-legislative proceeding, either the issuance of an assigned Commissioner's ruling or an industry division staff report setting forth recommendations on how to resolve the issues identified in the scoping memo.

<sup>10</sup> The five appendices are:

- Appendix 1, Broadband Funding Sources;
- Appendix 2, Unserved Locations;
- Appendix 3, Underserved Locations;
- Appendix 4, Community Anchor Institutions; and
- Appendix 5, Programs for De-Duplication.

- CENIC;
- CTIA;
- California Broadband & Video Association;
- GeoLinks;
- City and County of San Francisco;
- Cal Advocates;
- iFoster Inc.;
- Communications Workers of America District 9, United Steelworkers District 12, California Labor for Climate Jobs, Orange County Labor Federation, San Diego and Imperial Counties Labor Council, Labor Network for Sustainability, Los Angeles County Federation of Labor, AFL-CIO, Kern Inyo Mono Counties Central Labor Council, AFL-CIO, and Jobs with Justice San Francisco (Joint Labor Respondents);
- AT&T;
- TURN and CforAT;
- Tarana Wireless;
- The Greenlining Institute and #OaklandUndivided; and
- RCRC.

On December 7, 2023, the following parties filed reply comments:

- USTelecom;
- Community Legal Services;
- GeoLinks;
- The Small LECs;
- CENIC;
- Cal Advocates;
- The Greenlining Institute and #OaklandUndivided;
- Yurok Tribe;
- TURN and CforAT;

- Tarana Wireless;
- California Broadband & Video Association;
- AT&T;
- CTIA;
- San Diego Association of Governments (SANDAG);
- UNITE-LA, Inc and CADE; and
- SBUA.

On November 8, 2023, the Commission held two virtual public participation hearings.<sup>11</sup> Additionally, the Commission and the California Department of Technology (CDT) partnered with local and regional organizations and other state entities to host 17 BEAD planning workshops throughout California, as well as three in-person Tribal consultations. On November 18, 2023, the assigned Commission held a listening sessions related to this proceeding in Los Angeles and a second listening session was held in Oakland on January 18, 2024.

On December 27, 2023, the Commission submitted its Initial Proposal to the NTIA.

Between the submission of the Initial Proposal and March 8, 2024, NTIA requested several changes to the Initial Proposal, as well as more information to support certain proposals. On March 8, NTIA provided its final curing request.<sup>12</sup>

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<sup>11</sup> Rule 7.5(a)(3) of the Commission's Rules of Practice and Procedure requires for quasi-legislative proceedings that the Commission host "[a]t least one public engagement workshop to ensure that the issues are presented to members of the public who are not parties to the proceeding and members of the public have the opportunity to provide input into those issues."

<sup>12</sup> See, Ruling of Assigned ALJ Noticing NTIA Curing Instructions and Other Items, issued April 2, 2024.

On April 2, 2024, the Commission took notice of the NTIA's final curing instructions for Volume One of the Initial Proposal.<sup>13</sup>

## **1.2. Submission Date**

This matter was submitted on April 4, upon the Commission taking notice of the NTIA approving Volume One of the Initial Proposal.

## **2. Jurisdiction**

The Infrastructure Investment and Jobs Act of 2021 establishes the BEAD Program, under the administration of the NTIA. Although the Governor designated this Commission to serve as the recipient of and administering agent for the BEAD program for California,<sup>14</sup> the NTIA has the authority to review and approve a State's Initial Proposal, and may modify the Challenge Process proposed by States, including any modification of the final eligibility determinations made by this Commission.<sup>15</sup>

Per the NTIA's Notice of Funding Opportunity (NOFO), BEAD's principal focus is to deploy reliable broadband service to 100 percent of unserved and underserved locations, and, if funds permit, deploy reliable broadband service to

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<sup>13</sup> *Id.*

<sup>14</sup> See Governor Gavin Newsom, Letter of Intent for the Broadband Equity, Access, and Deployment Program Grant, July 1, 2022.

<sup>15</sup> Infrastructure Act Section 60102(h)(2)(D)(i); NTIA's NOFO at 34-35. See also, Assigned Commissioner's Scoping Memo and Ruling, issued July 14, 2023, at 8.

Community Anchor Institutions.<sup>16</sup> Further, the NTIA's NOFO directs States to prioritize fiber-optic deployments.<sup>17</sup>

After submission of its Initial Proposal and before awarding BEAD funds to subgrantees, this Commission must conduct the NTIA-approved Challenge Process, whereby a unit of local government, nonprofit organization, or broadband service provider can challenge a determination regarding whether a particular location or community anchor institution is eligible for the grant funds, including whether a particular location is unserved or underserved. This Commission must submit any successful challenges to the NTIA for its review and approval.<sup>18</sup>

### **3. Issues Before the Commission**

This decision resolves Issue 6, as identified in the Assigned Commission's Scoping Memo and Ruling, by adopting a process for eligible entities to challenge a determination regarding whether a location is served, unserved or underserved.

Per the NTIA's NOFO, the Commission must develop and implement a transparent, evidence-based, fair, and expeditious challenge process under which a unit of local government, nonprofit organization, or broadband service provider can challenge a determination as to whether a particular location or

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<sup>16</sup> National Telecommunications and Information Administration, Notice of Funding Opportunity, Broadband Equity, Access, and Deployment Program ("NTIA NOFO"), Funding Opportunity Number NTIA-BEAD-2022, at 7. At 17, the NTIA defines "unserved location" as a "broadband-serviceable location that the Broadband DATA Maps show as (a) having no access to broadband service, or (b) lacking access to Reliable Broadband Service offered with— (i) a speed of not less than 25 Mbps for downloads; and (ii) a speed of not less than 3 Mbps for uploads; and (iii) latency less than or equal to 100 milliseconds."

<sup>17</sup> NTIA NOFO at 14. The term "Priority Broadband Project" means a project that will provision service via end-to-end fiber-optic facilities to each end-user premises.

<sup>18</sup> NTIA NOFO at 9



community anchor institution is eligible for BEAD funding. Among other things, the process must allow for challenges regarding whether a particular location is served, unserved or underserved.<sup>19</sup> Resolving this issue means answering the following questions:

- What information should be required from a challenger as a basis for asserting reliable broadband service already exists at a location, or at locations, at sufficient speeds that disqualify them from being called “unserved” or “underserved?”
- What information should be required from a challenger as a basis for asserting a location, or a group of locations, lacks reliable broadband service at sufficient speeds and should be considered “unserved” or “underserved”?
- What entities should be considered permissible challengers eligible to file challenges to locations?
- How much time should challengers and challenged service providers be permitted to file and respond to challenges? Should permissible challengers be permitted to respond to rebuttals provided by challenged service providers?
- Should the Commission adopt any or all of the Model Challenge Processes proposed by the NTIA?

#### **4. Determinations of Served, Unserved and Underserved Status**

The Staff Proposal includes unserved and underserved locations based on the August 29, 2023 publication date of the National Broadband Map.<sup>20,21</sup>

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<sup>19</sup> As defined in the Infrastructure Act and Section I.C. of the Notice of Funding Opportunity

<sup>20</sup> Staff Proposal Attachment A at 4. Appendix 2 contains unserved locations and Appendix 3 contains underserved locations.

<sup>21</sup> The National Broadband Map, referred to as the Broadband DATA Map in the NTIA’s NOFO, is the fixed broadband availability map created by the Federal Communications Commission under Section 802(c)(1) of the Communications Act of 1934 (47 U.S.C. § 642(c)(1)).

Consistent with NTIA guidance, Staff proposes that determinations of unserved, underserved and served locations<sup>22</sup> use the November 15, 2023 publication of the National Broadband Map, or the most current version available at the time the Commission initiates the Challenge Process.<sup>23</sup> A location is served if it has reliable service, defined by the NTIA as:

“broadband service that the National Broadband Maps show is accessible to a location via: (i) fiber-optic technology; (ii) Cable Modem/ Hybrid fiber-coaxial technology; (iii) digital subscriber line (DSL) technology; or (iv) terrestrial fixed wireless technology utilizing entirely licensed spectrum or using a hybrid of licensed and unlicensed spectrum.”<sup>24</sup>

#### **4.1. Positions of Parties**

WISPA supports using the most current version of the National Broadband Map at the start of the Challenge Process to help avoid or limit the “map gap” that would not account for deployment post-dating an earlier version.”<sup>25</sup> Other parties only addressed this issue indirectly, for example, when arguing in opposition to the Commission adopting a particular proposed module, asserting the Commission should rely only on the National Broadband Map (*e.g.*, Small LECs).<sup>26</sup>

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<sup>22</sup> The NTIA’s NOFO defines “qualifying broadband” to a location that is not a CAI is Reliable Broadband Service with (i) a speed of not less than 100 Mbps for downloads; and (ii) a speed of not less than 20 Mbps for uploads; and (iii) latency less than or equal to 100 milliseconds; “qualifying broadband” to a Community Anchor Institution (CAI) is Reliable Broadband Service with (i) a speed of not less than 1 Gbps for downloads and uploads alike and (ii) latency less than or equal to 100 milliseconds.” NTIA NOFO at Section IV.B.7.a.ii.3

<sup>23</sup> Staff Proposal Attachment A at 4.

<sup>24</sup> NTIA NOFO at 15

<sup>25</sup> WISPA, Opening Comments, at 4.

<sup>26</sup> Small LECs, Opening Comments, at 5.

## 4.2. Discussion

The Commission adopts this proposal without modification. The Commission is required to comply with all NTIA rules and guidelines in development of the BEAD Program and therefore will rely on the National Broadband Map as approved by the NTIA for Volume 1.

## 5. Modifications to Served Status Determinations for Locations with DSL Service

The Staff Proposal includes two modifications to the status of broadband serviceable locations (“locations”) that are identified as served on the National Broadband Map, but where the locations are offered only DSL service. The first proposed modification is that the Commission treat locations that the National Broadband Map shows to have available qualifying broadband service delivered via DSL as “underserved.”<sup>27</sup> The Staff Proposal asserts this modification will reflect better the locations eligible for BEAD funding because it will facilitate the phase-out of legacy copper facilities and ensure the delivery of “future-proof” broadband service.<sup>28</sup>

The second proposed modification is that this Commission presume the locations that the National Broadband Map shows to have available non-qualifying broadband service (*i.e.*, a location that is “underserved”) delivered via DSL as “unserved” for reported speeds that are lower than 30 Mbps/5 Mbps, for which there is supporting evidence that speeds consistently deliver below 25 Mbps /3 Mbps service. The Staff Proposal asserts this modification will reflect better the locations eligible for BEAD funding because it will facilitate the

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<sup>27</sup> Staff Proposal Attachment A at 8.

<sup>28</sup> *Id.*

phase-out of legacy copper facilities and ensure the delivery of “future-proof” broadband service. Further, Staff argue that most of these locations are within areas designated by the Commission as Environmental and Social Justice (ESJ) Communities, which are predominantly communities of color or low-income communities underrepresented in the policy setting or decision-making process. Due to the possibility of California’s BEAD allocation being fully committed to deploying service to unserved locations, the Staff Proposal contends this modification will also ensure that locations served by low-speed DSL are not excluded from eligibility for this critical investment.<sup>29</sup> The NTIA, however, did not agree with this portion of the Staff Proposal and required the Commission to cure this section by removal of this modification.<sup>30</sup> The Final Initial Proposal eliminates this modification.

### **5.1. Positions of Parties**

Most, but not all parties that filed comments on this issue support both proposed modifications.

The California Broadband and Video Association, Greenling Institute and #OaklandUndivided, Community Legal Services, Cal Advocates, CforAT and TURN, and Joint Labor Respondents support the proposal.<sup>31</sup> Joint Labor Respondents argue that adopting the NTIA’s Optional Module for DSL ensures investment in future-proof fiber networks and expedites the phase-out of legacy

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<sup>29</sup> *Id* at 9.

<sup>30</sup> *See*, Ruling of Assigned ALJ Noticing NTIA Curing Instructions and Other Items, issued April 2, 2024.

<sup>31</sup> California Broadband and Video Association, Opening Comments, at 47. Greenling and #Oakland Undivided, Opening Comments, at 14. Community Legal Services, Opening Comments, at 7. Cal Advocates, Opening Comments, at 17. CforAT and TURN, Reply Comments, at 18.

copper facilities by treating locations that the National Broadband Map shows to have available qualifying broadband service delivered via DSL (*i.e.*, a location that is “served”) as “underserved.”<sup>32</sup> Joint Labor Respondents further support the proposal to mark qualifying broadband service delivered via DSL as “unserved” for reported speeds that are lower than 30 Mbps/5 Mbps, for which there is supporting evidence that speeds consistently deliver below 25 Mbps/3 Mbps service.”

RCRC supports the proposal and recommends treating all DSL service as unserved.<sup>33</sup>

The Small LECs do not support the proposal, arguing that scarce BEAD funds should not be used to overbuild networks capable of delivering services at speeds up to 100 Mbps/20 Mbps, including DSL in certain circumstances. Instead, the Small LECs contend the Commission should rely on the federal broadband maps as the starting point and base the eligibility determination on the speeds indicated in those maps, irrespective of whether DSL is the technology delivering those speeds.<sup>34</sup>

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<sup>32</sup> Joint Labor Respondents Opening Comment at 3-4.

<sup>33</sup> RCRC, Opening Comments, at 2-3.

<sup>34</sup> The Small LECs, Opening Comments, at 4-5.

## 5.2. Discussion

The Commission supports both proposals as they are consistent with Commission policy<sup>35</sup> and reflects FCC findings,<sup>36</sup> as well as the concerns raised by several communities. While the Commission would have approved both proposals without modification, the NTIA approved the first proposed DSL modification, but not the second proposed modification. However, to the extent an entity is able to demonstrate actual speeds below the threshold amount needed for a served determination, it may be possible to achieve the desired results through speed tests or other methods during the Challenge Process itself.

As a reminder to parties and interested individuals and entities, the NTIA's determination does not mean that BEAD rules prohibit challenges, via speed tests or other methods, to a determination that a DSL provider can serve a broadband serviceable location.

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<sup>35</sup> See D.22-04-055, *Decision Adopting Federal Funding Account Rules*, at 20:

“While we do not adopt the proposal that only Internet service offered with fiber infrastructure be deemed reliable, the Commission adopts a rebuttable presumption that legacy networks cannot provide reliable Internet service at speeds of 25Mbps download and 3 Mbps upload. Specifically, areas with Internet service provided only by legacy technologies such as copper telephone lines (typically using Digital Subscriber Line technology) or older versions of cable system technology (DOCSIS 2.0 or earlier) are eligible for funding. ISPs and other interested individuals wishing to rebut this presumption must demonstrate that all locations have access to speeds of at least 25 Mbps download and 3 Mbps upload. Speed tests from terminals, cabinets and at other locations that are not end users are not sufficient. Our determination of what wireline technologies offer reliable service is consistent with the Final Rule, which found that these legacy technologies typically lag on speeds, latency, and other factors, as compared to more modern technologies like fiber.”

<sup>36</sup> Twelfth Measuring Broadband America Fixed Broadband Report, at 11: “(the) weighted mean advertised speeds for DSL technology was 24 Mbps, which lagged considerably behind the weighted mean advertised download speeds for cable and fiber technologies of 305 Mbps and 510 Mbps, respectively...”

## **6. Low-Speed Fixed Wireless Service Modification**

The Staff Proposal includes one modification to the status of locations that are identified as served on the National Broadband Map, but where the locations are only offered fixed wireless broadband service. Staff proposes that this Commission adopt a rebuttable presumption that the locations the National Broadband Map shows to have available non-qualifying broadband service (*i.e.*, a location that is “underserved”) delivered over Licensed Fixed Wireless (LFW) as “unserved” for reported speeds that are lower than or equal to 30 Mbps /5 Mbps.<sup>37</sup>

Staff make this recommendation due to several technical limitations of fixed wireless service, such as: heavy fluctuation in fixed wireless broadband service speeds based on usage; signal interference; line of sight issues caused by changes in terrain and foliage density; proximity to a base station; or capacity of the cell site. Staff rely on the findings of impartial third parties, Commission Staff analysis and testing, and user agreements for leading providers of cellular fixed wireless which indicate that users will be deprioritized during periods of network congestion which increase the likelihood that service delivered to consumers will not meet the claimed thresholds.<sup>38</sup>

Staff assert this modification will reflect better the locations prioritized for BEAD funding because it will consider the actual speeds of locations are able to receive, while minimizing the burden on residents and challengers to collect data proactively through the speed test module. Further, Staff contend that most of these locations are within areas designated by this Commission as ESJ

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<sup>37</sup> Staff Proposal Attachment A at 9.

<sup>38</sup> *Id.* at 9-10.

Communities, and it is therefore critical to ensure that these communities are not excluded from BEAD based on exaggerated deployment claims.

To the extent that fixed wireless broadband service providers have data demonstrating that their networks consistently and reliably meet the NTIA's speed thresholds, they may rebut this classification through the Challenge Process as outlined in NTIA's BEAD Challenge Process Policy Notice version 1.3, Section 7.

### **6.1. Positions of Parties**

Parties disagree on whether the Commission should adopt this proposal, with fixed wireless providers opposing, while consumer and community organizations, as well as the cable industry, support the proposal.

The Greenling Institute and #OaklandUndivided, Community Legal Services, RCRC, and Cal Advocates support the proposal.<sup>39</sup> Joint Labor Respondents support the proposal and further recommend that the Commission change the availability status of areas listed on the National Broadband Map as served through licensed fixed wireless from "served" to "underserved."<sup>40</sup> The California Broadband and Video Association supports the proposed modification,<sup>41</sup> opining that "recent research demonstrates that licensed fixed wireless providers typically only have sufficient capacity to serve a small percentage of the homes and businesses in their coverage areas and are unable to provide service to all potential customers in their coverage areas."<sup>42</sup>

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<sup>39</sup> Greenlining and #Oakland Undivided, Opening Comments, at 13-14. Community Legal Services, Opening Comments, at 7. RCRC, Opening Comments, at 3. Cal Advocates, Opening Comments, at 17.

<sup>40</sup> Joint Labor Respondents Opening Comment at 4.

<sup>41</sup> California Broadband and Video Association, Opening Comments, at 48.

<sup>42</sup> *Id.* at 54-55.



As discussed more in Section 13.1, for increased efficacy, Cal Advocates proposes several modifications regarding the types of information or data challenges and rebutters should provide as it related to fixed wireless service.

WISPA contends fixed wireless providers should not be treated differently than other technologies: if a provider demonstrates that their contracts do not include such data throttling provisions, arguing that the Commission has no basis to prima facie treat areas shown as served as anything less based on a bias against a given technology. Further, WISPA opines that treating all licensed fixed wireless service as “unreliable” sharply deviates from the guidelines in the NTIA’s,<sup>43</sup> claiming that the NTIA rejected Ohio’s draft Initial Proposal challenge process “for treating locations that the National Broadband Map shows to have available qualifying broadband service ... delivered via Licensed Fixed Wireless technologies as unserved,” and “required Broadband Ohio to re-draft this section of its challenge process to come into line with NTIA’s definition of reliable broadband service.”<sup>44</sup>

CTIA also opposes the proposed fixed wireless modification, opining that the IIJA recognizes fixed wireless broadband as a reliable broadband technology, making the Staff Proposal inconsistent with, and contrary to, the plain language of the IIJA and the BEAD program requirements described in the NTIA’s NOFO.<sup>45</sup> Additionally, CTIA asserts the NTIA’s NOFO requires that California identify unserved and underserved locations using the most recently published Broadband Maps, and using a different definition for unserved would be in violation of the NTIA’s NOFO, claiming that the “NTIA also makes clear that it

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<sup>43</sup> WISPA, Opening Comments, at 2-3.

<sup>44</sup> WISPA, Reply Comments, at 2.

<sup>45</sup> CTIA, Opening Comments, at 4.

“will not approve proposals to make wholesale changes to the classification of locations as unserved, underserved, or served”<sup>46</sup> CTIA further argues that the recategorization of locations based on speed is properly laid out in the challenge process, but that the Commission is not eligible to offer such challenges.<sup>47</sup> CTIA also disputes the information and data the Staff Proposal relies on, opining that the technical arguments for the inclusion of the modification are based on anecdotal articles and observations without frequency listed, and “none of these data sources satisfies the standards for a ‘rigorous speed test’ finding that NTIA contemplates might justify evidence-based reclassification of locations.”<sup>48</sup>

CTIA claims the variation of speed based on periods of network congestion are ubiquitous across the telecommunications industry, and these limitations extend beyond fixed wireless service. Further, the current categorizations already account for network management or fluctuations, and the challenge process addresses these issues, which make it an invalid reason to reclassify wireless locations pre-challenge process.<sup>49</sup> CTIA asserts that the 5G Home Internet services provided by CTIA’s members meet programmatic requirements and that including additional unserved locations is counterintuitive when the Commission has raised concerns about whether it will have sufficient funding to reach all unserved locations in California.<sup>50</sup>

GeoLinks disputes CTIA’s claim that mobile wireless is included in the definition of reliable broadband service, and instead argues that the Commission

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<sup>46</sup> *Id.* at 5.

<sup>47</sup> *Id.* at 7.

<sup>48</sup> *Id.* at 8.

<sup>49</sup> *Id.* at 7-8.

<sup>50</sup> *Id.* at 10.

must distinguish between fixed wireless service and broadband service offered via mobile wireless, as the services are not the same, which GeoLinks contends the FCC has recognized in its establishment of different governance rules that apply to each kind of service.<sup>51</sup>

Tarana Wireless argues adopting the fixed wireless modification will add more broadband serviceable locations to the unserved locations eligible for priority service and will strain finite resources and jeopardize California's chances of meeting the goal of 100 percent universal service. Tarana Wireless claims that fixed wireless access technology has evolved beyond the limitations described in the Staff Proposal, and that Tarana Wireless has developed proven hardware and software technologies which overcome line-of-sight obstructions and disruptive interference to provide reliable, high-speed broadband service to hundreds of homes off of a single base node. While traditional fixed wireless systems, such as those utilizing 3GPP<sup>52</sup> or WiFi technologies, may struggle to maintain reliable broadband service in inclement weather, Tarana Wireless asserts its technology has effectively overcome these challenges.<sup>53</sup>

## **6.2. Discussion**

The Commission supports this proposal, as it is consistent with its Federal Funding Account rules.<sup>54</sup> When rebutting the FCC's National Broadband Map,

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<sup>51</sup> GeoLinks, Opening Comments, at 2-3.

<sup>52</sup> Third Generation Partnership Project, or 3GPP, is a general term used to describe a number of standards organizations which develop protocols for mobile telecommunications.

<sup>53</sup> Tarana Wireless, Opening Comments, at 3-5.

<sup>54</sup> See D.22-04-055, *Decision Adopting Federal Funding Account Rules*, at A-8, where the Commission defined an unserved area as "an area for which no wireline broadband provider reliably offers broadband service at speeds of at least 25 Mbps downstream and 3 Mbps upstream to the entire community."

released on November 18, 2022, the Commission challenged 9.9 million locations, with 88 percent of those locations purported to be served by wireless internet service providers, and one provider's challenged locations accounting for nearly 66 percent of the total.<sup>55</sup> CTIA misstates the information and data that Commission Staff relied on to develop this proposal, ignoring that the proposal cites user agreements from AT&T, Verizon, and T-Mobile.

The NTIA instructed the Commission to cure this modification since fixed wireless service meets the NTIA's definition of reliable broadband service, though it is subject to the same challenges that wireline service must meet. However, the NTIA accepted the Commission's proposal that conditions contained in the user agreements of AT&T, Verizon and T-Mobile are sufficient to adopt a rebuttable presumption that their cellular wireless broadband service does not meet the definition of reliable broadband service, even if these companies claim to be able to meet the speed threshold. The Commission's broadband maps for BEAD will reflect this approach.

The Commission looks forward to working collaboratively with fixed wireless providers to achieve the goal of the BEAD Program, as it will not be possible to achieve it without utilization of fixed wireless solutions.

## **7. Speed Test Modification**

The Staff Proposal includes a modification that the Commission treat as "underserved" locations that the National Broadband Map shows to be "served" if rigorous speed test methodologies (*i.e.*, methodologies aligned to the BEAD Model Challenge Process Speed Test Module), including data collected by the Commission in connection with another grant program challenge or objection

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<sup>55</sup> See, *Ruling of Assigned ALJ Noticing NTIA Curing Instructions and Other Items*, issued April 2, 2024.

process, the Commission's CalSPEED initiative,<sup>56</sup> or another tool using methodologies equivalent to the BEAD Model Challenge Process Speed Test Module, demonstrate that the "served" locations actually receive service that is materially below 100 Mbps downstream and 20 Mbps upstream.

Under the Staff Proposal, the Commission would treat as "unserved" locations that the National Broadband Map shows to be either "underserved" or "served" if rigorous speed test methodologies demonstrate that these locations actually receive service that is materially below 25 Mbps downstream and 3 Mbps upstream. Rigorous speed test methodologies include methodologies aligned to the BEAD Model Challenge Process Speed Test Module, such as data collected by the Commission in connection with another Commission grant program challenge or objection process, the Commission's CalSPEED initiative, or another tool that uses methodologies equivalent to the BEAD Model Challenge Process Speed Test Module.

Staff assert this modification will better reflect the locations eligible for BEAD funding because it will consider the actual speeds of locations, leveraging the extensive data collection already conducted by the Commission and reducing the administrative burden on challengers, providers, and Commission Staff to process challenges for locations already successfully challenged using equivalent evidence to that required for BEAD challenges.

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<sup>56</sup> The Commission's CalSPEED program measures the reliability, quality, and availability of mobile wireless services. CalSPEED uses its own open-source software to take these measurements. This information is used to create online maps that display the data gathered. CalSPEED uses its own software in smartphones to take measurements at more than 4,000 locations in urban, rural, and Tribal areas across California. CalSPEED measures downstream and upstream speeds, round trip time, service consistency, data loss, call quality, video quality, and more.

### 7.1. Positions of Parties

Parties disagree over whether the Commission should adopt the proposal.

Joint Labor Respondents, RCRC, CforAT and TURN, and #OaklandUndivided support the proposed speed test modification.<sup>57</sup> Community Legal Services Legal recommends that speed tests be allowed to change a served determination from served to underserved but not to unserved<sup>58</sup> and that if possible, the speed test be performed on a computer that is hardwired with an ethernet cable directly to the modem and that the application conducting the speed test not require the provider-assigned internet protocol (IP) address, either version 4 or version 6, identifying the residential gateway conducting the test.<sup>59</sup>

The California Broadband and Video Association opposes the proposed speed test modification, claiming it could inundate the state with inaccurate challenges.<sup>60</sup> Further, California Broadband and Video Association opines that the speed test data collected likely will not meet the evidentiary standards required by the NTIA.<sup>61</sup>

AT&T asks the Commission to clarify that speed tests will not be required for locations served by end-to-end fiber, arguing that speed tests are unnecessary for fiber broadband service because end-to-end fiber consistently delivers speeds to end user premises that far exceed speeds of 100 Mbps/20 Mbps.<sup>62</sup>

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<sup>57</sup> Joint Labor Respondents Opening Comments at 4. RCRC, Opening Comments, at 3. CforAT and TURN, Reply Comments, at 15-16. #OaklandUndivided, Reply Comments, at 7.

<sup>58</sup> Community Legal Services, Opening Comments, at 14.

<sup>59</sup> Community Legal Services, Opening Comments, at 11-12.

<sup>60</sup> California Broadband and Video Association, Opening Comments, at 47.

<sup>61</sup> *Id.* at 52.

<sup>62</sup> AT&T, Opening Comments, at 2-3.

WISPA recommends that any speed tests be subject to prior verification of the ISP's then-current network topology so that all speed tests rely on accurate network architecture data rather than surmise or third-party guesswork.<sup>63</sup> WISPA appreciates the proposed stipulation that speed tests must include "certification of the speed tier to which the customer subscribes...California should incorporate this into all speed-related modifications."<sup>64</sup>

## **7.2. Discussion**

This Commission has a long history of using speed tests to help determine if a specific location or area is eligible for broadband grant funding. Thus, this proposal appeared to be appropriate to include in the BEAD Program rules. However, the NTIA does not support this modification<sup>65</sup> and, as such, this proposal is not adopted.

## **8. De-duplication of Funding**

The NTIA's rules prohibit this Commission from treating any location that will be served due to an enforceable federal, state, or local commitment to deploy

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<sup>63</sup> WISPA, Opening Comments, at 3-4.

<sup>64</sup> *Id.* at 4.

<sup>65</sup> *See, Ruling of Assigned ALJ Noticing NTIA Curing Instructions and Other Items*, issued April 2, 2024.

qualifying broadband as “unserved” or “underserved.”<sup>66</sup> However, NTIA rules allow this Commission to request a waiver from this provision.<sup>67</sup>

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<sup>66</sup> Per NTIA NOFO Section IV.B.7.a.ii, at 36, footnote 52:

An enforceable commitment for the deployment of qualifying broadband to a location exists when the commitment to deploy qualifying broadband service to that location was made as a condition of:

- Any grant, loan, or loan guarantee provided by an Eligible Entity to the provider of broadband service;
- Any grant, loan, or loan guarantee provided by the Secretary of Agriculture under:
  - o Title VI of the Rural Electrification Act of 1936 (7 U.S.C. § 950bb *et seq.*), including: any program to provide grants, loans, or loan guarantees under Sections 601 through 603 of that Act (7 U.S.C. § 950bb *et seq.*); and the Community Connect Grant Program established under Section 604 of that Act (7 U.S.C. § 950bb-3); or
  - o The broadband loan and grant pilot program known as the “Rural eConnectivity Pilot Program” or the “ReConnect Notice of Funding Opportunity Program” authorized under Section 779 of division A of the Consolidated Appropriations Act, 2018 (Public Law 115-141; 132 Stat. 348);
  - o Any high-cost universal service support provided under Section 254 of the Communications Act of 1934 (47 U.S.C. § 254), except that in the case of the Rural Digital Opportunity Fund, a location will be considered to have an enforceable commitment for qualifying broadband only (a) after the Federal Communications Commission has announced in a Public Notice that RDOF support for that location is ready-to-authorize or is authorized, and (b) the provider does not rely on satellite technologies to deliver service;
- Any grant provided under Section 6001 of the American Recovery and Reinvestment Act of 2009 (47 U.S.C. § 1305);
- Amounts made available for the Education Stabilization Fund established under the heading “DEPARTMENT OF EDUCATION” in title VIII of division B of the CARES Act (Public Law 116-136; 134 Stat. 564), and funded under the CARES Act, the Coronavirus Response and Relief Supplemental Appropriations Act (CRRSA Act), and the American Rescue Plan Act (ARP Act);

*Footnote continued on next page.*



The Staff Proposal includes a recommendation that the Commission use the NTIA's BEAD Eligible Entity Planning Toolkit (Toolkit) to identify existing federal enforceable commitments to avoid any de-duplication of broadband grant funding. The NTIA describes this Toolkit as "NTIA-developed technology tools that, among other things, overlay multiple data sources to capture federal, state, and local enforceable commitments"<sup>68</sup> and as "an interactive web-based tool hosted in NTIA's ArcGIS Online environment."<sup>69</sup>

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- Amounts made available for the Coronavirus State and Local Fiscal Recovery Funds (SLFRF) established under the American Rescue Plan Act of 2021 (Public Law 117-2; 135 Stat. 4) (ARPA);
  - Amounts made available for the Capital Projects Fund established by Section 604 of the Social Security Act, as added by Section 9901 of ARPA; or
  - Any other grant, loan, or loan guarantee provided by, or funded in whole or in part by, the federal government or a State or Territorial government for the provision of broadband service."

Eligible Entities may fund Unserved Service Projects and Underserved Service Projects that include locations in an area that has an enforceable commitment for the deployment of qualifying broadband to less than 100 percent of the locations in that area. *See, e.g.*, 47 C.F.R. § 54.308(a). Eligible Entities must, however, seek to identify as part of the challenge process described in Section IV.B.6 of this NOFO those unserved locations and underserved that will not be served by qualifying broadband service as a result of such enforceable commitment, and use that information in determining whether to treat each location as unserved or underserved within the relevant area.

Further, for unserved locations and underserved on Tribal Lands, a commitment that otherwise meets the criteria set forth above shall not constitute an enforceable commitment for the deployment of qualifying broadband unless it includes a legally binding agreement, which includes a Tribal Government Resolution, between the Tribal Government of the Tribal Lands encompassing that location, or its authorized agent, and a service provider offering qualifying broadband service to that location.

<sup>67</sup> NTIA BEAD Challenge Process Notice at 15.

<sup>68</sup> *Id.* at 15.

<sup>69</sup> *See* NTIA, Frequently Asked Questions and Answers Draft Version 1.0, Broadband, Equity, Access, and Deployment (BEAD) Program Eligible Entity Planning Toolkit at 2.

In addition to relying on the Toolkit, Staff proposed to use the following data sets:

- The Broadband Funding Map published by the FCC pursuant to IIJA § 60105;<sup>70</sup>
- Data sets from the State of California broadband deployment programs that rely on funds from the Capital Projects Fund and the State and Local Fiscal Recovery Funds administered by the U.S. Treasury;
- Data sets from the State of California broadband deployment programs that rely on State of California funds, as well as other local data collections of existing enforceable commitments; and
- Data sets from California local governments and Tribal nations regarding any broadband deployments they have funded.<sup>71</sup>

The Staff Proposal allows for the flexibility to consider any funding from programs that will take effect after the Challenge Process begins, but prior to the initiation of the subgrantee selection process. Programs and funding under consideration for de-duplications may include, among others: Capital Projects Fund grants, Federal Funding Account funding, California Advanced Services Fund grants, the FCC's Rural Deployment Opportunity Fund grants, or the United States Department of Agriculture's ReConnect grants, all of which may be used as match to BEAD applications. To the extent such funding is already awarded and able to cover all locations within an area without BEAD funding, the Commission will de-duplicate such locations.<sup>72</sup>

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<sup>70</sup> The broadband funding map published by FCC pursuant to IIJA § 60105 is referred to as the "FCC Broadband Funding Map."

<sup>71</sup> Staff Proposal at Attachment A 12.

<sup>72</sup> *Id.* at Attachment A 12-13.

### **8.1. Positions of Parties**

TURN and CforAT generally support the proposed de-duplication process, but encourage the Commission to ensure that any items identified as enforceable commitments are truly enforceable, since some providers may apply for funds and subsequently reject the funding after it is awarded, or fail to meet their obligations.<sup>73</sup> The Small LECs ask the Commission to add the following to the list of Enforceable Commitments in Appendix 5: the Federal Funding Account (FFA), U.S. Department of Agriculture ReConnect Loan and Grant Program, Enhanced Alternative Connect America Cost Model (A-CAM).<sup>74</sup>

### **8.2. Discussion**

The Commission adopts this proposal. The NTIA also approved it. Where the Commission believes a waiver is needed it will request a waiver from the NTIA. The Commission intends to delegate to Staff the authority to file a waiver and/or modification of the NTIA's de-duplication process consistent with this decision. Whether the NTIA approves the Commission's proposed match funding process, which is subject to Volume Two of the Initial Proposal, will determine the specific instructions the Commission will provide Staff.

## **9. Community Anchor Institutions**

Consistent with the definition of "community anchor institution" in 47 USC 1702 (a)(2)(E), the Staff Proposal includes the following entities as community anchor institutions: a school, library, health clinic, health center, hospital or other medical provider, public safety entity, institution of higher education, public housing organization (including any public housing agency and U.S. Department of Housing and Urban Development-assisted housing

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<sup>73</sup> TURN and CforAT, Opening Comments, at 20.

<sup>74</sup> The Small LECs, Opening Comments, at 5-6.

organization), or community support organization that facilitates greater use of broadband service by vulnerable populations, including, but not limited to, low-income individuals, unemployed individuals, children, the incarcerated, and aged individuals. This proposed definition includes all facilities of the sorts described above that are owned by or provided for Tribal nations.<sup>75</sup>

Commission Staff assessed the network connectivity needs of the types of eligible community anchor institutions listed above, including direct outreach to many of the entities, based on whether the community support organization facilitates greater use of broadband service by vulnerable populations, including, but not limited to, low-income individuals, unemployed individuals, children, the incarcerated, and aged individuals.<sup>76</sup>

Appendix 4 of the Staff Proposal contains a list of community anchor institutions that do not have adequate broadband service, based on Commission Staff analysis.

### **9.1. Positions of Parties**

CENIC expresses concern that the Community Anchor Institution list in Appendix 4 contains a number of duplicate entries and recommends the deletion of those entries<sup>77</sup> and looks forward to the opportunity to review the final list of community anchor institutions as part of the Challenge Process.<sup>78</sup> Community Legal Services asserts that the information used to determine eligibility for all health clinics, health centers, and hospitals may not be accurate, noting that 417 of the 737 locations listed in Appendix 4 have no broadband availability rating,

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<sup>75</sup> Staff Proposal at 5.

<sup>76</sup> *Id.* at 5-7.

<sup>77</sup> CENIC, Opening Comments, at 2.

<sup>78</sup> *Id.* at 3.

while only 38 have an affirmative rating of “0.”<sup>79</sup> CENIC agrees, noting collecting this kind of data from community anchor institutions is very challenging and often is only as accurate at the moment in time that it is reported.<sup>80</sup>

RCRC proposes that the county of the community anchor institution be included in the list in Appendix 4, asserting it is easier for counties to identify community anchor institutions. RCRC note that errors occurred in the Staff Proposal, for example in Alpine County, where a library and sheriff substation in Bear Valley were omitted, but certain community anchor institutions in or near Markleeville and Woodfords were duplicated.<sup>81</sup>

Community Legal Services opposes including all health clinics, health centers, and hospitals with Centers for Medicare and Medicaid Services (CMS) identifier certification number (CCN) within the definition of Community Anchor Institution, making them eligible for BEAD funding. Community Legal Services asserts that list of proposed eligible community anchor institutions includes some of the wealthiest hospitals in California, which are owned or run by some of the wealthiest companies in America, including Kaiser, Sutter, Cedars- Sinai Health System, and the University of Southern California. Community Legal Services recommends removing health clinics, health centers, and hospitals that are the least situated to facilitate greater use of broadband services by vulnerable populations and the least likely to need BEAD funds. Community Legal Services recommends removing from Appendix 4 hospitals with annual net patient revenue above a certain limit, perhaps \$1 billion, which would remove UCSF Medical Center, Cedars-Sinai Medical Center,

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<sup>79</sup> Community Legal Services, Opening Comments, at 6.

<sup>80</sup> CENIC, Reply Comments, at 2.

<sup>81</sup> RCRC, Opening Comments, at 2.

UC San Diego Medical Center, Ronald Reagan UCLA Medical Center, LAC/USC Medical Center, Keck Hospital of USC, Loma Linda University Medical Center, Sutter Medical Center-Sacramento, LAC/Harbor-UCLA Medical Center, and Kaiser Foundation Hospital-Santa Clara. Community Legal Services also suggests it may be reasonable to remove affiliate hospitals as well.<sup>82</sup> In contrast, Community Legal Services contends that health clinics that are located in disadvantaged communities, serve patients without insurance, and do not require appointments would most closely conform to the definition of a community anchor institution. Community Legal Services asserts that such locations are more accessible to low-income members of the public than private, insurance-based hospitals and would better facilitate greater use of broadband services by vulnerable populations.<sup>83</sup> CENIC asserts that the rationale to remove these selected sites from the list should be because they have over 1 Gigabit symmetrical service with latency less than or equal to 100 milliseconds as stated in the NTIA's NOFO.<sup>84</sup>

RCRC proposes that County and Local Government centers be included in the list of Community Anchor Institutions and that references to "vulnerable populations" for community anchor institutions instead be referenced as "covered populations," to be consistent with the Digital Equity Act and California's Five-Year Action Plan.<sup>85</sup>

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<sup>82</sup> Community Legal Services, Opening Comments, at 1-6.

<sup>83</sup> *Id.* at 3.

<sup>84</sup> CENIC, Reply Comments, at 3.

<sup>85</sup> RCRC, Opening Comments, at 3.

Greenlining and #OaklandUndivided propose that the Commission classify public housing as a community anchor institution, to align with the definition used in the CASF Public Housing Account Program.<sup>86</sup>

iFoster generally supports the Staff Proposal's definition of community anchor institution, but requests that "foster youth" be added to the vulnerable populations that may be served by an eligible community support organization and thus fall within the definition of a community anchor institution.<sup>87</sup>

## **9.2. Discussion**

The Commission adopts the Staff Proposal. The NTIA also approved it. In response to comments, updated appendices will be provided to NTIA and released as part of the Challenge Process.

## **10. Permissible Challenges to Determinations of Served, Unserved and Underserved Status**

As noted above, after submitting its Initial Proposal to the NTIA and before allocating BEAD funding, this Commission must ensure a transparent, evidence-based, and expeditious challenge process under which a unit of local government, nonprofit organization, or other broadband service provider can challenge a determination made by the eligible entity in the initial proposal as to whether a particular location or community anchor institution within the jurisdiction of the eligible entity is eligible for the grant funds, including whether a particular location is unserved or underserved.<sup>88</sup>

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<sup>86</sup> Greenlining and #OaklandUndivided, Opening Comments, at 13.

<sup>87</sup> iFoster, Opening Comments, at 7-9.

<sup>88</sup> Infrastructure Investment and Jobs Act, Section 60102(h)(2)(A)

To challenge eligibility determinations, the Staff Proposal recommends adopting the NTIA’s Model Challenge Process,<sup>89</sup> inclusive of modifications, which permits challenges on the following grounds:

- The identification of eligible community anchor institutions (CAI), as defined by the Commission;
  - Location is a CAI; or
  - Location is not a CAI.
- Community anchor institution BEAD eligibility determinations;
  - Qualifying broadband is not available; or
  - Qualifying broadband is available.
- BEAD eligibility determinations for existing broadband serviceable locations (BSLs);
- Enforceable commitments;<sup>90</sup> or
- Planned service.<sup>91</sup>

#### **10.1. Positions of Parties**

Joint Labor Respondents proposes that the Commission create an “affordability challenge,” similar to that proposed by the Public Service Commission of Wisconsin, for instances where all available broadband subscription options remain unreasonably costly, making the service inaccessible in practice. The Public Service Commission of Wisconsin defined unreasonable subscription cost as exceeding 250 percent of the average minimum broadband

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<sup>89</sup> Staff Proposal Attachment A at 8.

<sup>90</sup> See Footnote 65.

<sup>91</sup> The challenger has knowledge that broadband will be deployed at this location by June 30, 2024, without an enforceable commitment or a provider is building out broadband offering performance beyond the requirements of an enforceable commitment. See Staff Proposal Attachment A at 18.



monthly subscription price for an urban census block, with successful challenges to locations that meet this criteria designated as eligible “underserved” locations.”<sup>92</sup> Community Legal Services offers a similar proposal, where challengers would be allowed to raise an “availability” challenge by demonstrating that there is no affordable 100/20 Mbps service for residences or affordable 1 Gbps symmetrical service for Community Anchor Institutions. (*i.e.*, \$30/month for 100/20 Mbps or \$80/month for 1 Gbps symmetrical service)<sup>93</sup>

## 10.2. Discussion

The Commission has found that unaffordable broadband is very similar to no broadband<sup>94</sup> and has designed other broadband grants with affordability in mind.<sup>95</sup> However, it does not appear that the NTIA’s Model Challenge Process contemplates challenges based on an affordability criteria.<sup>96</sup> Further, even if that

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<sup>92</sup> Joint Labor Respondents, Opening Comments, at 5.

<sup>93</sup> Community Legal Services, Opening Comments, at 8-9.

<sup>94</sup> See Resolution T- 17350, *Approval of Funding for the Grant Application of Verizon California Inc. (U1002C) from the California Advanced Services Fund (CASF) Amounting to \$286,398.45 for the Crowley Lake and Swall Meadows Unserved and Underserved Broadband Project*, at 6. The Commission approved CASF Funding to Verizon California, despite a challenge. The greatest reason for denying the challenge was that Communications Division Staff could not verify the challenger’s claims that it was capable of serving the communities in question, especially when the data submitted by the challenger contradicted its assertions. However, both Staff and the Commission found it problematic to uphold a challenge where the challenger charged an unaffordable price.

<sup>95</sup> See D.22-04-055, *Decision Adopting Federal Funding Account Rules*, at 64. FFA grantees must participate in the federal ACP program or otherwise provide access to a broad-based affordability program to low-income consumers. FFA grantees that participate or commit to participating in the federal Lifeline program or the California LifeLine program receive 10 points. Additionally, FFA applications will receive 20 additional points for offering a generally available low-cost broadband plan for the life of the infrastructure.

<sup>96</sup> Challenges are permitted on the following grounds:

- The identification of eligible community anchor institutions (CAI), as defined by the Commission;

*Footnote continued on next page.*

was not the case, it is not clear how affordability challenges could be managed statewide in the timeframe allowed for by the NTIA. Pending the NTIA's approval, Volume 2 of the Commission's Initial Proposal will address affordability through the scoring process.

## **11. Entities Eligible to Submit Challenges**

The Staff Proposal recommends adopting the NTIA BEAD Model Challenge Process. The NTIA identifies the following entities as eligible to submit challenges: nonprofit organizations, units of local and tribal governments, and broadband service providers.<sup>97</sup>

### **11.1. Positions of Parties**

RCRC opposes limiting eligible entities for submitting challenges, asserting that "limiting permissible challengers solely to nonprofit organizations, local government entities, tribal nations, and service providers unfairly disenfranchises businesses and individuals from putting forward credible objections, and places untenable burdens on nonprofits and local and tribal governments to serve as clearinghouses for individual objections."<sup>98</sup>

- 
- Location is a CAI; or
  - Location is not a CAI.
  - Community anchor institution BEAD eligibility determinations;
    - Qualifying broadband is not available; or
    - Qualifying broadband is available.
  - BEAD eligibility determinations for existing broadband serviceable locations (BSLs);
  - Enforceable commitments; or
  - Planned service.

<sup>97</sup> NTIA BEAD Challenge Process Guidance at 12.

<sup>98</sup> RCRC, Opening Comments, at 4.

## **11.2. Discussion**

The Commission adopts this proposal. We believe this is the most efficient way to meet the tight deadlines associated with implementing the BEAD Program, including finalizing the Challenge Process in 120 days, as well as reviewing and finalizing proposed grants for NTIA approval within 365 days of the NTIA's approval of Volume 2 of the Initial Proposal.

## **12. Time Frames for Challenges**

As noted above, the Staff Proposal recommends the Commission use the NTIA's Model Challenge Process. NTIA rules require the Commission's Challenge Process for each broadband serviceable location include the following four phases: (a) publication of eligible locations; (b) challenge; (c) rebuttal; and (d) final determination.

The publication of eligible locations phase is when the Commission publishes the set of locations eligible for BEAD funding, as well as served locations, both of which are subject to challenge.

The Challenge Phase is the period of time when permissible challengers submit their challenges, using an online portal maintained by the Commission. These challenges must be visible to the service providers whose service availability is being contested.

The rebuttal phase is when a service provider is allowed to rebut a challenge regarding its ability to serve a particular location. If a challenge that meets the minimum level of evidence is not rebutted within the rebuttal period, the challenge is substantiated considered sustained.<sup>99</sup>

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<sup>99</sup> NTIA BEAD Challenge Process Guidance at 16.

The final determination phase is when the Commission decides whether a disputed location is eligible, either declaring the challenge “sustained” or “rejected.”<sup>100</sup>

The Staff Proposal proposes a Challenge Process spanning up to 90 calendar days, consistent with the schedule of the NTIA model challenge process. The proposed deadlines are below.

- a. Commission Staff would publish eligible locations on February 15, 2024.<sup>101</sup>
- b. Challengers may dispute eligibility determinations for broadband serviceable locations for 30 days, tentatively from March 1, 2024 through March 30, 2024. Challengers may submit the challenge through the Commission’s challenge portal. All challenges will be made public. The portal will notify the provider of the challenge through an automated email, which will include related information about timing for the provider’s response. At this time, the location will enter the “challenged” state.

The challenge portal will verify the following:

- That the address provided in the challenge can be found in the Fabric<sup>102</sup> and is a BSL;
- That the challenged service is listed in the National Broadband Map and meets the definition of reliable broadband service;

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<sup>100</sup> *Id.*

<sup>101</sup> Staff Proposal at 12.

<sup>102</sup> The Broadband Serviceable Location Fabric (Fabric) is a dataset of all locations in the United States and its Territories where fixed broadband internet access service is or could be installed. The Fabric allows broadband availability data filers, the FCC, and other stakeholders to work from a single, standardized list of locations for the Broadband Data Collection (BDC). The FCC has contracted with CostQuest Associates to create the Fabric. More information is available on the FCC’s website at <https://help.bdc.fcc.gov/hc/en-us/articles/5375384069659-What-is-the-Location-Fabric>.

- That the email address from which the challenge was sent is verifiable and reachable by sending a confirmation message to the listed contact email; and
- For scanned images, the challenge portal will determine whether the quality is sufficient to enable optical character recognition (OCR).

For availability challenges, Commission Staff will manually verify that the evidence submitted falls within the categories stated in the NTIA BEAD Challenge Process Policy Notice and the document is unredacted and dated.<sup>103</sup>

- c. Providers will have 15 calendar days from notification of a challenge to provide rebuttal information to the CPUC. The 15-day challenge rebuttal period will run from April 1, 2024 to April 15, 2024. Providers may rebut, concede the challenge or choose to not rebut it.<sup>104</sup>
- d. Commission Staff will make a final challenge determination within 30 calendar days of the challenge rebuttal. Reviews will occur on a rolling basis, as challenges and rebuttals are received. The proposed 30-day final determination period will run from April 16, 2024 to May 15, 2024.<sup>105</sup>

### **12.1. Positions of Parties**

AT&T recommends the Commission align with the NTIA's guidance and maintain challenge submission rebuttal windows open for at least 30 calendar days.<sup>106</sup> The California Broadband and Video Association asks the Commission

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<sup>103</sup> Staff Proposal at 12-13.

<sup>104</sup> *Id.* at 13.

<sup>105</sup> *Id.* at 13-14.

<sup>106</sup> AT&T, Opening Comments, at 1.

to adopt an overall timeframe of 120 days to conduct the challenge process, as it asserts is contemplated by NTIA.<sup>107</sup>

The California Broadband and Video Association asks the Commission to provide a 45-day period for challenge submissions, followed by a 45-day period for rebuttals to any challenges, and require local governments and nonprofits to conduct a pre-screening process to remove frivolous or incomplete challenges submitted by individuals.<sup>108</sup> #OaklandUndivided opposes the pre-screening process proposed by the California Broadband and Video Association, contending that it is arbitrary, and in noncompliance with any provided guidance regarding these funds, reiterating its encouragement to design a challenge process which is accessible to California consumers and their representative non-profit organizations who are currently misrepresented in existing mapping data.<sup>109</sup>

The California Broadband and Video Association requests the Commission establish a 30-day period before the opening of the challenge submission window to allow providers to submit evidence of existing enforceable commitments<sup>110</sup>

Joint Labor Respondents request the Commission extend the 15-day rebuttal period if an ISP provides a reasonable explanation for why additional time is needed to submit rebuttal evidence.<sup>111</sup>

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<sup>107</sup> California Broadband and Video Association, Opening Comments, at 49.

<sup>108</sup> *Id.* at 47.

<sup>109</sup> #OaklandUndivided, Reply Comments, at 3.

<sup>110</sup> California Broadband and Video Association, Opening Comments, at 49.

<sup>111</sup> Joint Labor Respondents, Opening Comments, at 6.

CENIC supports aligning the challenge window with the NTIA guidance on timeframes, if not a longer window.<sup>112</sup>

## **12.2. Discussion**

The Commission adopts this proposal to reflect approved NTIA guidance issued<sup>113</sup> after staff prepared its proposal. We revise the specific deadlines for certain Challenge Process tasks in the following manner:

- The Challenge Phase shall commence seven (7) calendar days after the publication of the Eligible Locations;
- The deadline for eligible challengers to submit their challenges shall be 30 calendar days following the start of the Challenge Phase;
- The Evidentiary Review period shall commence following the conclusion of the Challenge Phase and last for a period of 14 calendar days;
- The Rebuttal Phase shall commence following the conclusion of the Evidentiary Review. The deadline for rebuttals shall be 30 calendar days following the conclusion of the Evidentiary Review;
- The Final Determination Phase shall commence following the conclusion of the Rebuttal Phase and last for a period of 30 calendar days.

We specifically decline to adopt the California Broadband and Video Association's proposed pre-screening process. The California Broadband and Video Association does not provide sufficient evidence demonstrating that challenges submitted by non-profits or the general public lack information or contain data that is less accurate than what an internet service provider may

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<sup>112</sup> CENIC, Reply Comments, at 2.

<sup>113</sup> BEAD Challenge Process Policy Notice Version 1.3

submit, nor does it convince us that the industry should receive special treatment over the customers they serve.

### 13. Information Required for Challenges

The Staff Proposal includes several types of challenges, as well as the examples of the information our Commission Staff will require to review those challenges or to determine a rebuttal.<sup>114</sup> That information is summarized in the table, below.

| Challenge Type | Description  | Specific Examples   | Permissible rebuttals   |
|----------------|--|---|---|
| Availability   | The broadband service identified is not offered at the location, including a unit of a multiple dwelling unit (MDU). | <ul style="list-style-type: none"> <li>• Screenshot of provider webpage.</li> <li>• A service request was refused within the last 180 days (<i>e.g.</i>, an email or letter from provider).</li> <li>• Lack of suitable infrastructure (<i>e.g.</i>, no fiber on pole).</li> <li>• A letter or email dated within the last 365 days that a provider failed to schedule a service installation or offer an installation date within 10 business days of</li> </ul> | <ul style="list-style-type: none"> <li>• Provider shows that the location subscribes or has subscribed within the last 12 months, <i>e.g.</i>, with a copy of a customer bill.</li> <li>• If the evidence was a screenshot and believed to be in error, a screenshot that shows service availability.</li> <li>• The provider submits evidence that service is now available as a standard installation, <i>e.g.</i>, via a copy of an offer sent to the location.</li> </ul> |

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<sup>114</sup> Staff Proposal at 15-19.



|              |   |  |  |
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|              |   | a request. <sup>115</sup> <ul style="list-style-type: none"> <li>• A letter or email dated within the last 365 days indicating that a provider requested more than the standard installation fee to connect this location or that a Provider quoted an amount in excess of the provider's standard installation charge in order to connect service at the location.</li> </ul> |  |
| <b>Speed</b> | The actual speed of the service tier falls below the unserved or underserved thresholds. <sup>116</sup> | Speed test by subscriber, showing the insufficient speed and meeting the requirements for speed tests. <sup>117</sup>  | Provider has countervailing speed test evidence showing sufficient speed, <i>e.g.</i> , from their own |

<sup>115</sup> A standard broadband installation is defined in the Broadband DATA Act (47 U.S.C. § 641(14)) as “[t]he initiation by a provider of fixed broadband internet access service [within 10 business days of a request] in an area in which the provider has not previously offered that service, with no charges or delays attributable to the extension of the network of the provider.”

<sup>116</sup> The challenge portal has to gather information on the subscription tier of the household submitting the challenge. Only locations with a subscribed-to service of 100/20 Mbps or above can challenge locations as underserved. Speed challenges that do not change the status of a location do not need to be considered. For *example*, a challenge that shows that a location only receives 250 Mbps download speed even though the household has subscribed to gigabit service can be disregarded since it will not change the status of the location to unserved or underserved.

<sup>117</sup> In accordance with the National Telecommunications and Information Administration's (NTIA) Model Challenge Process, the CPUC will accept speed tests as evidence for

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substantiating challenges and rebuttals. Each speed test must consist of three measurements, taken on different days. Speed tests cannot predate the beginning of the challenge period by more than 60 calendar days.

Speed tests can take four forms:

1. A reading of the physical line speed provided by the residential gateway, (*i.e.*, DSL modem, cable modem (for HFC), optical network terminal (ONT) (for Fiber To The Home), or fixed wireless subscriber module
2. A reading of the speed test available from within the residential gateway web interface
3. A reading of the speed test found on the service provider's web page

A speed test performed on a laptop or desktop computer within immediate proximity of the residential gateway, using speedtest.net or other Ookla-powered front ends or M-Lab's speed test services. Each speed test measurement must include: 1) the time and date the speed test was conducted; and 2) the provider-assigned internet protocol (IP) address, either version 4 or version 6, identifying the residential gateway conducting the test.

Each group of three speed tests must include:

- The name and street address of the customer conducting the speed test;
- A certification of the speed tier to which the customer subscribes (*e.g.*, a copy of the customer's last invoice or signed certification by the customer of the speed tier and a statement indicating the customer is subscribed to the highest service tier available);
- An agreement, using an online form provided by the CPUC, that grants access to these information elements to the CPUC, any contractors supporting the Challenge Process, and the service provider; and
- The IP address and the subscriber's name and street address are considered personally identifiable information (PII) and thus are not disclosed to the public (*e.g.*, as part of a challenge dashboard or open data portal).

Each location must conduct three speed tests on three different days; the days do not have to be adjacent. The median of the three tests (*i.e.*, the second highest (or lowest) speed) is used to trigger a speed-based (S) challenge, for either upload or download. For *example*, if a location claims a broadband speed of 100 Mbps/25 Mbps and the three speed tests result in download speed measurements of 105, 102 and 98 Mbps, and three upload speed measurements of 18, 26 and 17 Mbps, the speed tests qualify the location for a challenge, since the measured upload speed marks the location as underserved.

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|                |  |  | network management system. <sup>118</sup>   |
| <b>Latency</b> | The round-trip latency of the broadband service exceeds 100 ms. <sup>119</sup> | Speed test by subscriber, showing the excessive latency. | Provider has countervailing speed test evidence showing latency at or below 100 ms, <i>e.g.</i> , from their own network management system or the CAF |

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Speed tests may be conducted by subscribers, but speed test challenges must be gathered and submitted by units of local government, nonprofit organizations, or a broadband service provider.

Subscribers submitting a speed test must indicate the speed tier they are subscribing to. Since speed tests can only be used to change the status of locations from “served” to “underserved”, only speed tests of subscribers that subscribe to tiers at 100/20 Mbps and above are considered. If the household subscribes to a speed tier of 100/20 Mbps or higher and the speed test yields a speed below 100/20 Mbps, this service offering will not count towards the location being considered served. However, even if a particular service offering is not meeting the speed threshold, the eligibility status of the location may not change. For example, if a location is served by 100 Mbps licensed fixed wireless and 500 Mbps fiber, conducting a speed test on the fixed wireless network that shows an effective speed of 70 Mbps does not change the status of the location from served to underserved.

A service provider may rebut an area speed test challenge by providing speed tests, in the manner described above, for at least 10% of the customers in the challenged area. The customers must be randomly selected. Providers must apply the 80/80 rule<sup>26</sup>, *i.e.*, 80% of these locations must experience a speed that equals or exceeds 80% of the speed threshold. For example, 80% of these locations must have a download speed of at least 20 Mbps (that is, 80% of 25 Mbps) and an upload speed of at least 2.4 Mbps to meet the 25/3 Mbps threshold and must have a download speed of at least 80 Mbps and an upload speed of 16 Mbps to be meet the 100/20 Mbps speed tier. Only speed tests conducted by the provider between the hours of 7 p.m. and 11 p.m. local time will be considered as evidence for a challenge rebuttal.

<sup>118</sup> As described in the NTIA’s NOFO, a provider’s countervailing speed test should show that 80 percent of a provider’s download and upload measurements are at or above 80 percent of the required speed. *See Performance Measures Order*, 33 FCC Rcd at 6528, para. 51. *See* BEAD NOFO at 65, n. 80, Section IV.C.2.a.

<sup>119</sup> *Performance Measures Order*, including provisions for providers in non-contiguous areas (§21).

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|-------------------------------|---|--|--|
|                               |   |  | performance measurements. <sup>120</sup>   |
| <b>Data cap</b>               | The only service plans marketed to consumers impose an unreasonable capacity allowance (“data cap”) on the consumer. <sup>121</sup> | <ul style="list-style-type: none"> <li>• Screenshot of provider webpage.</li> <li>• Service description provided to consumer.</li> </ul> | Provider has terms of service showing that it does not impose an unreasonable data cap or offers another plan at the location without an unreasonable cap. |
| <b>Technology</b>             | The technology indicated for this location is incorrect.  | Manufacturer and model number of residential gateway (CPE) that demonstrates the service is delivered via a specific technology.         | Provider has countervailing evidence from their network management system showing an appropriate residential gateway that matches the provided service.    |
| <b>Business service only</b>  | The location is residential, but the service offered is marketed or available only to businesses.                                   | Screenshot of provider webpage.  | Provider documentation that the service listed in the BDC is available at the location and is marketed to consumers.                                       |
| <b>Enforceable Commitment</b> | The challenger has knowledge that broadband will be deployed at this location by the date established in the                        | Enforceable commitment by service provider (e.g., authorization letter). In the case of Tribal Lands, the challenger must                | Documentation that the provider has defaulted on the commitment or is otherwise unable to meet the commitment  |

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<sup>120</sup> *Id.*

<sup>121</sup> An unreasonable capacity allowance is defined as a data cap that falls below the monthly capacity allowance of 600 GB listed in the FCC 2023 Urban Rate Survey (FCC Public Notice DA 22-1338, December 16, 2022). Alternative plans without unreasonable data caps cannot be business-oriented plans not commonly sold to residential locations. A successful challenge may not change the status of the location to unserved or underserved if the same provider offers a service plan without an unreasonable capacity allowance or if another provider offers reliable broadband service at that location.

|                        |  |   |  |
|------------------------|--|---|--|
|                        | deployment obligation.   | submit the requisite legally binding agreement between the relevant Tribal Government and the service provider for the location(s) at issue.  | ( <i>e.g.</i> , is no longer a going concern).   |
| <b>Planned service</b> | The challenger has knowledge that broadband will be deployed at this location by June 30, 2024, without an enforceable commitment or a provider is building out broadband offering performance beyond the requirements of an enforceable commitment. | <ul style="list-style-type: none"> <li>• Construction contracts or similar evidence of on-going deployment, along with evidence that all necessary permits have been applied for or obtained.</li> <li>• Contracts or a similar binding agreement between the Eligible Entity and the provider committing that planned service will meet the BEAD definition and requirements of reliable and qualifying broadband even if not required by its funding source (<i>i.e.</i>, a separate federal grant program), including the expected date deployment will be completed,</li> </ul> | Documentation showing that the provider is no longer able to meet the commitment ( <i>e.g.</i> , is no longer a going concern) or that the planned deployment does not meet the required technology or performance requirements. |

|  |   |  |  |
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|  |   | which must be on or before June 30, 2024.  |  |
| <b>Not part of enforceable commitment.</b> | This location is in an area that is subject to an enforceable commitment to less than 100% of locations and the location is not covered by that commitment. ( <i>See</i> BEAD NOFO at 36, n. 52.) | Declaration by service provider subject to the enforceable commitment.   |  |
| <b>Location is a CAI</b>                   | The location should be classified as a CAI.   | Evidence that the location falls within the definitions of CAIs set by the Eligible Entity. <sup>122</sup>                       | Evidence that the location does not fall within the definitions of CAIs set by the Eligible Entity or is no longer in operation. |
| <b>Location is not a CAI</b>               | The location is currently labeled as a CAI but is a residence, a non-CAI business, or is no longer in operation.  | Evidence that the location does not fall within the definitions of CAIs set by the Eligible Entity or is no longer in operation. | Evidence that the location falls within the definitions of CAIs set by the Eligible Entity or is still operational.              |

### 13.1. Positions of Parties

WISPA recommends the Commission adopt a “preponderance of the evidence” standard, which will be administratively easier to implement than, for example, a “clear and convincing evidence” standard that could be interpreted differently by challenge adjudicators. In addition, the challenger, whether a

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<sup>122</sup> For *example*, eligibility for FCC e-Rate or Rural Health Care program funding or registration with an appropriate regulatory agency may constitute such evidence, but the Eligible Entity may rely on other reliable evidence that is verifiable by a third party.

governmental or tribal entity, nonprofit organization, or broadband provider, should have the burden of proof.<sup>123</sup>

The Greenlining Institute and #OaklandUndivided express concerns about customers being able to obtain their bills from their broadband provider, noting that requiring the submission of an online form from someone who is unserved is a prohibitive barrier in and of itself, while obtaining a bill will require significant time requesting the information from a provider's customer service department, and that customers may be asked to pay for a copy of their bill, as one participant in a survey conducted by #OaklandUndivided reported a \$5 fee required for access to their bill.<sup>124</sup>

The Greenling Institute and #Oakland Undivided also express concern that the information in a customer bill includes Personally Identifiable Information, noting the increased risk of that sensitive information being exposed during transmission between a third party before being sent to the Commission.<sup>125</sup>

The Greenlining Institute and #Oakland Undivided urge the Commission to reduce the need for customer billing information in the following ways:

- In regions where all available plans are above 100/20 Mbps, a challenger should be able to sign an affidavit stating that the minimum serviceable speeds for all subscribers meet the 100/20 Mbps state threshold in lieu of providing individual subscriber-level billing information.
- When the slowest plans offered exceed 25/3 Mbps (unserved) or 100/20 Mbps (underserved) within a franchise area, the Commission should eliminate the

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<sup>123</sup> WISPA, Opening Comments, at 5.

<sup>124</sup> Greenlining and Oakland Undivided, Opening Comments, at 10.

<sup>125</sup> *Id.* at 10.

requirement for a certification of the speed tier to which the customer subscribes.

- If speed tests are under federal limits (such as 25/3 Mbps), then the proposed customer bill requirement should be automatically waived.<sup>126</sup>

For availability challenges, the California Broadband and Video Association recommends the Commission require that any evidence to have been collected within the last six months, to avoid evidence becoming too stale to be credible.<sup>127</sup>

For rebuttal evidence, the California Broadband and Video Association argues the Commission should not limit availability rebuttal evidence to confirmation that service was provided to a broadband serviceable location within the previous twelve months and instead allow evidence confirming that the provider has provided service to a broadband serviceable location at any time in the past.<sup>128</sup>

The California Broadband and Video Association asks the Commission to clarify that screenshots showing service availability are acceptable rebuttal evidence for all availability challenges.<sup>129</sup>

For planned service challenges, the California Broadband and Video Association requests that the Commission clarify that evidence of a construction contract, pole attachment license, franchise agreement, or similar evidence of planned deployment is sufficient to demonstrate that broadband will be deployed to a location, and remove the proposed requirement to submit

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<sup>126</sup> *Id.* at 8-10.

<sup>127</sup> California Broadband and Video Association, Opening Comments, at 57.

<sup>128</sup> *Id.* at 58.

<sup>129</sup> *Id.*



evidence that all necessary permits have been applied for or obtained, arguing that this information is overly burdensome both for providers to produce and for the Commission to review. WISPA states its members have expressed concern about the types of evidence that will be considered acceptable for rebuttals demonstrating planned service, and asks for greater clarity on the meaning of “necessary permits.”<sup>130</sup>

The California Broadband and Video Association asks the Commission to change the proposed deadline for planned service challenges from June 30, 2024 to June 30, 2025.<sup>131</sup>

GeoLinks urges the Commission to grant fixed wireless service providers flexibility in how they refute a challenge by allowing the use of portable testing units, if possible. However, if such testing is not possible or practicable, GeoLinks contends service providers should be allowed to offer other information to show by a preponderance of the evidence that it offers the speeds its claims at the locations or across the areas that are being challenged.<sup>132</sup> Cal Advocates proposes several revisions to the various types of challenges and rebuttals, to increase the specificity for challenges and rebuttals as it relates to fixed wireless service. Cal Advocates proposes the following type of information for challenges:

Availability challenge: For a location it asserts is served by fixed wireless service, that provider must show a copy of a customer bill for the location, indicating a subscription within the past 12 months, *e.g.*, with a copy of a

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<sup>130</sup> WISPA, Opening Comments, at 4.

<sup>131</sup> California Broadband and Video Association, Opening Comments, at 58.

<sup>132</sup> GeoLinks, Opening Comments, at 5.

customer bill or a copy of an offer sent to the location. This type of challenge would not be rebuttable.

Speed challenge: A provider must submit speed test evidence showing sufficient speed (*e.g.*, from their own network management system). This could be rebutted with a speed test by the subscriber at the subject location, showing insufficient speed and meeting the requirements for speed tests.

Latency challenge: A provider must submit speed test evidence showing latency at or below 100 ms, *e.g.*, from their own network management system or the Connect America Fund (CAF) performance measurements. This may be rebutted with a speed test by subscriber at the subject location, showing excessive latency.

Fixed wireless challenge: A provider must submit terms of service showing that it does not impose an unreasonable data cap or offers another plan at the location without an unreasonable cap. This may be rebutted with screenshot of a provider's webpage or a service description provided to consumer.<sup>133</sup>

### **13.2. Discussion**

The Commission adopts this proposal with modifications sourced from additional guidance released by NTIA.<sup>134</sup> A complete list of information required for challenges, including modifications, can be found in Appendix A.

Various broadband service providers, or industry associations representing those providers, suggest revisions that exceed the requirements of the NTIA Model Challenge Process and make it more difficult for consumers,

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<sup>133</sup> Cal Advocates, Opening Comments, Attachment A-17-18.

<sup>134</sup> NTIA BEAD Challenge Process Policy Notice Version 1.3, at 17-20.

local governments, and other interested entities to “ground truth” where a provider actually offers broadband service that meets the NTIA’s definition of reliable broadband service. We decline to adopt those changes.

#### **14. Specifications for Area and MDU Challenges**

Staff propose that the Commission administer area and multiple dwelling unit (MDU) challenges for the following challenge types: Availability, Speed, Latency, Data Cap, and Technology.<sup>135</sup>

Additionally, Staff propose that an area challenge reverses the burden of proof for availability, speed, latency, data caps, and technology if at least six challenges for a particular category, across all challengers, have been submitted for a provider within a census block group.<sup>136</sup> Staff proposes that an MDU challenge requires challenges by at least three units or ten percent of the unit count listed in the Fabric within the same broadband serviceable location, whichever is larger.<sup>137</sup>

Under the Staff Proposal, the provider receiving an area or MDU challenge must demonstrate that they are indeed meeting the availability, speed, latency, data cap, and technology requirement, respectively, for all (served) locations within the area or all units within an MDU. The provider can use any of the permissible rebuttals.<sup>138</sup> However, area challenges must be rebutted with evidence that service is available for all broadband serviceable locations within the census block group, e.g., by network diagrams that show fiber or hybrid

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<sup>135</sup> Staff Proposal at 20.

<sup>136</sup> If a provider offers multiple technologies, such as DSL and fiber, each will be treated separately because they are likely to have different availability and performance.

<sup>137</sup> Staff Proposal at 20.

<sup>138</sup> *Id.*

fiber-coaxial (HFC) infrastructure or customer subscribers. For fixed wireless service, the challenge system will offer representative random, sample of the area in contention, but no fewer than ten locations where the provider has to demonstrate service availability and speed (*e.g.*, with a mobile test unit).<sup>139</sup>

#### **14.1. Positions of Parties**

The Greenlining Institute and #OaklandUndivided recommend the Commission allow for the submission of a single location challenge, instead of the proposed ten percent or three-unit rule, arguing that the proposal is a significant burden on community groups and local governments. At a minimum, The Greenlining Institute and #OaklandUndivided prefer the Commission adopt NTIAs updated guidance for MDU Challenges released in November of 2023.<sup>140</sup> The City and County of San Francisco also supports reducing the unit threshold for MDU challenges to one challenge within an MDU.<sup>141</sup> TURN and CforAT recommend the Commission adopt more recent NTIA language for Area/MDU challenges:

[a]n MDU challenge requires challenges for one unit for MDUs having fewer than 15 units, for two units for MDUs of between 16 and 24 units, and at least three units for larger MDUs. Here, the MDU is defined as one broadband serviceable location listed in the Fabric. An MDU challenge counts towards an area challenge (*i.e.*, six successful MDU challenges in a census block group may trigger an area challenge).<sup>142</sup>

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<sup>139</sup> *Id.*

<sup>140</sup> Greenlining and #OaklandUndivided, Opening Comments, at 12.

<sup>141</sup> City and County of San Francisco, Opening Comments, at 2.

<sup>142</sup> TURN and CforAT, Opening Comments, at 22. Model Challenge Process at 18. As a practical matter, the Model Challenge Process requirement generally requires that challengers challenge far less than 10 percent of an MDU's unit count. For *example*, for an MDU with fifteen units, a challenger need only provide a challenge for one unit, or 6.7% of the unit count. For an MDU

*Footnote continued on next page.*

Alternatively, TURN and CforAT suggest removing the phrase “whichever is higher” from its separate requirement and instead include language that explicitly allows challengers to select the metric on which their challenge is based.<sup>143</sup>

Joint Labor Respondents recommend reclassifying MDUs, asserting that the FCC’s Map may overestimate coverage at many MDUs. Additionally, Joint Labor Respondents urges the Commission to reclassify all MDUs within high-poverty and highly unconnected census tracts as “underserved,” until appropriately rebutted.”<sup>144</sup>

The California Broadband and Video Association opposes the proposed optional area and MDU challenge module, opining that both are insufficiently defined by the NTIA’s NOFO and could add unnecessary complexity to the Commission’s challenge process.<sup>145</sup>

#### **14.2. Discussion**

In response to comments, the Commission revises this proposal to reflect the latest NTIA guidance. An MDU challenge requires challenges for one unit for MDUs having fewer than 15 units, for two units for MDUs of between 16 and 24 units, and at least three units for larger MDUs. Additionally, an MDU challenge counts towards an area challenge (*i.e.*, six successful MDU challenges in a census block group may trigger an area challenge).

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with 24 units, a challenger need only provide a challenge for two units, or 8.3 percent of the unit count.

<sup>143</sup> TURN and CforAT, Opening Comments, at 22.

<sup>144</sup> Joint Labor Respondents, Opening Comments, at 5.

<sup>145</sup> California Broadband and Video Association, Opening Comments, at 48.

## 15. Summary of Public Comment

Rule 1.18 allows any member of the public to submit written comment in any Commission proceeding using the “Public Comment” tab of the online Docket Card for that proceeding on the Commission’s website. Rule 1.18(b) requires that relevant written comment submitted in a proceeding be summarized in the final decision issued in that proceeding.

The Commission received over 450 public comments on the Docket Card. Comments address a broad array of issues related to both Volume One and Volume Two of the Commission’s Initial Proposal to the NTIA, contain general statements in favor or against the use of taxpayer funding to support the expansion of broadband service to unserved and underserved populations, as well as remarks identifying specific communities in need of service, on the state of competition in the California internet service market, as well as other issues outside the scope of this proceeding, such as high customer bills, adopting net neutrality rules, designating broadband service as a public utility or revising pole attachment rules. Public comments regarding issues within the scope of this decision include the opinions expressed below.

- The Commission must ensure accuracy of providers’ self-reported availability of rates by requiring Commission-confirmed service levels and consider allowing mooring slips, marina slips, and piers to count as residences. Many seaside communities have residents and visitors who live aboard for some or all of the year that require connectivity for everyday use and for marine safety.<sup>146</sup>

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<sup>146</sup> Lisa Lavelle, Avalon, CA90704, submitted December 7, 2023.

- Wireless (broadband) is notoriously unreliable and unable to meet the demands of present and future digital communications.<sup>147</sup>
- AT&T 'Internet Air' (fixed wireless service) should not count as meeting FCC or Commission requirements for 'high speed' internet service, as the service severely degrades multiple times per day.<sup>148</sup>
- My service is weak, inconsistent, drops out without notice or explanation or without proper repair.<sup>149</sup>
- The Commission should consider any technology utilizing ADSL (Asymmetric Digital Subscriber Line) should be considered the same as DSL, so that locations otherwise considered served via ADSL are underserved, and locations served only with speeds of less than 30Mbps/ 5 Mbps are unserved.<sup>150</sup>
- The Fresno Coalition for Digital Inclusion asks the Commission to modify the MDU challenge threshold from three unites to one unit.<sup>151</sup>
- In Oakland, the cost of living and cost of internet services are so high that it's extremely difficult to afford home connectivity/Wi-Fi. The only service that is remotely affordable is too slow for my work with students online.<sup>152</sup>
- The State should create a state broadband map that isn't discriminatory to invest in communities that really are disconnected.<sup>153</sup>

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<sup>147</sup> Sidnee Cox, Windsor, CA 95492, submitted December 7, 2023.

<sup>148</sup> William Croft, Mount Shasta, CA96067, submitted November 2, 2023.

<sup>149</sup> S Edwards, Los Angeles, CA90048, submitted November 2, 2023.

<sup>150</sup> Tom Mullen, Riverside, CA92501, submitted November 21, 2023.

<sup>151</sup> Kevin Miller, Fresno, CA93721, submitted December 6, 2023.

<sup>152</sup> Marya Hosseinpur, Oakland, CA94612, November 9, 2023.

<sup>153</sup> Amber Johnson Oakland, CA 94605, November 9, 2023.

- Why has AT&T refused to provide broadband in parts of Santa Clarita? People down the street have broadband from our house maybe two blocks. AT&T only provides DSL on my block.<sup>154</sup>
- AT&T does not provide internet plans with speeds exceeding 6 Mbps. For a family of 5 with 3 students this is not anywhere close to enough bandwidth.<sup>155</sup>
- The available service providers in my area serve only 70 percent of the area. If one is lucky enough to get service through a satellite company, the bill is higher than most and the connection is not reliable.<sup>156</sup>
- 30mbps is too slow as a minimum. 5G speeds and distances make it slow.<sup>157</sup>
- Frontier is the only provider that will work with this area and their speeds are slow, service is poor and we are clearly a last priority for them.<sup>158</sup>
- I live in a city, Visalia, and have been a customer of Xfinity/Comcast and AT&T. Both are fairly slow and unreliable. They claim higher speed but that is not true.<sup>159</sup>
- I have contacted Frontier on numerous occasions trying to simply be able to subscribe to internet access at my home. Due to "network limitations" I am told that it is simply not accessible to me at any price.<sup>160</sup>
- “As an unlicensed fixed wireless ISP, I would like to make a statement here. Raw speed is way overrated. Latency is the new metric for measuring Internet Service Quality.

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<sup>154</sup> Chris Mohler, Santa Clarita , CA91387, submitted November 2, 2023.

<sup>155</sup> Gerardo Santamaria, Santa Ana, CA92704, submitted on November 2, 2023.

<sup>156</sup> Emily Kilgore, Dunlap, CA 93621, submitted on October 28, 2023.

<sup>157</sup> Anonymous Commenter, Los Angeles, CA90042, submitted on October 24, 2023.

<sup>158</sup> Traci Feldman Santa Paula , CA, 93060, submitted on October 19, 2023.

<sup>159</sup> Kathy Benjamin, Visalia, CA93277, submitted on October 19, 2023.

<sup>160</sup> Mark Croce, Linden, CA, 95236, submitted on October 18, 2023.



75% of our customer base are on 25 Mbps with mid 20 millisecond latency. We have faster service available but they are not calling in and asking for it. Pricing doesn't play in here because we're not even getting asked about it at all. Netflix, work from home, VoIP, *etc*, all work flawlessly on much less than 100 Mbps if you have a proper queuing mechanism. It would be a tragic waste of taxpayers' money to overbuild an area like ours with fiber because the take rate is going to be somewhere below 10%. Focusing on speed alone has taken us down a very bad rabbit hole and this is boosted by the likes of AT&T and Comcast who lobby for ever increasing speeds despite the cold hard facts that no matter if you give a home 100 Mbps or 1 Gbps, their usage stays the same, somewhere around 25 Mbps with a steady increase over time. As average usage has grown slowly over time we have increased our baseline service to meet that need. It is not uncommon for our user base to forget who their ISP is because they literally don't talk to us for years, the service is that stable. We need to save money where we can as a country."<sup>161</sup>

## **16. Conclusion**

The Commission revises and adopts the draft of Volume One of the Initial Proposal to the NTIA served for public comment on November 7, 2023 and submitted to the NTIA on December 27, 2023. These revisions reflect changes made in response to comments, as well as curing instructions from the NTIA, after the Commission submitted the Initial Proposal.

The Commission's Challenge Process shall begin no later than 60 calendar days after the issuance of this decision, and no sooner than seven (7) calendar days after the publication of the Eligible Locations. The Commission delegates to Staff the authority to dispense with challenges. Staff shall serve notice of the

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<sup>161</sup> Trendal Toews, Willows, CA, 95988, submitted on October 18, 2023.

publication of the Eligible Locations. Per the NTIA's Model Challenge Process, which this Commission adopts, the Challenge Phase shall begin following the conclusion of the seven (7) day publication period of the Eligible Locations and last for a period of 30 calendar days. Evidentiary Review will take place during the 14 calendar days following the conclusion of the Challenge Phase. Internet service providers shall be notified of challenges and shall have 30 calendar days after the conclusion of Evidentiary Review to submit their rebuttals (Rebuttal Phase) to those challenges. Information and data required for challenges and rebuttals is contained in Appendix A. After the Rebuttal Phase ends, Staff shall have 30 calendar days to make a final determination for the Commission. Not later than 60 calendar days after the NTIA approves the Commission's final determination, Staff shall publish the Final Eligible Locations.

#### **17. Procedural Matters**

This decision affirms all rulings made by the ALJ and assigned Commissioner in this proceeding. All motions not ruled on are deemed denied.

#### **18. Comments on Proposed Decision**

The proposed decision of Commissioner Darcie L. Houck in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on \_\_\_\_\_, and reply comments were filed on \_\_\_\_\_ by \_\_\_\_\_.

#### **19. Assignment of Proceeding**

Darcie L. Houck is the assigned Commissioner and Thomas J. Glegola is the assigned ALJ in this proceeding.

#### **Findings of Fact**

1. The Infrastructure Investment and Jobs Act of 2021 (P.L. 117-58 §60102(b)) establishes the BEAD Program, under the administration of the NTIA.

2. California is eligible to receive approximately \$1.86 billion in BEAD funding, based on the federal government's calculation of California's share of unserved locations nationally.

3. Per the NTIA's NOFO, BEAD's principal focus is to deploy reliable broadband service to 100 percent of unserved and underserved locations, and, if funds permits, deploy reliable broadband service to Community Anchor Institutions. Further, the NTIA's NOFO directs States to prioritize fiber-optic deployments.

4. The Commission submitted its Initial BEAD Proposal to the NTIA on December 27, 2023.

5. After submission of its Initial Proposal and before awarding BEAD funds to subgrantees, this Commission must conduct the NTIA-approved Challenge Process, whereby a unit of local government, nonprofit organization, or broadband service provider can challenge a determination regarding whether a particular location or community anchor institution is eligible for the grant funds, including whether a particular location is unserved or underserved.

6. The NTIA defines reliable broadband service as: "broadband service that the National Broadband Maps show is accessible to a location via: (i) fiber-optic technology; (ii) Cable Modem/ Hybrid fiber-coaxial technology; (iii) digital subscriber line (DSL) technology; or (iv) terrestrial fixed wireless technology utilizing entirely licensed spectrum or using a hybrid of licensed and unlicensed spectrum."

7. Using the latest available version of the National Broadband Map to determine where a broadband serviceable location is served, unserved or underserved complies with NTIA instructions.

8. Download and upload speeds of DSL broadband service decline with distance from the central office.

9. In D.22-04-055, the Commission adopted a rebuttable presumption that legacy networks cannot provide reliable internet service at speeds of 25Mbps download and 3 Mbps upload. Areas with internet service provided only by legacy technologies such as copper telephone lines (typically using Digital Subscriber Line technology) or older versions of cable system technology (DOCSIS 2.0 or earlier) are eligible for funding, though internet service providers have the ability to prove their service meets the standard.

10. The NTIA accepted the Commission's proposed modification that the Commission treat locations that the National Broadband Map shows to have available qualifying broadband service delivered via DSL as "underserved."

11. The NTIA did not accept the proposed modification that this Commission presume the locations that the National Broadband Map shows to have available non-qualifying broadband service (*i.e.*, a location that is "underserved") delivered via DSL as "unserved" for reported speeds that are lower than 30 Mbps/5 Mbps, for which there is supporting evidence that speeds consistently deliver below 25 Mbps /3 Mbps service.

12. The user agreements for the three large cellular wireless broadband providers, AT&T Mobility, Verizon and T-Mobile, all indicate congestion management practices, and other policies that create significant and credible doubts about their ability to meet the NTIA's definition of reliable broadband service.

13. When rebutting the FCC's National Broadband Map, released on November 18, 2022, the Commission challenged 9.9 million locations, with

88 percent of those locations purported to be served by wireless internet service providers, and one provider's challenged locations accounting for nearly 66 percent of that total.

14. The NTIA found that absent specific non-cellular fixed wireless broadband speed test data for specific locations indicating otherwise, non-cellular fixed wireless service meets the definition of reliable broadband service.

15. The NTIA directed the Commission to exclude the proposed modification to treat low-speed non-cellular fixed wireless service as unserved.

16. The NTIA accepted the Commission's proposal that cellular wireless broadband service does not meet the definition of reliable broadband service.

17. This Commission has a long history of using speed tests to help determine if a specific location or area is eligible for broadband grant funding, especially its CalSPEED app.

18. The NTIA rejected the Commission's proposed speed test modification.

19. Consistent with the definition of "community anchor institution" in 47 USC 1702 (a)(2)(E), the following as entities are eligible community anchor institutions: a school, library, health clinic, health center, hospital or other medical provider, public safety entity, institution of higher education, public housing organization (including any public housing agency and U.S. Department of Housing and Urban Development-assisted housing organization), or community support organization that facilitates greater use of broadband service by vulnerable populations, including, but not limited to, low-income individuals, unemployed individuals, children, the incarcerated, and aged individuals.

20. The definition of "community anchor institution" in 47 USC 1702 (a)(2)(E), includes all facilities of the sorts described above that are owned by or provided for Tribal nations.

21. The NTIA accepted the Commission's proposed definition for community anchor institution and the application of it in the Commission's proposed BEAD rules. The appendices containing the list of eligible community anchor institutions will be updated, submitted to the NTIA and released as part of the Challenge Process.

### **Conclusions of Law**

1. The Governor designated this Commission to serve as the recipient of and administering agent for the BEAD program for California.

2. The NTIA has the authority to review and approve a State's Initial Proposal, and may modify the Challenge Process proposed by States, including any modification of the final eligibility determinations made by this Commission. As the grantee, the Commission is required to accept the NTIA's determinations.

3. The Infrastructure Investment and Jobs Act and the NTIA include the following entities as permissible challengers:

- a. nonprofit organizations;
- b. units of local and tribal governments; and
- c. broadband service providers.

4. The Infrastructure Investment and Jobs Act and the NTIA include the following as permissible types of challenges:

- a. The identification of eligible community anchor institutions, as defined by the Commission;
- b. Community anchor institution BEAD eligibility determinations;
- c. BEAD eligibility determinations for existing broadband serviceable locations (BSLs);
- d. Enforceable commitments; or
- e. Planned service.

5. The NTIA permits this Commission to seek a waiver of its de-duplication process.

6. The proposed Challenge Process, as modified by the Commission and the NTIA, provides all challengers with a transparent, consistent and expeditious procedure for challenging determinations of whether a broadband serviceable location is served, underserved, or unserved.

7. It is reasonable to rely on speed tests from one resident in a MDU to determine if the MDU receives reliable broadband service at served speeds.

8. The timeframes for challenges to service level determinations for broadband serviceable locations, and rebuttals to challenges, as adopted in this decision, are reasonable.

9. It is reasonable for this Commission to require the information listed in Appendix A for those that wish to challenge a determination on the National Broadband Map that broadband service at a particular broadband serviceable location meets the definition of reliable broadband service at served speeds. In a similar manner, it is reasonable to require the information listed in Section 13 for those that wish to rebut a challenge.

10. The Commission has the authority to delegate to Staff the review of challenges specified in this Decision and it is reasonable that it do so in this proceeding. While Communications Division Staff is permitted to dispense with the challenges for the purpose of preparing a Staff Proposal, the Commission still must adopt that Staff Proposal.

## **O R D E R**

**IT IS ORDERED** that:

1. The process to determine areas that are eligible for funds under the Broadband Equity, Access, and Deployment Program, contained in the Final

Initial Proposal Volume 1 of the California Public Utilities Commission, as approved by the National Telecommunications and Information Administration, and included in Appendix B, is adopted.

2. The California Public Utilities Commission delegates to Communications Division Staff the ability to dispense with challenges using the process outlined in this decision.

3. The Broadband Equity, Access, and Deployment Program administered by the California Public Utilities Commission (Commission) shall begin no later than 60 calendar days after the issuance of this decision, and no sooner than seven (7) calendar days after the publication of the Eligible Locations and include the following steps:

- (a) The Commission's Communications Division Staff (Staff) shall serve notice of the publication of the Eligible Locations.
- (b) The Challenge Phase shall begin following the conclusion of the seven (7) day publication period of the Eligible Locations and last for a period of 30 calendar days.
- (c) Staff Evidentiary Review will take place during the 14 calendar days following the conclusion of the Challenge Phase.
- (d) Internet service providers shall be notified of challenges and shall have 30 calendar days after the conclusion of Evidentiary Review to submit their rebuttals (Rebuttal Phase) to those challenges. Information and data required for challenges and rebuttals is contained in Appendix A.
- (e) After the Rebuttal Phase ends, Staff shall have 30 calendar days to make a final determination for the Commission.
- (f) The Commission has 120 days from the initiation of the Challenge Process to submit its determinations.



- (g) Not later than 60 calendar days after the NTIA approves the Commission's final determination, Staff shall publish the Final Eligible Locations.

4. The following entities are eligible to submit challenges to the California Public Utilities Commission in the timeframes adopted in Ordering Paragraph 3:

- (h) nonprofit organizations;
- (i) units of local and tribal governments; and
- (j) broadband service providers.

5. Eligible challengers must adhere to the information requirements contained in Appendix A to challenge a determination regarding whether a particular broadband serviceable location or community anchor institution is eligible for the grant funds, including whether a particular location is unserved or underserved.

6. The California Public Utilities Commission delegates to Communications Division Staff the ability to dispense with challenges using the process outlined in this decision.

7. Rulemaking 23-02-016 remains open.

This order is effective upon issuance.

Dated \_\_\_\_\_, at Sacramento, California.

### Appendix A

Examples of acceptable evidence for challenges and rebuttals for each potential challenge type

| Challenge Type      | Description  | Specific Examples  | Permissible rebuttals   |
|---------------------|--|--|---|
| <b>Availability</b> | The broadband service identified is not offered at the location, including a unit of a multiple dwelling unit (MDU). | <ul style="list-style-type: none"> <li>• Screenshot of provider webpage.</li> <li>• A service request was refused within the last 180 days (<i>e.g.</i>, an email or letter from provider).</li> <li>• Lack of suitable infrastructure (<i>e.g.</i>, no fiber on pole).</li> <li>• A letter or email dated within the last 365 days that a provider failed to schedule a service installation or offer an installation date within 10 business days of a request.<sup>162</sup></li> <li>• A letter or email dated within the last 365 days indicating that a provider requested more</li> </ul> | <ul style="list-style-type: none"> <li>• Provider shows that the location subscribes or has subscribed within the last 12 months, <i>e.g.</i>, with a copy of a customer bill.</li> <li>• If the evidence was a screenshot and believed to be in error, a screenshot that shows service availability.</li> <li>• The provider submits evidence that service is now available as a standard installation, <i>e.g.</i>, via a copy of an offer sent to the location.</li> </ul> |

<sup>162</sup> A standard broadband installation is defined in the Broadband DATA Act (47 U.S.C. § 641(14)) as “[t]he initiation by a provider of fixed broadband internet access service [within 10 business days of a request] in an area in which the provider has not previously offered that service, with no charges or delays attributable to the extension of the network of the provider.”

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|              |   | than the standard installation fee to connect this location or that a Provider quoted an amount in excess of the provider's standard installation charge in order to connect service at the location. |  |
| <b>Speed</b> | The actual speed of the service tier falls below the unserved or underserved thresholds. <sup>163</sup> | Speed test by subscriber, showing the insufficient speed and meeting the requirements for speed tests. <sup>164</sup>   | Provider has countervailing speed test evidence showing sufficient speed, <i>e.g.</i> , from their own |

<sup>163</sup> The challenge portal has to gather information on the subscription tier of the household submitting the challenge. Only locations with a subscribed-to service of 100/20 Mbps or above can challenge locations as underserved. Speed challenges that do not change the status of a location do not need to be considered. For *example*, a challenge that shows that a location only receives 250 Mbps download speed even though the household has subscribed to gigabit service can be disregarded since it will not change the status of the location to unserved or underserved.

<sup>164</sup> In accordance with the National Telecommunications and Information Administration's (NTIA) Model Challenge Process, the CPUC will accept speed tests as evidence for substantiating challenges and rebuttals. Each speed test must consist of three measurements, taken on different days. Speed tests cannot predate the beginning of the challenge period by more than 60 calendar days.

Speed tests can take four forms:

- A reading of the physical line speed provided by the residential gateway, (*i.e.*, DSL modem, cable modem (for HFC), optical network terminal (ONT) (for Fiber To The Home), or fixed wireless subscriber module
- A reading of the speed test available from within the residential gateway web interface
- A reading of the speed test found on the service provider's web page

*Footnote continued on next page.*

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- A speed test performed on a laptop or desktop computer within immediate proximity of the residential gateway, using speedtest.net or other Ookla-powered front ends or M-Lab's speed test services. Each speed test measurement must include: 1) the time and date the speed test was conducted; and 2) the provider-assigned internet protocol (IP) address, either version 4 or version 6, identifying the residential gateway conducting the test.

Each group of three speed tests must include:

- The name and street address of the customer conducting the speed test;
- A certification of the speed tier to which the customer subscribes (*e.g.*, a copy of the customer's last invoice or signed certification by the customer of the speed tier and a statement indicating the customer is subscribed to the highest service tier available);
- An agreement, using an online form provided by the CPUC, that grants access to these information elements to the CPUC, any contractors supporting the challenge process, and the service provider; and
- The IP address and the subscriber's name and street address are considered personally identifiable information (PII) and thus are not disclosed to the public (*e.g.*, as part of a challenge dashboard or open data portal).

Each location must conduct three speed tests on three different days; the days do not have to be adjacent. The median of the three tests (*i.e.*, the second highest (or lowest) speed) is used to trigger a speed-based (S) challenge, for either upload or download. For *example*, if a location claims a broadband speed of 100 Mbps/25 Mbps and the three speed tests result in download speed measurements of 105, 102 and 98 Mbps, and three upload speed measurements of 18, 26 and 17 Mbps, the speed tests qualify the location for a challenge, since the measured upload speed marks the location as underserved.

Speed tests may be conducted by subscribers, but speed test challenges must be gathered and submitted by units of local government, nonprofit organizations, or a broadband service provider.

Subscribers submitting a speed test must indicate the speed tier they are subscribing to. Since speed tests can only be used to change the status of locations from "served" to "underserved", only speed tests of subscribers that subscribe to tiers at 100/20 Mbps and above are considered. If the household subscribes to a speed tier of 100/20 Mbps or higher and the speed test yields a speed below 100/20 Mbps, this service offering will not count towards the location being considered served. However, even if a particular service offering is not meeting the speed threshold, the eligibility status of the location may not change. For *example*, if a location is served by 100 Mbps licensed fixed wireless and 500 Mbps fiber, conducting a speed test on the

*Footnote continued on next page.*

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|                 |   |  | network management system. <sup>165</sup>  |
| <b>Latency</b>  | The round-trip latency of the broadband service exceeds 100 ms. <sup>166</sup>  | Speed test by subscriber, showing the excessive latency.   | Provider has countervailing speed test evidence showing latency at or below 100 ms, <i>e.g.</i> , from their own network management system or the CAF performance measurements. <sup>167</sup> |
| <b>Data cap</b> | The only service plans marketed to consumers impose an unreasonable capacity allowance (“data cap”) on the consumer. <sup>168</sup> | <ul style="list-style-type: none"> <li>• Screenshot of provider webpage.</li> <li>• Service description provided to</li> </ul> | Provider has terms of service showing that it does not impose an unreasonable data cap or offers another plan at the location  |

fixed wireless network that shows an effective speed of 70 Mbps does not change the status of the location from served to underserved.

A service provider may rebut an area speed test challenge by providing speed tests, in the manner described above, for at least 10% of the customers in the challenged area. The customers must be randomly selected. Providers must apply the 80/80 rule<sup>26</sup>, *i.e.*, 80% of these locations must experience a speed that equals or exceeds 80% of the speed threshold. For example, 80% of these locations must have a download speed of at least 20 Mbps (that is, 80% of 25 Mbps) and an upload speed of at least 2.4 Mbps to meet the 25/3 Mbps threshold and must have a download speed of at least 80 Mbps and an upload speed of 16 Mbps to be meet the 100/20 Mbps speed tier. Only speed tests conducted by the provider between the hours of 7 p.m. and 11 p.m. local time will be considered as evidence for a challenge rebuttal.

<sup>165</sup> As described in the NTIA’s NOFO, a provider’s countervailing speed test should show that 80 percent of a provider’s download and upload measurements are at or above 80 percent of the required speed. *See Performance Measures Order*, 33 FCC Rcd at 6528, para. 51. *See* BEAD NOFO at 65, n. 80, Section IV.C.2.a.

<sup>166</sup> *Performance Measures Order*, including provisions for providers in non-contiguous areas (§21).

<sup>167</sup> *Ibid.*

<sup>168</sup> An unreasonable capacity allowance is defined as a data cap that falls below the monthly capacity allowance of 600 GB listed in the FCC 2023 Urban Rate Survey (FCC Public Notice DA 22-1338, December 16, 2022). Alternative plans without unreasonable data caps cannot be business-oriented plans not commonly sold to residential locations. A successful challenge may

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|                               |   | consumer.   | without an unreasonable cap.   |
| <b>Technology</b>             | The technology indicated for this location is incorrect.  | Manufacturer and model number of residential gateway (CPE) that demonstrates the service is delivered via a specific technology.  | Provider has countervailing evidence from their network management system showing an appropriate residential gateway that matches the provided service.      |
| <b>Business service only</b>  | The location is residential, but the service offered is marketed or available only to businesses.                                   | Screenshot of provider webpage.   | Provider documentation that the service listed in the BDC is available at the location and is marketed to consumers.   |
| <b>Enforceable Commitment</b> | The challenger has knowledge that broadband will be deployed at this location by the date established in the deployment obligation. | Enforceable commitment by service provider ( <i>e.g.</i> , authorization letter). In the case of Tribal Lands, the challenger must submit the requisite legally binding agreement between the relevant Tribal Government and the service provider for the location(s) at issue. | Documentation that the provider has defaulted on the commitment or is otherwise unable to meet the commitment ( <i>e.g.</i> , is no longer a going concern). |
| <b>Planned service</b>        | The challenger has knowledge that broadband will be deployed at this location by  | <ul style="list-style-type: none"> <li>Construction contracts or similar evidence of on-going deployment,</li> </ul>  | Documentation showing that the provider is no longer able to meet the commitment ( <i>e.g.</i> , is  |

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not change the status of the location to unserved or underserved if the same provider offers a service plan without an unreasonable capacity allowance or if another provider offers reliable broadband service at that location.

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|---|--|--|---|
|   | <p>June 30, 2024, without an enforceable commitment or a provider is building out broadband offering performance beyond the requirements of an enforceable commitment.</p> | <p>along with evidence that all necessary permits have been applied for or obtained.</p> <ul style="list-style-type: none"> <li>• Contracts or a similar binding agreement between the Eligible Entity and the provider committing that planned service will meet the BEAD definition and requirements of reliable and qualifying broadband even if not required by its funding source (<i>i.e.</i>, a separate federal grant program), including the expected date deployment will be completed, which must be on or before June 30, 2024.</li> </ul> | <p>no longer a going concern) or that the planned deployment does not meet the required technology or performance requirements.</p> |
| <p><b>Not part of enforceable commitment.</b></p> | <p>This location is in an area that is subject to an enforceable commitment to less than 100% of locations and the location is not covered by that commitment.</p>         | <p>Declaration by service provider subject to the enforceable commitment.</p>  |   |

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|  | (See BEAD NOFO at 36, n. 52.)  |  |  |
| <b>Location is a CAI</b>                                     | The location should be classified as a CAI.  | Evidence that the location falls within the definitions of CAIs set by the Eligible Entity. <sup>169</sup>                       | Evidence that the location does not fall within the definitions of CAIs set by the Eligible Entity or is no longer in operation. |
| <b>Location is not a CAI</b>                                 | The location is currently labeled as a CAI but is a residence, a non-CAI business, or is no longer in operation. | Evidence that the location does not fall within the definitions of CAIs set by the Eligible Entity or is no longer in operation. | Evidence that the location falls within the definitions of CAIs set by the Eligible Entity or is still operational.              |
| <b>CAI: Qualifying broadband unavailable.</b> <sup>170</sup> | The CAI cannot obtain qualifying broadband.  | Evidence that the CAI has tried to acquire qualifying broadband but has been unsuccessful.                                       | Evidence that qualifying broadband is available to the CAI.  |
| <b>CAI: Qualifying broadband available.</b>                  | The CAI can obtain qualifying broadband.   | Evidence that the CAI can acquire symmetric gigabit service.   | Evidence that qualifying broadband is not available to the CAI.  |
| <b>DSL</b>   | Pre-challenge modification for DSL technology.   | No location-specific evidence required.  | Not rebuttable.  |
| <b>Fixed wireless</b>  | Pre-challenge modification for fixed wireless technology.  | No location-specific evidence required.  | Rebuttal evidence described in the Eligible Entity's approved IP Volume I.   |

<sup>169</sup> For *example*, eligibility for FCC e-Rate or Rural Health Care program funding or registration with an appropriate regulatory agency may constitute such evidence, but the Eligible Entity may rely on other reliable evidence that is verifiable by a third party.

<sup>170</sup> "Qualifying broadband" to a CAI is Reliable Broadband Service with (i) a speed of not less than 1 Gbps for downloads and uploads alike and (ii) latency less than or equal to 100 milliseconds." NOFO, p. 37.



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| <b>Measurement challenge</b> | Pre-challenge modification for a measurement- based challenge using anonymous speed tests. | No location-specific evidence required. | Provider has countervailing speed test evidence showing sufficient speed, <i>e.g.</i> , from their own network management system. <sup>171</sup> |
|------------------------------|--|---|--|

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<sup>171</sup> As described in the NTIA's NOFO, provider's countervailing speed test should show that 80 percent of a provider's download and upload measurements are at or above 80 percent of the required speed. See Performance Measures Order, 33 FCC Rcd at 6528, para. 51. See BEAD NOFO at 65, n. 80, Section IV.C.2.a.