

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.

FILED
PUBLIC UTILITIES COMMISSION
FEBRUARY 23, 2023
SAN FRANCISCO, CALIFORNIA
RULEMAKING 23-02-016

**ORDER INSTITUTING RULEMAKING PROCEEDING TO CONSIDER
RULES TO IMPLEMENT THE BROADBAND EQUITY,
ACCESS, AND DEPLOYMENT PROGRAM**

Summary

This Order Instituting Rulemaking will consider rules to determine grant funding, eligibility and compliance for funds distributed to California under the federal Broadband Equity, Access, and Deployment Program, created by the Infrastructure Investment and Jobs Act of 2021.

1. Background

The Infrastructure Investment and Jobs Act (IIJA) was signed into law by President Biden on November 15, 2021.¹ Among the law's numerous provisions, the IIJA establishes the \$42.45 billion Broadband Equity, Access, and Deployment (BEAD) Program, administered by the National Telecommunications and Information Administration (NTIA).

¹ P.L. 117-58 §60102(b) (2021).

In addition to the initial planning grant funds allocated to each eligible state and territory, the NTIA will distribute BEAD funding based on the share of unserved locations in each eligible state or territory.² These unserved locations are “determined in accordance with the broadband DATA maps” that the Federal Communications Commission (FCC) was mandated to create by the Broadband DATA Act.³

After receiving BEAD funding from the NTIA, a state may award sub-grants 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; 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.⁴ In awarding sub-grants for projects to construct and deploy broadband infrastructure and networks, states should prioritize projects applying to service unserved locations, then projects applying to service underserved locations, and then projects connecting eligible community anchor institutions.⁵

To inform future federal broadband planning, a state is required to submit to the NTIA: 1) an initial report after receiving grant funds, 2) semiannual

² *Id* at §60102(c)(1) –(c)(3).

³ *Id* at §60102(c)(1)(A) In calculating the amount allocated to each state as described above, NTIA is to rely on the FCC’s broadband maps, developed as required by the Broadband Deployment Accuracy and Technological Availability Act (Broadband DATA Act, P.L. 116-130), to determine the number of unserved locations.

⁴ *Id* at §60102(f).

⁵ *Id* at §60102(h)(1)(A)(i).

reports, and 3) a final report after expending all funds.⁶ An entity awarded a sub-grant is required to submit semiannual reports to the state to track the effectiveness of its use of the funds.⁷

Outside of “high-cost areas,” a state or the entity receiving a sub-grant must contribute at least 25 percent of project costs.⁸ The matching contribution may include funds from state and local governments, for-profit or nonprofit entities, regional commissions, or others; in-kind contributions; or funding that the state or subgrantee received from existing federal broadband programs under the Families First Coronavirus Response Act (P.L. 116-127), the CARES Act (P.L. 116-136), the Consolidated Appropriations Act, 2021 (P.L. 116-260), or the American Rescue Plan Act of 2021 (P.L. 117-2).⁹ An entity that has received broadband funds from a federal, state, or local government may still apply for a sub-grant in the program, and conversely, an entity receiving a sub-grant in the BEAD Program will still be eligible to apply for other broadband funds from federal, state, or local governments.¹⁰ Last, states must use the federal funds from the program to supplement, not displace, the amounts that the state would otherwise make available for broadband deployment.¹¹

The IIJA defines a location as unserved if the National Broadband Map indicates that 1) it is a broadband-serviceable location (defined by the FCC as any business or residential location where broadband service is available or can be

⁶ *Id* at §60102(j)(1)

⁷ *Id* at §60102(j)(2)(A).

⁸ This matching requirement does not apply to broadband deployment projects in high-cost areas. (*See* P.L. 117-58, §60102(h)(3)(A)(i).)

⁹ P.L. 117-58, §60102(h)(3)(B)(iii).

¹⁰ *Id* at §60102(k).

¹¹ *Id* at §60102(l).

installed) and 2) it either has no access to broadband service or lacks reliable broadband service. According to the NTIA's BEAD Program Notice of Funding Opportunity (BEAD NOFO),¹² reliable broadband service should be provided via fiber, cable, digital subscriber line (DSL), or terrestrial fixed wireless technology using licensed or a hybrid of licensed and unlicensed spectrum.

On August 12, 2022, the Commission applied for BEAD Initial Planning Funds (BEAD-IPF). On December 20, 2022, the Biden Administration announced the award of \$4,996,502 to the California Public Utilities Commission (Commission or CPUC) for California's BEAD-IPF grant, to be administered by the NTIA. At the same time, the Biden Administration announced the award of \$4,001,525 in a State Digital Equity Planning Grant to the California Department of Technology (CDT).¹³ Under BEAD Program rules, the CPUC and CDT are required to coordinate efforts as BEAD and Digital Equity programs are planned and implemented.¹⁴

Finally, the BEAD Program requires a state to submit its Five-Year Action Plan to NTIA within 270 days of receipt of Initial Planning Funds.

2. Preliminary Scoping Memo

The preliminary scope of issues in the proceeding is set forth below, in accordance with the Commission's Rules of Practice and Procedure (Rules), Rule 7.1(d).¹⁵ In general, the purpose of this proceeding is to develop procedures,

¹² The NTIA's BEAD NOFO, released on May 13, 2022, is available at: <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf>.

¹³ See Biden-Harris Administration Awards Nearly \$9 Million to California in 'Internet for All' Planning Grans, rel. 12/20/2022: <https://broadbandusa.ntia.doc.gov/news/latest-news/biden-harris-administration-awards-nearly-9-million-california-internet-all>

¹⁴ See BEAD NOFO, Sec. I, B.2, Process Overview, at 10.

¹⁵ All references to "Rules" are to the Commission's Rules of Practice and Procedure unless otherwise indicated.

rules, and orders necessary to fulfilling the duties and responsibilities assigned to the Commission by Governor Newsom.¹⁶ Many of the rules for the BEAD Program, which the Commission would administer as a grantee, are already in place, either in statute or the BEAD NOFO issued by the NTIA in May 2022. The issues this proceeding would address include developing rules, where the Commission has discretion, that would apply to the subgrantees to whom the Commission would award BEAD funding. Issues initially in the scope of this proceeding are listed below.

1. Extremely High-Cost Threshold. The NTIA's Notice of Funding Opportunity requires the CPUC to establish an "Extremely High Cost Per Location Threshold" in a manner that maximizes use of the best available technology while ensuring that the program can meet the prioritization and scoring requirements.¹⁷ The NTIA expects the Extremely High Cost Per Location Threshold to be set as high as possible to help ensure that end-to-end fiber projects are deployed wherever feasible. How should the Commission define the threshold for locations that constitute "extremely high cost" locations?
2. Geographic Level. The Notice of Funding Opportunity gives flexibility to states to solicit proposals from prospective subgrantees at the geographic level of their choosing—for example, on a per-location basis, per-census block basis, per-town, per-county or another geographic unit. States may alternatively solicit proposals for project areas they define or ask prospective subgrantees to define their own proposed project areas. What is the best, or most appropriate, geographic level for subgrantee proposals?

¹⁶ See Letter of Intent for the Broadband Equity, Access, and Deployment Program Grant from Governor Newsom to Alan Davidson, Assistant Secretary of Commerce for Communications and Information, July 1, 2022.

¹⁷ Refer to Section IV.B.6.b of the Notice of Funding Opportunity for the Broadband Equity, Access, and Deployment Program

3. Overlapping Project Areas. What mechanism should be used for overlapping proposals to allow for a like-to-like comparison of competing proposals?
4. Selection Among Priority Broadband Projects. In addition to the Primary Criteria and Secondary Criterion required in the Notice of Funding Opportunity, which additional prioritization factors should be considered?¹⁸ How should they each be measured, and should they be weighted in prioritization?
5. Selection Among Other Last-Mile Broadband Deployment Projects. In addition to the Primary Criteria and Secondary Criteria required in the Notice of Funding Opportunity, which Additional Prioritization Factors should be considered?¹⁹ How should they each be measured, and should they be weighted in prioritization?
6. Challenge Process. States 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 made by states as to whether a particular location or community anchor institution within the jurisdiction of the Eligible Entity is eligible for grant funds. Among other things, the process must allow for challenges regarding whether a particular location is unserved or underserved as defined in the Infrastructure Act and Section I.C of the Notice of Funding Opportunity. What information²⁰ should be provided by a challenger as a basis for asserting service already exists at a location, or at locations, that disqualify them from being called “unserved?”
7. Match Requirement. The IIJA expressly provides that matching funds for the BEAD Program may come from

¹⁸ Additional Criteria proposed are: Equitable Workforce Development and Job Quality, Open Access, and Local and Tribal Coordination.

¹⁹ See previous footnote.

²⁰ For context, refer to Decision 22-04-055, Section 19.

- federal regional government entities and from funds that were provided to an Eligible Entity or a subgrantee for the purpose of deploying broadband service under the Families First Coronavirus Response Act, the CARES Act, the Consolidated Appropriations Act of 2021, or the American Rescue Plan Act of 2021, to the extent permitted by those laws. What state funding should also be allowed to be used as matching funds?
8. Statewide Middle Mile. How should the Commission prioritize subgrantee project proposals that plan on utilizing the statewide open-access middle mile network? Should the Commission require applicants proposing to build their own middle mile infrastructure with BEAD funds to make their network open access? In the event the middle mile portion of an application significantly overlaps the statewide middle mile network, should the applicant be required to consult with the California Department of Technology?
 9. Ministerial Review. Should the Commission include a ministerial review process whereby the Commission delegates to staff the ability to approve BEAD subgrants that meet certain criteria? What should those criteria be?
 10. Grant Conditions. What conditions should the Commission impose on BEAD subgrantees-- for example, workforce development (e.g., job training) or affordable plans?
 11. Grant Applications. How many application cycles should there be in a calendar year?
 12. Payments. What payment milestones should the BEAD subgrantee program adopt?
 13. Impacts on environmental and social justice communities, including the extent to which BEAD Program subgrants will impact achievement of any of the nine goals of the Commission's Environmental and Social Justice Action Plan.
 14. How should the Commission implement other issues for which it has discretion under the BEAD NOFO? Parties

should specify the issues, including the statute or rule, and include specific recommendations.

As an initial matter, the Commission invites comments on this Order Instituting Rulemaking (OIR). Pursuant to Rule 6.2, comments on an OIR shall state any objections to the preliminary scoping memo regarding the category, issues to be considered, or schedule. In addition to discussing the items that should be in the scope of this proceeding, parties are asked to respond in detail to the issues and questions listed above, as their comments and reply comments may inform a staff proposal. The precise issues to be addressed and the process for addressing those issues will be set forth in an assigned Commissioner's Scoping Memo.

3. Categorization; Ex Parte Communications; Need for Hearing

The Commission's Rules of Practice and Procedure require that an order instituting rulemaking preliminarily determine the category of the proceeding and the need for a hearing. As a preliminary matter, we determine that this proceeding is quasi-legislative because our consideration and approval of this matter would establish policy or rules affecting a class of regulated entities. Accordingly, *ex parte* communications are permitted without restriction or reporting requirement pursuant to Article 8 of the Rules.

We preliminarily determine that evidentiary hearings are not necessary. However, the assigned Commissioner may re-evaluate the need for evidentiary hearings when issuing the scoping memo for this proceeding.

4. Preliminary Schedule

The preliminary schedule is set forth below. The assigned Commissioner and Administrative Law Judge (ALJ) have the authority to set other dates in the proceeding or modify those below as necessary.

Day 1	Order Instituting Rulemaking issued
Day 20	Deadline for requests to be on service list
Day 46	Initial Comments on OIR filed and served
Day 61	Reply Comments on OIR filed and served

The determination on the need for further procedural measures, including the scheduling of a pre-hearing conference, discovery, technical workshops, public participation hearings and/or evidentiary hearings will be made in one or more rulings issued by the assigned Commissioner. Any party that believes an evidentiary hearing is required may address such need for hearing in comments and reply comments on this OIR.

The assigned Commissioner or the assigned ALJ may change or modify the schedule to promote efficient and fair administration of this proceeding. Today's decision sets a due date for comments and reply comments on the OIR. The schedule for the remainder of the proceeding will be adopted in the assigned Commissioner's Scoping Memo.

It is the Commission's intent to complete this proceeding within 18 months of the date this decision is adopted. (Public Utilities (Pub. Util.) Code Section 1701.5(b).)

If there are any workshops in this proceeding, notice of such workshops will be posted on the Commission's Daily Calendar to inform the public that a decision-maker or an advisor may be present at those meetings or workshops. Parties shall check the Daily Calendar regularly for such notices.

5. Service of OIR

We provide service to the Service Lists of Rulemaking (R.) 20-09-001 and R.20-08-021. Service of the OIR does not confer party status or place any person who has received such service on the Official Service List for this proceeding.

Instructions for obtaining party status or being placed on the official service list are given below.

6. Filing and Service of Comments and Other Documents

Filing and service of comments and other documents in the proceeding are governed by the Commission's Rules of Practice and Procedure. Parties are instructed to only serve documents on the assigned Commissioner, advisors to the assigned Commissioner, and the assigned ALJ(s) by electronic copy and not by paper copy, unless specifically instructed to do otherwise.

7. Addition to Official Service List

Addition to the official service list is governed by Rule 1.9(f) of the Commission's Rules of Practice and Procedure.

Any person will be added to the "Information Only" category of the official service list upon request, for electronic service of all documents in the proceeding, and should do so promptly in order to ensure timely service of comments and other documents and correspondence in the proceeding. (See Rule 1.9(f).) The request must be sent to the Process Office by e-mail (process_office@cpuc.ca.gov) or letter (Process Office, California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, California 94102). Please include the Docket Number of this rulemaking in the request.

Persons who file responsive comments thereby become parties to the proceeding (see Rule 1.4(a)(2)) and will be added to the "Parties" category of the official service list upon such filing. In order to assure service of comments and other documents and correspondence in advance of obtaining party status, persons should promptly request addition to the "Information Only" category as described above; they will be removed from that category upon obtaining party status.

8. Subscription Service

Persons may monitor the proceeding by subscribing to receive electronic copies of documents in this proceeding that are published on the Commission's website. There is no need to be on the official service list in order to use the subscription service. Instructions for enrolling in the subscription service are available on the Commission's website at <http://subscribecpuc.cpuc.ca.gov/>.

9. Intervenor Compensation

Intervenor Compensation is permitted in this proceeding. Pursuant to Pub. Util. Code Section 1804(a)(1), a customer who intends to seek an award of compensation must file and serve a notice of intent to claim compensation within 30 days after the prehearing conference. Parties new to participating in Commission proceedings may contact the Commission's Public Advisor.

10. Public Advisor

Any person or entity interested in participating in this rulemaking who is unfamiliar with the Commission's procedures should contact the Commission's Public Advisor in San Francisco at (415) 703-2074 or 1-866-849-8390 or e-mail public.advisor@cpuc.ca.gov. The TTY number is 1-866-836-7825.

11. Public Outreach

Pub. Util. Code Section 1711(a) states:

Where feasible and appropriate, except for adjudication cases, before determining the scope of the proceeding, the commission shall seek the participation of those who are likely to be affected, including those who are likely to benefit from, and those who are potentially subject to, a decision in that proceeding. The commission shall demonstrate its efforts to comply with this section in the text of the initial scoping memo of the proceeding.

Public outreach will be described in the scoping memo of the assigned Commissioner.

O R D E R

IT IS ORDERED that:

1. This Order Instituting Rulemaking is adopted pursuant to Rule 6 of the Commission's Rules of Practice and Procedure.
2. The preliminary categorization is quasi-legislative.
3. The preliminary determination is that an evidentiary hearing is not needed.
4. The preliminary scope of issues is as stated above in Section 2.
5. Any party that expects to claim intervenor compensation for its participation in this Rulemaking must file its notice of intent to claim intervenor compensation in accordance with Public Utilities Code Section 1804(a)(1) and Rule 17.1(a)(2).

This order is effective today.

Dated February 23, 2023, at San Francisco, California.

ALICE REYNOLDS
President
GENEVIEVE SHIROMA
DARCIE L. HOUCK
JOHN REYNOLDS
KAREN DOUGLAS
Commissioners