

Decision 24-09-050 September 26, 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 TWO OF THE BROADBAND
EQUITY, ACCESS, AND DEPLOYMENT PROGRAM RULES**

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Appendix A – Initial Proposal Volume Two, as Approved by the NTIA

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

Summary

In this decision, the California Public Utilities Commission (Commission) revises and adopts Volume Two of the Initial Proposal (Volume Two) for the Broadband Equity, Access, and Deployment (BEAD) Program. Volume Two focuses on the rules for awarding BEAD grants to subgrantees in California.

The Commission submitted both Volume One and Volume Two of its Initial Proposal to the National Telecommunications and Information Administration (NTIA) on December 26, 2023. The NTIA must approve the Commission's Initial Plan before the Commission can solicit grant applications.

During its review of Volume Two, the NTIA provided the Commission with curing instructions for Volume Two on seven separate occasions.

The deadlines for submitting BEAD applications will be announced by the Commission's Communications Division Staff, after the NTIA approves the final eligibility map.

This proceeding remains open.

1. Factual and Procedural Background

On February 23, 2023, the California Public Utilities Commission (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 (IIJA).¹ Among the law's numerous provisions, the IIJA establishes the \$42.45 billion

¹ P.L. 117-58 §60102(b) (2021).

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 locations² 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; 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 MCI Metro Access Transmission Services, LLC (Verizon);
- Next Century Cities;

² Section 60102(a)(2)(H) of the IIJA defines the terms “location” and “broadband-serviceable location” “have the meanings given those terms by the (Federal Communications) Commission under rules and guidance that are in effect, as of the date of enactment of this Act.” In the Third Broadband Data Collection Report and Order, the FCC adopted “as the fundamental definition of a ‘location’ for purposes of the [Broadband Serviceable Location] Fabric: a business or residential location in the United States at which fixed broadband Internet access service is, or can be, installed.” See Establishing the Digital Opportunity Data Collection; Modernizing the FCC Form 477 Data Program, WC Docket Nos. 19-195, 11-10, Third Report and Order, 36 FCC Rcd 1126, 1175 para. 126 (2021). This decision uses “location” and broadband-serviceable location” interchangeably.

- 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;³
- The Small LECs;⁴
- 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;

³ Membership of the California Broadband & Video Association includes parties to this proceeding, such as Charter, Comcast and Cox.

⁴ 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 Ponderosa Telephone Co., Calaveras Telephone Company, Cal-Ore Telephone Co., and Ducor Telephone Company.

- 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);⁵
- 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.

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;

⁵ Formerly known as the Wireless Internet Service Providers Association

- 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, 2023.⁶

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

- Community Legal Services;
- California Broadband & Video Association;
- CENIC;
- California Alliance for Digital Equity (CADE);⁷

⁶ 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.

⁷ 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.

- The Greenlining Institute;
- Cal Advocates;
- WISPA;
- City and County of San Francisco;
- SBUA;
- TURN and CforAT;
- GeoLinks; and
- USTelecom.⁸

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

- California Broadband & Video Association;
- The Greenlining Institute;
- Community Legal Services;
- 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.⁹

⁸ 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.

⁹ 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..."

On November 7, 2023, the assigned ALJ issued via ruling a Staff Proposal for public comment.^{10,11} The Staff Proposal contains a draft of both Volume One and Volume Two of the Initial Proposal the Commission must submit to the NTIA. The Commission adopted Volume One in D.24-05-029. This decision addresses Volume Two. The November Ruling made available much of the data and other information used to develop the Staff Proposal, including five appendices.¹² Finally, the November Ruling asked parties to comment on any statements made during the October 26, 2023 workshop.

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

- Community Legal Services;
- SBUA;
- The Small LECs;
- CENIC;
- CTIA;
- California Broadband & Video Association;
- GeoLinks;
- City and County of San Francisco;
- Cal Advocates;

¹⁰ The Staff Proposal will be referred to as the “November Proposal” while the ruling will be referred to as the “November Ruling.”

¹¹ 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.

¹² 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.

- 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.¹³ Additionally, the Commission and the California Department of Technology (CDT) partnered with local and regional organizations and other state entities to host seventeen (17) BEAD planning workshops throughout California, as well as three in-person Tribal consultations. On November 18, 2023, the Assigned Commissioner held a listening session related to this proceeding in Los Angeles; a second listening session was held in Oakland on January 18, 2024.

On December 26, 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 for Volume One.¹⁴

On April 2, 2024, the Commission took notice of the NTIA's final curing instructions for Volume One of the Initial Proposal.¹⁵

On May 9, 2024, the Commission adopted D.24-05-029, approving Volume One of the Initial Proposal.

¹³ 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."

¹⁴ See, Ruling of Assigned ALJ Noticing NTIA Curing Instructions and Other Items, issued April 2, 2024.

¹⁵ *Id.*

Between the Commission's submission of the Initial Proposal in December 2023 and August 23, 2024, the NTIA requested numerous changes to Initial Proposal Volume Two, as well as additional supporting information.

On August 16, 2024, the Commission took notice of the NTIA's curing instructions for Volume Two of the Initial Proposal. The NTIA issued Curing Requests on the following dates:

- February 28, 2024;
- April 10, 2024;
- May 14, 2024;
- June 5, 2024;
- July 1, 2024;
- July 15, 2024; and
- August 7, 2024.

In the same ruling, the assigned ALJ notified parties that this phase of this proceeding stands submitted.

1.2. Submission Date

This matter was submitted on August 22, 2024, upon the assigned ALJ issuing a ruling notifying parties that this phase of the proceeding stands submitted.

2. Jurisdiction

The Infrastructure Investment and Jobs Act of 2021 establishes the BEAD Program, under the administration of the NTIA. Although the Governor designated the Commission to serve as the recipient of and administering agent for the BEAD program for California,¹⁶ the NTIA has the authority to review and

¹⁶ See, Governor Gavin Newsom, Letter of Intent for the Broadband Equity, Access, and Deployment Program Grant, July 1, 2022.

approve a State's Initial Proposal and may modify the proposed rules and criteria for awarding grants, including and final eligibility determinations made by this Commission.¹⁷

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 Community Anchor Institutions.¹⁸ Further, the NTIA's NOFO directs States to prioritize fiber-optic deployments.¹⁹

3. Issues Before the Commission

This decision resolves Issues 1-5, 7-15, and addresses Issue 17, as identified in the Assigned Commission's Scoping Memo and Ruling, including those listed below.

1. **Extremely High-Cost Threshold.** The NTIA's NOFO requires the Commission to establish an "Extremely High Cost Per Location Threshold". 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? What considerations should the Commission weigh for projects

¹⁷ 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.

¹⁸ 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."

¹⁹ 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.

proposed to serve locations that exceed the Extremely High Cost Per Location Threshold?

2. **Geographic Level.** The NOFO 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?
3. **Overlapping Project Areas.** If the Commission receives grants proposals that would serve the same 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 NOFO, should the Commission adopt additional prioritization factors for Priority Broadband Projects? If yes, which factors should the Commission adopt and how should those factors be measured or weighed?
5. **Selection Among Other Last-Mile Broadband Deployment Projects.** In addition to the Primary Criteria and Secondary Criteria required in the NOFO, should the Commission consider additional prioritization factors for Other Last-Mile Broadband Deployment Projects? If yes, how should those factors be measured and weighted?
6. **Match Requirement.** The IIJA expressly provides that matching funds for the BEAD Program may come from 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. Should the Commission prioritize projects

that include matching funds beyond those allowed by the IIJA? What state funding, if any, should also be allowed to be used as matching funds?

7. **Statewide Middle Mile.** 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?
8. **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? If so, what should those criteria be?
9. **Affordability.** Section C.2.c of the NOFO requires each Eligible Entity to include in its Initial and Final Proposals a middle-class affordability plan to ensure that all consumers have access to affordable high-speed internet. If the Commission were to adopt an affordable plan requirement, what constitutes an “affordable plan?” How should the Commission define “middle-class households”? How should the Commission define “low-cost broadband service option” required to be offered by all subgrantees? What other factors should the Commission consider in developing the middle-class affordability plan?
10. **Technical Assistance.** May BEAD funds be used for technical assistance and, if yes, should the Commission make funding available for potential subgrantees?
11. **Climate Resilience.** Section IV.C.1.h of the NOFO requires each Eligible Entity to provide an assessment of climate threats and proposed mitigation measures. How should the Commission evaluate potential climate threats to

deployed infrastructure? What mitigation measures should be required of subgrantees?

12. **Labor Practices and Workforce Development.** The NOFO encourages Eligible Entities to consider workforce development goals when selecting subgrantees. What requirements should the Commission consider to ensure Eligible Entities are considering workforce development goals? Should the Commission require subgrantees or their contractors and/or subcontractors provide Registered Apprenticeships and pre-apprenticeships tied to a Registered Apprenticeship, joint labor management partnerships, and other high-quality, on-the-job training opportunities? Should subgrantees be required to offer “quality” jobs and, if so, what should be the definition of “quality” jobs? Should subgrantees be required to prioritize hiring local workers and have robust and specific plans to recruit historically underrepresented populations facing labor market barriers and, if so, what should be the definition of an underrepresented population? Should the Commission ensure that subgrantees prioritize projects that use unionized labor? Should there be any other requirements for subgrantees to support the development of a highly skilled workforce capable of carrying out work in a manner that is safe and effective.
13. **Grant Conditions.** Should the Commission impose additional conditions on BEAD subgrantees? What conditions should the Commission impose?
14. **Grant Applications.** How many application cycles should the Commission create in a calendar year?
15. **Impacts on Environmental and Social Justice Communities (ESJ).** What potential 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, should be considered?

4. Defining Project Areas

Federal BEAD rules allow each State to determine how to design Project Areas or to choose to allow applicants to do so, so long as the State has a plan to address the needs of all unserved and underserved locations.²⁰ The November Proposal asked parties to comment on two options for defining Projects Areas. The first option would allow applicants to define their Project Areas in their applications, using a census block group (CBG) as a minimum unit.²¹ The second option is to use the boundaries of Tribal Lands and school districts as Project Areas.²² Where there exists overlap between Tribal and school district geographic boundaries, the school district Project Area would include all locations within the district other than those within Tribal boundaries, as the Tribal boundaries will constitute a separate and distinct Project Area.²³ The November Proposal recognizes that this approach may lead to the submission of applications for overlapping CBGs that will require a deconfliction and clarification effort, with Staff negotiating with applicants to arrive at an outcome that addresses the needs of as many as possible eligible locations. Requiring Project Areas to at a

²⁰ NTIA NOFO, at 38. A state “may solicit proposals from prospective subgrantees at the geographic level of its choosing – for example, on a per-location basis, per-census block basis, per-town, per-county or another geographic unit. An Eligible Entity may alternatively solicit proposals for project areas it defines or ask prospective subgrantees to define their own proposed project areas. If the Eligible Entity allows prospective subgrantees to define proposed project areas, it must develop a mechanism for de-conflicting overlapping proposals (for example, by de-scoping some locations from a provider’s proposed project area) to allow for like-to-like comparison of competing proposals. Whatever process is selected, the Eligible Entity must ensure it has a plan for serving all unserved and (where it has sufficient funding) underserved locations.”

²¹ November Proposal, Attachment B, at 37.

²² *Id.*, Attachment B, at 38.

²³ To the extent an applicant includes Tribal Lands in its application, the applicant would also need to submit evidence that demonstrates Tribal consent or partnership as to the proposal set forth in the application.

minimum be a CBG is intended in part to enable a simpler deconfliction process than if applicants define project areas at the address level, which could lead to more overlapping applications.²⁴

Under both proposals, applicants must provide proposed pricing for service to all unserved and underserved locations in the Project Area.²⁵ However, the Commission would allow applicants to propose service to less than 100 percent of eligible locations in a Project Area or to propose separate pricing plans to reach nearly all eligible locations in the Project Area, to increase the chances of funding the vast majority of unserved and underserved locations throughout the State, with the best technology possible.²⁶

Applicants would also be required to provide a list of any locations excluded from their service commitment, as well as related mapping data per the Commission's specifications, so that applications can be scored and compared to each other.²⁷

In addition to asking which option the Commission should adopt, the November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

²⁴ November Proposal, Attachment B, at 37-38.

²⁵ *Id.*, Attachment B, at 38.

²⁶ *Id.*, Attachment B, at 39.

²⁷ *Id.*

4.1. Positions of Parties

CENIC, NDC, RCRC, San Francisco, and Cal Advocates support allowing applicants to define Projects Areas, with the understanding that Project Areas will not be less granular than the CBG geographic span.

CENIC favors allowing applicants to define Projects Areas, arguing that that approach is consistent with the Commission's approach in the Federal Funding Account (FFA), and noting that using school district geographic boundaries could be challenging for prospective BEAD applicants because certain school districts, such as Siskiyou Union High School District, which covers approximately 347 square miles and Elk Grove Unified School District, which spans 320 square miles, can be very large.²⁸ NDC agrees, claiming projects consisting of CBGs will be more economically viable and efficient, and that CBG data provides more focused information for identifying low-income communities, unlike large geographic spans, such as school districts. NDC also is concerned that projects at the school district geographic span may lead to more applications with overlapping Project Areas and result in a longer negotiation and deconfliction process.²⁹ RCRC supports allowing applicants to select their own Project Areas at the CBG level, but does not support using other geographic spans, asserting that creating Project Areas based on established boundaries of Tribal Lands and school districts is inconsistent with how broadband networks are designed.³⁰ Cal Advocates asserts the Commission should adopt CBGs as minimum project units because a relatively smaller minimum geographic unit would allow for greater participation in the BEAD program by smaller

²⁸ CENIC, Opening Comments, at 3.

²⁹ NDC, Opening Comments, at 4-5.

³⁰ RCRC, Opening Comments, at 5.

providers³¹ and would ease analysis of project applications and project results, given the amount of demographic data available at that geographic span as compared with school district level data.³² San Francisco asserts using CBGs would allow equal opportunity for applicants of all sizes and types and allow funds to be more efficiently targeted to the locations with the greatest need.³³

Tarana Wireless supports defining Project Areas using established jurisdictional boundaries, asserting that non-political boundaries can ensure that providers do not craft applications that “cherry pick” broadband serviceable locations.³⁴

Cal Advocates supports the requirement that projects serve 100 percent of eligible locations within their proposed Project Area, with exceptions permitted where bringing fiber to certain proposed project locations would cause the proposed project budget to exceed the Extremely High-Cost Per Location Threshold and neither the applicant nor any other competing or nearby applicant is able to bring proposed per-location projects costs for that Project Area to less than the Threshold.³⁵ Tarana Wireless also supports ensuring that BEAD applicants commit to serving 100 percent of broadband serviceable locations in a Project Area, suggesting this would allow providers to propose a mixture of broadband technologies (e.g. fiber and licensed fixed wireless).³⁶ RCRC supports the ability of applicants to serve less than 100 percent of the Project Area, with a

³¹ Cal Advocates, Opening Comments, at 19.

³² *Id.*, at 20.

³³ San Francisco, Opening Comments, at 3.

³⁴ Tarana Wireless, Opening Comments, at 7.

³⁵ Cal Advocates, Opening Comments, at 19, 21.

³⁶ Tarana Wireless, Opening Comments, at 7.

caveat that there should be a minimum percentage of service required, such as 80 percent.³⁷ AT&T supports allowing applicants to propose to serve fewer than 100 percent of the unserved and underserved locations in each Project Area, contending it would enable applicants to identify and remove outlier locations that are too costly to serve with fiber that these locations put the rest of the project at risk of losing out on end-to-end fiber.³⁸ AT&T proposes the Commission create a separate application round to offer BEAD funding for these most-costly locations in a non-fiber round or address them on a case-by-case basis.³⁹

The California Broadband and Video Association does not support either proposed option for defining a Project Area, and instead strongly urges the Commission to permit applicants to design their own Project Areas⁴⁰ and allow applicants to de-scope broadband serviceable locations that are cost outliers.⁴¹ The California Broadband and Video Association claims this approach will allow applicants to develop more efficient and economical proposals that leverage existing networks and facilities, maximize network efficiency, and reflect the geographic level at which providers can successfully deploy and sustainably operate their proposed networks⁴² while basing Project Areas on political boundaries would lead to inefficient and costly allocation of funds that risk leaving unserved areas unconnected, ultimately jeopardizing the Commission's

³⁷ RCRC, Opening Comments, at 5.

³⁸ AT&T, Opening Comments, at 5.

³⁹ *Id.*

⁴⁰ California Broadband and Video Association, Opening Comments, at 9.

⁴¹ *Id.*, at 12.

⁴² *Id.*, at 9.

ability to achieve both the State's and the BEAD Program's goals.⁴³ CTIA asserts giving applicants more flexibility to define Project Areas will encourage more cost-efficient proposals, as well as account for topography, terrain, environmental factors, and rights-of-way considerations.⁴⁴ WISPA also does not support defining Project Areas based on geopolitical boundaries such as county borders or census blocks, but on independent criteria focused on "respecting geographic features and population densities."⁴⁵

AT&T does not support using geographic units such as CBGs, Tribal Lands, or school districts, to define a Project Areas, asserting those geographic spans do not reflect existing network infrastructure resources and will effectively disqualify some applicants, or force them to extend beyond what they can manage from a financial, operational, or human resources perspective.⁴⁶ AT&T recommends defining a Project Area as geographically granular as possible, noting that the NTIA's guidance recognizes individual locations as an option. AT&T specifically recommends using census blocks to define a Project Area, claiming doing so will maximize efficiencies, reduce costs, and enable greater participation by a variety of applicants and will help extend the reach of the State's BEAD allocation to enable end-to-end fiber deployments to as many locations as possible. AT&T asserts using larger minimum geographic units could force applicants to build far beyond their current infrastructure and thereby eliminate synergies and increase costs.⁴⁷ If the Commission is to adopt

⁴³ *Id.*, at 11.

⁴⁴ CTIA, Opening Comments, at 2.

⁴⁵ WISPA, Opening Comments, at 10.

⁴⁶ AT&T, Opening Comments, at 4.

⁴⁷ *Id.*

geographic spans larger than census blocks, AT&T argues CBGs are preferable, as they are more likely to reflect natural population boundaries, such as highways, and therefore, to enable more efficient network deployments.⁴⁸

WISPA proposes an alternative process by which applicants would define their own proposed funding areas, allowing for three stages: 1) deconfliction;⁴⁹ 2) scoring;⁵⁰ and 3) settlement.⁵¹

If the Commission does not receive proposals using larger geographic units in the first round of applications, AT&T suggests the Commission consider shifting to a smaller unit, like census blocks or locations, in subsequent rounds.⁵²

The Yurok Tribe disagrees with AT&T's recommendation to create a project size scoring subcategory, arguing that doing so would reward incumbent providers at the cost of new providers, as incumbent providers are better positioned to develop larger projects that serve more locations. Additionally, this category would cause projects serving rural customers to score lower, as remote, rural projects will almost necessarily cost more per location served.⁵³

The Yurok Tribe does not support AT&T's recommendation to define Project Area as geographically granular as possible, contending that AT&T's

⁴⁸ *Id.*, at 5.

⁴⁹ WISPA, Opening Comments, at 8. Following the application deadline, all applicants that have filed would have a 15-30-day review period to determine whether they wish to make changes in their proposals to remove overlaps with other applicants.

⁵⁰ *Id.*, at 9. Following the deconfliction period, each remaining overlap area would be separately scored on critical criteria to evaluate the optimal proposal in each such discrete area.

⁵¹ *Id.* Following the provisional assignment stage, to the extent that multiple applicants have been assigned to different territories within an initial overlap area, there would be an additional brief period within which those entities could negotiate to adjust their proposals to cede or trade areas that they propose to cover.

⁵² AT&T, Opening Comments, at 5-6.

⁵³ Yurok Tribe, Reply Comments, at 3.

logic that requiring minimum geographic units to be equivalent to a contiguous Tribal Land area could "eliminate synergies and increase costs" has led to a patchwork of service on tribal lands, and chronic underinvestment."⁵⁴

4.2. Discussion

In response to comments, the November Proposal was revised such that Volume Two of the Initial Proposal submitted to the NTIA in December 2023 allows applicants to submit their applications to serve Project Areas comprised of, at a minimum, CBGs. As noted by some parties, larger geographic spans, such as school districts, risk discouraging applications, as they may be too large of an area for one project to serve. In contrast, smaller geographic spans, like census blocks, will make the application review process more time consuming and risk not meeting the NTIA's tight deadlines. Allowing applicants to define Projects Areas, as some industry parties request, will lengthen the negotiation and deconfliction process, something those same parties oppose, while also risking that some unserved or underserved locations will be left behind.

Applicants must apply to serve 100 percent of serviceable locations within their proposed CBGs. The Commission will permit applicants to aggregate contiguous CBGs as they see fit in a proposed project area unit (PUA), though applicants may not subdivide an individual CBG. Depending on the size of their project, an applicant may request a waiver to serve less than 100 percent of serviceable locations.

The Commission adopts this revised proposal, which is consistent with NTIA curing instructions.

⁵⁴ Yurok Tribe, Reply Comments, at 3.

5. Prioritization

The IIJA requires States to prioritize BEAD funding to unserved locations, followed by underserved locations as the second priority, and then community anchor institutions (CAIs) as the third.⁵⁵ The NTIA confirmed this prioritization in its NOFO.⁵⁶ The Commission also must prioritize fiber projects, where economically possible.⁵⁷

Based on this, under the November Proposal, the Commission would review applications for BEAD funding with a focus on utilizing the funds available to serve as many qualifying locations as possible, consistent with the mandates of the BEAD Program to ensure that the Final Proposal maximizes the number of locations that will be served using BEAD funds. Thus, in the event that BEAD funds are insufficient to deliver fiber to all locations, the Commission will prioritize projects to serve unserved and underserved locations located in

⁵⁵ Public Law 117-58, Sec. 60102 (h)(1)(A)(i)(I-III). 135 STAT. 1196. (2021)

⁵⁶ *See*, NTIA NOFO, at 37: A state “shall award funding in a manner that ensures the deployment of service to all unserved locations within the Eligible Entity’s jurisdiction. If the Eligible Entity has sufficient funds to ensure deployment of service to all underserved locations within its jurisdiction, it must ensure such deployment as well. If the Eligible Entity lacks sufficient funds to ensure deployment of service to all underserved locations, it must commit the remainder of its BEAD funds to ensure deployment to underserved locations. Eligible Entities must submit Initial Proposals and Final Proposals that will result in coverage for all unserved locations, and (to the extent funds are available) all underserved locations.” *See also*, NTIA NOFO at 41: A state “may seek proposals to serve unserved locations, underserved locations, and CAIs collectively or separately, so long as the Eligible Entity awards funding in a manner that prioritizes Unserved Service Projects and once it certifies that it will ensure coverage of all unserved locations within the Eligible Entity, prioritizes Underserved Service Projects.”

⁵⁷ *See*, NTIA NOFO, Section IV.B.7. A “Priority Broadband Project” is a project that will provision service via end-to-end fiber-optic facilities to each end-user premises and such a project shall be “the default winner” over other permissible technologies unless the locations would be too costly to serve with fiber.

high-poverty areas and persistent poverty counties, consistent with the BEAD NOFO, as well as projects to serve locations on Tribal Lands.

Under the November Proposal, the Commission may undertake an additional application round if funds are available to provide broadband to any qualified locations not covered in the initial application round.

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

5.1. Positions of Parties

Cal Advocates suggests the Commission clarify how it intends to reconcile the prioritization of projects in high-poverty areas and persistent poverty counties with the prioritization of projects benefiting unserved locations, arguing the Commission should identify those areas that fall within the NOFO's definitions for these prioritization areas at the time it publishes its location eligibility map.⁵⁸ Cal Advocates also recommends prioritizing BEAD funding on projects with greater proportions of unserved locations⁵⁹ and proposes prioritizing applications where at least 80 percent of locations are unserved. Among this group of applications, Cal Advocates proposes that the Commission first fund projects for which at least 25 percent of the unserved locations are in high-poverty areas or persistent poverty counties, funded in the order of highest proportion of unserved locations to lowest. Cal Advocates then recommends that the next prioritization level be unserved projects with at least 80 percent

⁵⁸ Cal Advocates, Opening Comments, at 12-13.

⁵⁹ *Id.*, at 13.

unserved locations that will serve lower percentages of locations in high-poverty areas or persistent poverty counties, also funded in the order of highest proportion of unserved locations to lowest. After that, Cal Advocates suggests one final prioritization tier for projects that propose to serve predominantly unserved locations until there are no remaining applications with proposed Projects Areas comprised of a majority unserved locations, funding those predominantly underserved projects with at least 25 percent of locations in high-poverty areas or persistent poverty counties first, in the order of greatest proportion of unserved locations.⁶⁰

CENIC supports this approach.⁶¹

Tarana Wireless expresses concern that the Commission will not meet the goal of serving all unserved locations, underserved locations, and CAIs in the California.⁶²

5.2. Discussion

In response to curing instructions from the NTIA, the Commission made clear that, in the event that BEAD funds are insufficient to deliver reliable broadband service to all locations, the Commission will prioritize projects to first serve unserved then underserved locations.⁶³

The Commission adopts this proposal with this clarification, which is consistent with NTIA curing instructions.

⁶⁰ *Id.*, at 15.

⁶¹ CENIC, Reply Comments, at 3-4.

⁶² Tarana Wireless, Opening Comments, at 5.

⁶³ NTIA Curing Instructions, February 28, 2024.

6. Projects on Tribal Lands

The NTIA's NOFO requires the Commission to submit with its Final Plan, proof of a Tribal Government's consent to any BEAD deployment on its land.⁶⁴ Section 5.9 of the November Proposal includes the intent to not award any funds for deployment on Tribal Lands without a written formal Resolution of Consent from the applicable Tribal Government. This requirement must be met prior to the Commission's submission of its Final Proposal to the NTIA, and the Commission strongly encourages applicants to engage in meaningful consultation with Tribal Governments well in advance of any application, so a formal Resolution of Consent may be reviewed as part of the Commission's evaluation of applications.

In limited circumstances, the Commission may consider and score an application for deployment on Tribal Lands where no Resolution of Consent has yet been provided, if substantial evidence of meaningful and sustained consultation with the Tribal Government is provided. However, a formal Resolution of Consent must be submitted to the Commission before funds are formally committed.

Recognizing that Tribal communities may extend beyond existing formal boundaries of Tribal Lands and many Tribal members do not live within those boundaries, the Commission encourages applicants to construe broadly requirements for meaningful consultation and demonstration of consent and seek Tribal consent and collaboration to serve Tribal members living in proximity to Tribal Lands. The Commission views the term Tribal Lands to

⁶⁴ NTIA NOFO at 38.

include Tribal communities within ancestral Tribal Lands where Tribal members reside.⁶⁵

For any applications that include projects on Tribal Lands, the above referenced documents will be a required element of the review to determine a presumptive awardee. If a presumptive awardee cannot provide documentation of support and approval from Tribal authorities, the Commission will use the Negotiation Phase to engage with other applicants and/or to meet with Tribal authorities to understand their preferences.

The Commission believes that these parameters and processes for Tribal engagement and consent to proposed projects on Tribal Lands will result in more equitable and informed outcomes that benefit both the State and Tribal communities.⁶⁶

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal? The Commission also sought comments from Tribal entities to assist in refining its definition of “Tribal Lands” to ensure we fully address the need of California’s Tribal communities to access broadband service.

6.1. Positions of Parties

No parties commented on this issue.

6.2. Discussion

Prior to submitting the Initial Plan to the NTIA in December 2023, this proposal was revised to allow for other formal forms of consent consistent with

⁶⁵ November Proposal, Attachment B, at 40.

⁶⁶ *Id.*, Attachment B, at 41.

the applicable Tribe's governing structure. Additionally, to prevent Tribal Governments from unnecessarily spending time on a full Resolution of Consent or other form of consent consistent with the applicable Tribe's governing structure during the application period, the Commission will require the formal consent prior to its submission of the BEAD Final Proposal to NTIA. As part of their applications, the Commission will allow applicants to provide evidence of meaningful consultation, including a fully executed Letter of Intent. Consistent with Commission policy and NTIA requirements, applicants must engage in meaningful consultation with Tribal entities beyond delineated boundaries.

The Commission adopts the revised proposal, which is consistent with NTIA curing instructions.

7. Developing the Extremely High Cost per Location Threshold

The Extremely High Cost Per Location Threshold is the mechanism the NTIA requires States to use to determine the cost at which it is infeasible to fund fiber to eligible locations; above that threshold, applications that propose to use alternative, lower-cost technologies may be funded based on the Extremely High Cost Per Location Threshold calculation that funding more fiber to those locations would exceed a State's available BEAD budget. As a result, the Extremely High Cost Per Location Threshold enables States to identify the locations that are too costly for fiber deployment and where NTIA will allow alternative technologies that are less expensive but still meet BEAD's definition of broadband.⁶⁷

The November Proposal contains two options for creating the Extremely High Cost Per Location Threshold. The first option is to develop the Extremely

⁶⁷ NTIA NOFO at 13.

High Cost Per Location Threshold after receiving applications.⁶⁸ Under this approach, Staff would determine the Extremely High Cost Per Location Threshold once it has received all grant applications and will use it to allocate BEAD funding in an efficient manner, based on the applications received, State and federal goals, the NTIA's requirement to fund fiber-to-the-premises wherever possible, while also prioritizing the federal statutory goal of complete coverage of unserved locations, followed by underserved locations and Community Anchor Institutions. The Extremely High Cost Per Location Threshold will be developed using the proposed grant funding amounts in the applications received and may be adjusted during the negotiation phase based on feedback and outcomes from the negotiation process.⁶⁹

The second option is that the Commission develop the Extremely High Cost Per Location Threshold before receiving applications. Under this approach, the Commission would utilize cost modeling for BEAD unserved locations, including per-location costs for applications received for other Commission broadband grant programs, to identify an Extremely High Cost Per Location Threshold prior to initiating the BEAD grant period, allowing applicants to be aware of the Extremely High Cost Per Location Threshold amount prior to submitting applications, allowing them to pursue applications with an understanding of where fiber deployment costs may exceed the Extremely High Cost Per Location Threshold.

Under both scenarios, the Extremely High Cost Per Location Threshold would be as high as feasible to ensure the most fiber coverage, consistent with

⁶⁸ November Proposal, Attachment B, at 41-42.

⁶⁹ *Id.*, Attachment B, at 42.

the State's BEAD allotment and the federal statutory goal of complete coverage of unserved locations, followed by underserved locations, and Community Anchor Institutions.⁷⁰

The November Proposal asks parties to comment on which option to support. The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

7.1. Positions of Parties

The California Broadband and Video Association, WISPA, Tarana Wireless, NDC, RCRC, Cal Advocates, TURN and CforAT support the Commission establishing the Extremely High Cost Per Location Threshold after receiving all BEAD applications.

NDC asserts that any objective determination of the Extremely High Cost Per Location Threshold prior to the receipt of all applications would be contrary to BEAD's objectives, as it may preclude applicants from considering high-cost fiber projects.⁷¹ RCRC asserts this approach will give the Commission needed flexibility to determine how best to maximize the limited resources available without placing artificial limits.⁷² Cal Advocates asserts waiting to set the Extremely High-Cost Per Location Threshold until after applications are submitted will enable the Commission to maximize fiber investments based on timely, real-world assessments of the costs and risks of broadband deployment illustrated in the proposals of those who will be constructing networks while

⁷⁰ *Id.*

⁷¹ NDC, Opening Comments, at 6.

⁷² RCRC, Opening Comments, at 5.

avoiding the need to rely on modelling that has not been subject to public input.⁷³ Tarana Wireless opines this approach best reflects market prices for deploying fiber infrastructure.⁷⁴ The Small LECs support waiting for the submission of applications before computing the Extremely High-Cost Per Location Threshold, but the methodology for creating the threshold should be set forth with greater precision, even if the calculation will not be performed until after the initial round of proposals is submitted.⁷⁵ TURN and CforAT agree with the other parties recommending the Commission wait until after receiving applications before setting the Extremely High Cost Per Location Threshold⁷⁶ and suggest the Commission interpret the BEAD NOFO as permitting the Commission to adjust the Extremely High Cost Per Location Threshold based on a particular location's relevant characteristics (e.g., a more costly application proposing to serve a remote location in mountainous and/or wooded terrain should receive a positive adjustment to the Extremely High Cost Per Location Threshold to ensure these locations can be considered for fiber deployments, which would promote more resilient builds).⁷⁷ The California Broadband and Video Association argues the Commission should not determine the Extremely High Cost Per Location Threshold based on nationwide studies, nor consider data regarding the costs per passing and subsidies per passing under the State's

⁷³ Cal Advocates, Opening Comments, at 22.

⁷⁴ Tarana Wireless, Opening Comments, at 7.

⁷⁵ The Small LECs, Opening Comments, at 1-2.

⁷⁶ TURN and CforAT, Reply Comments, at 5-6.

⁷⁷ *Id.*, at 7.

other broadband deployment grant programs, since locations served through these other programs may be more readily serviceable at lower costs.⁷⁸

TURN and CforAT recommend the Commission allow for adjustments to the Extremely High Cost Per Location Threshold to further safe, resilient, and reliable networks in areas vulnerable to climate risks, opining that the Commission should determine the specific enhancement or adjustment after it receives applications and adjust the Extremely High Cost Per Location Threshold to account for increased costs associated with resiliency or reliability network enhancements. TURN and CforAT argue that this requirement ensures that proposals incorporating resiliency or reliability designs are not disadvantaged and, in some instances, are given preference, when competing with lower-cost proposals that do not include resiliency or reliability measures.⁷⁹

Tarana Wireless expresses concern the Commission will prioritize an Extremely High-Cost Per Location Threshold as high as feasible to ensure greater fiber coverage,⁸⁰ claiming that a high threshold that overly relies on fiber will jeopardize connectivity for Californians and deplete financing that should be used for important digital equity initiatives.⁸¹ Tarana Wireless suggests that the Commission “allow providers to submit applications using a mixture of technologies that optimize California’s finite dollars to deploy fiber where it makes sense and utilizing alternate reliable broadband technologies to achieve 100% universal service in a project area.”⁸²

⁷⁸ The California Broadband and Video Association, Opening Comments, at 13.

⁷⁹ TURN and CforAT, Reply Comments, at 7-8.

⁸⁰ Tarana Wireless Opening Comments, at 7.

⁸¹ *Id.*, at 7.

⁸² *Id.*

Tarana Wireless contends the proposed rules do not comply with federal requirements and objects to the Commission's desire to prioritize fiber builds, claiming it will fail to achieve coverage of all unserved locations in California, as well as hundreds of thousands of underserved Californians.⁸³

If the Commission is not able to achieve service to underserved California families and CAIs, Tarana Wireless urges the Commission to publish an iteration of Volume Two that is transparent about its proposed strategy to extend broadband service to unserved locations, opining this would align with the BEAD NOFO and give a better sense of how the Commission plans to allocate \$1.86 billion.⁸⁴

WISPA recommends setting the Extremely High Cost Per Location Threshold to optimize the effectiveness of public funds in promoting the State's broadband and digital economy strategies, not at an artificially high threshold that leaves unserved locations unserved and wastes public funding overbuilding locations that are already served.⁸⁵ WISPA points to Colorado's choice to focus on alternative technologies in Extremely High Cost Per Location Threshold areas as an example.⁸⁶

Joint Labor Respondents⁸⁷ do not oppose the Commission developing the Extremely High Cost Per Location Threshold until after applications are

⁸³ *Id.*, at 3.

⁸⁴ *Id.*

⁸⁵ WISPA, Opening Comments, at 11.

⁸⁶ *Id.*

⁸⁷ Joint Labor Respondents is the collective filing of the following parties: Communications Workers of America District 9 ("CWA"); California Labor for Climate Jobs; Jobs with Justice San Francisco; Labor Network for Sustainability; United Steelworkers District 12; Los Angeles County Federation of Labor, AFL-CIO; Kern Inyo Mono Counties Central Labor Council, AFL-

Footnote continued on next page.

submitted. However, Joint Labor Respondents urge the Commission to set the Extremely High Cost Per Location Threshold as high as possible to help ensure that end-to-end fiber projects are deployed wherever feasible.⁸⁸ Joint Labor Respondents also encourage the Commission to consider studies of the long-term value of fiber in determining an Extremely High Cost Per Location Threshold, including engineering analysis of fixed wireless technologies by CTC Technology and Energy, which concludes that “fiber represents the most fiscally prudent expenditure of public funds in most circumstances because of its longevity and technical advantages.”⁸⁹ Joint Labor Respondents recommend that the Commission incorporate a minimum of a 30-year period to evaluate the total cost of ownership of non-FTTP networks as part of its Extremely High Cost Per Location Threshold analysis.⁹⁰

Cal Advocates asks the Commission to clarify its Subgrantee Selection Process regarding how it intends to reconcile prioritization of projects in high poverty areas and persistent poverty counties with prioritization of projects benefiting unserved locations, in particular, the process to determine its Extremely High Cost Per Location Threshold must take into consideration this prioritization.⁹¹

SBUA supports developing the Extremely High Cost Per Location Threshold before applications are submitted, asserting that the Commission can

CIO; Orange County Labor Federation; and San Diego and Imperial Counties Labor Council. In their filing, these entities collectively refer to themselves as “Respondents.” For clarity, this decision refers to this party as “Joint Labor Respondents.”

⁸⁸ Joint Labor Respondents, Opening Comments, at 12.

⁸⁹*Id.*, at 13.

⁹⁰ *Id.*

⁹¹ Cal Advocates, Opening Comments, at 12-13.

use cost modeling for BEAD unserved locations, including per-location costs for applications received for other Commission broadband grant programs, claiming doing so would ensure more adequate consideration of the intangible benefits to the public of broadband deployment, such as improved quality of life, community resilience, enhanced public safety. In contrast, SBUA contends that waiting until after applications are submitted would mean the Commission is relying on cost calculations from private sector companies that typically omit or inadequately consider factors crucial to the public interest, such as the well-being and safety of broadband users.⁹²

Regardless of when the Commission sets the Extremely High Cost Per Location Threshold, AT&T argues the threshold should be at a level that prioritizes end-to-end fiber projects while ensuring that every unserved and underserved location in California will receive broadband service at speeds of at least 100/20 Mbps.⁹³ The Small LECs recommend the Commission only approve applications that use non-fiber technologies if there is insufficient funds to fund all Project Areas.⁹⁴

CTIA asks the Commission to outline a process for setting the Extremely High Cost Per Location Threshold and ensure that it is used as part of “a holistic, technology-neutral approach that embraces the use of non-fiber Reliable Broadband Service technologies to achieve broadband deployment as prioritized by the IIJA and NOFO.”⁹⁵

⁹² SBUA, Opening Comments, at 5.

⁹³ AT&T, Opening Comments, at 7.

⁹⁴ The Small LECs, Opening Comments, at 3-4.

⁹⁵ CTIA, Opening Comments, at 12.

When developing the Extremely High Cost Per Location Threshold, NDC recommends the Commission include a factor that accounts for the “economic benefits” of the broadband fiber deployment, and require applicants to include a potential long-term outlook forecast (e.g., 20 years) of the benefits arising from a fiber build to a remote community and the detrimental impact of that community not being able to afford the access to high-speed internet in absence of BEAD funding.⁹⁶

7.2. Discussion

In response to comments, Volume Two of the Initial Plan submitted to the NTIA in December 2023 reflects that the Commission will develop the Extremely High Cost Per Location Threshold after receiving applications, using the cost data contained in those applications, as well as the Commission’s roughly \$1.86 billion BEAD allocation, and updating the Extremely High Cost Per Location Threshold as negotiations and preliminary awards adjust available BEAD funding.

In response to a curing request from the NTIA, the Initial Plan was revised to stress that the Extremely High Cost Per Location Threshold will be set to enable maximum fiber coverage while also funding non-fiber technologies wherever the Commission does not have any application for fiber at a proposed cost that fits within the overall BEAD budget and the Extremely High Cost Per Location Threshold. Additionally, to ensure fiber coverage is distributed as widely as possible, the cured version of Initial Proposal Volume Two clarifies that the Extremely High Cost Per Location Threshold method is calculated

⁹⁶ NDC, Opening Comments, at 7.

relative to each Project Area Unit (PAU),⁹⁷ effectively giving each PAU a benchmark budget that is adjusted dynamically as projects are progressively selected for awards. The cured version of Initial Proposal Volume Two also clarifies that the Commission may use other data sources besides the cost information contained in applications to calculate the Extremely High Cost Per Location Threshold for each PAU and budget accordingly, given the initial possibility that not all PAUs may receive proposals.⁹⁸

Tarana Wireless' claim that the Commission's choice to prioritize fiber builds as part of its BEAD Initial Proposal does not comply with federal requirements ignores the plain reading of the NTIA's NOFO.⁹⁹ While the Commission has repeatedly stated that it views fixed wireless broadband service as a necessary component of the strategy to meet the goal of ensuring that all unserved and underserved locations receive broadband service, the Commission cannot ignore the direction given by the NTIA and must prioritize fiber builds where it is economically feasible, within California's BEAD budget.

The Commission approves this proposal without further modification, which is consistent with NTIA curing instructions.

⁹⁷ Broadband Serviceable Locations, a term defined by the FCC, refers to all structures (houses, businesses, industries, etc.) in the United States in which fixed broadband internet access service exists, is limited, or it does not exist. The BSL data is presented as a standardized list of location IDs that are assigned to each recorded address in the country. Project Area Unit (PAU) refers to geographical boundaries composed of BSLs that do not have access to fixed broadband internet services. As part of BEAD's application process, an applicant may design the area for which they are proposing to provide broadband services based on locations that do not have existing/proper internet access (Unserved, underserved, CAIs).

⁹⁸ NTIA Curing Request, April 10, 2024.

⁹⁹ See, NTIA NOFO, Section IV.B.7. A "Priority Broadband Project" is a project that will provision service via end-to-end fiber-optic facilities to each end-user premises and such a project shall be "the default winner" over other permissible technologies unless the locations would be too costly to serve with fiber.

The Commission directs Staff to develop the Extremely High Cost Per Location Threshold to include it in the Final Plan that will be submitted to the Commission for its approval prior to submitting it to the NTIA. In developing an Extremely High Cost Per Location Threshold, Staff must focus on meeting the NTIA's priority to serve as many locations as possible with fiber, while also meeting the BEAD Program goal of serving all unserved and underserved locations, while also ensuring that the total proposed grants awards do not exceed California's available BEAD funding allotment.

8. De-Confliction and Negotiation Processes and Utilizing Extremely High Cost Per Location Threshold

The NTIA's NOFO allows the Commission to negotiate with applicants to revise their proposed Project Areas, either to remove broadband serviceable locations from a proposed Project Area, or to add broadband serviceable locations, or to negotiate the grant amount for projects that exceed the Extremely High Cost Per Location Threshold, or to revise the technology offered to a specific broadband serviceable location.¹⁰⁰

¹⁰⁰ See, NTIA NOFO at 38: "If, after soliciting proposals, the Eligible Entity has received no proposals to serve a location or group of locations that are unserved, underserved, or a combination unserved and underserved, the Eligible Entity may engage with existing providers and/or other prospective subgrantees to find providers willing to expand their existing or proposed service areas. An Eligible Entity may consider inducements such as use of state funding toward the match requirement set forth in Section III.B or benefits during the grant selection process (e.g., points or credits). The Eligible Entity shall, in this circumstance, work to ensure that its approach is as transparent as possible. For the avoidance of doubt, this provider-specific outreach is only appropriate after the Eligible Entity has solicited proposals and failed to obtain one or more proposals to serve the location or locations at issue." See also, NTIA NOFO at 38-39: "An Eligible Entity may decline to select a proposal that requires a BEAD subsidy that exceeds the Extremely High Cost Per Location Threshold for any location to be served in the proposal if use of an alternative Reliable Broadband Service technology meeting the BEAD Program's technical requirements would be less expensive. Subject to the overarching requirement to run a fair, open, and competitive process, the Eligible Entity has discretion to

Footnote continued on next page.

Section 5.1.4.2 of the November Proposal includes an overview of a proposed process, whereby, following the receipt of applications, assignments to proposed Project Areas are made for the highest scoring applications that do not exceed the Extremely High Cost Per Location Threshold for a specific PUA budget. For the remainder, the Commission will engage with applicants in negotiations designed to reach final agreement on two topics: Project Area boundaries and costs.

The conditions under which the Commission would open negotiations with applicants or potential applicants include:

design a selection process that allows it to engage with a prospective subgrantee to revise the proposal to ensure that no location requires a subsidy that exceeds the Extremely High Cost Per Location Threshold.

If no Reliable Broadband Service technology meeting the BEAD Program's technical requirements would be deployable for a subsidy of less than the Extremely High Cost Per Location Threshold at a given location, an Eligible Entity is authorized to select a proposal involving a less costly technology for that location, even if that technology does not meet the definition of Reliable Broadband Service but otherwise satisfies the Program's technical requirements. In this instance, Eligible Entities are directed to seek out the most robust, affordable, and scalable technologies achievable under the circumstances particular to that location." *See also*, NTIA NOFO at 42:" An Eligible Entity's process in selecting subgrantees for last-mile broadband deployment projects must first assess which locations or sets of locations under consideration are subject to one or more proposals that (1) constitute Priority Broadband Projects and (2) satisfy all other requirements set out in this NOFO with respect to subgrantees. In the event there is just one proposed Priority Broadband Project in a location or set of locations, and that proposal does not exceed the Eligible Entity's Extremely High Cost Per Location Threshold, that proposal is the default winner, unless the Eligible Entity requests, and the Assistant Secretary grants, a waiver allowing the Eligible Entity to select an alternative project. To the extent there are multiple proposals in a location or set of locations that (1) constitute Priority Broadband Projects and (2) satisfy all other requirements with respect to subgrantees, the Eligible Entity shall use its approved competitive process to select a project subject to the selection criteria set forth below."

- The existence of BEAD eligible broadband serviceable locations that receive no applications proposing to serve those locations;¹⁰¹
- The existence of multiple applications proposing to serve the same locations;
- The Commission receives an application where the cost per locations exceed the Extremely High Cost per Location Threshold; or
- An applicant proposes to serve several different Project Areas and the Commission negotiates lower pricing with the applicant based on the potential award of multiple aggregated Project Areas.¹⁰²

Section 5.11 of the November Proposal discusses in detail a process for utilizing the Extremely High Cost Per Location Threshold in which: 1) the Commission will determine which proposals for 100 percent of eligible locations in a Project Area exceed the Extremely High Cost Per Location Threshold and will consider whether to fund applications for lower percentages; and 2) the Commission will consider whether to fund fiber applications that exceed the Extremely High Cost Per Location Threshold where a lower cost non-Priority Broadband Project has been proposed and meets the minimum standards.

¹⁰¹ In the event no proposal (or no viable proposal) is received for any given Project Area, under the November Proposal, the Commission would conduct one or both of two processes, depending on the circumstances. First, the November Proposal assumes Staff will engage in negotiations with one or more applicants that have applied for adjacent areas to determine whether other applicants would be willing to take on commitments to fund those locations, based on costs that will be negotiated between the applicant and Staff. The Commission may choose to negotiate with one or more applicants to maximize the chances of determining a solution for those locations. Second, the November Proposal anticipates that, depending on circumstances, the Commission may choose to undertake a second (and possibly third) competitive process to formally attract applications for those locations. Thus the November Proposal reserves the itself the flexibility to undertake one or both of these processes following receipt of the applications, arguing that the flexibility to undertake these processes based on circumstances will increase the competitive pressure on applicants. November Proposal at 40.

¹⁰² November Proposal, Attachment B, at 24.

The approach, in sequenced order, is as follows:

1. The Commission will review applications to determine whether there exists sufficient funding to fund all of the highest-scoring fiber applications for 100 percent coverage in all Project Areas. If this is the case, there will be no need for the Extremely High Cost Per Location Threshold.

2. If the Commission determines that there are insufficient funds, it will identify the Project Areas for which the highest scoring fiber applications for 100 percent of eligible locations do not exceed the Extremely High Cost Per Location Threshold.

3. Beginning with the project with the highest score, the Commission will negotiate with the applicant that submitted the fiber proposal for that project area, offering an opportunity to revise its proposal so that it does not exceed the Extremely High Cost Per Location Threshold. In the event that two or more applicants have submitted proposals for the Project Area that exceed the Extremely High Cost Per Location Threshold, the Commission will negotiate first with the highest scoring applicant. If the applicant is unable to reduce its cost per location sufficiently, the Commission will then negotiate the same with the other applicant(s) for that Project Area, in order of highest-scoring application.

4. If no applicant for that project area is able to reduce its proposal below the Extremely High Cost Per Location Threshold, the Commission will consider whether other applicants that have provided fiber proposals for nearby areas could potentially serve the applicable area. If such potential exists, the Commission will negotiate with one or more of those applicants to determine if they will amend their application to include the subject areas at a cost that is below the Extremely High Cost Per Location Threshold.

5. The Commission will undertake this process with respect to all project areas for which fiber applications for 100 percent coverage exceed the Extremely High Cost Per Location Threshold until the Extremely High Cost Per Location Threshold has been sufficiently increased (based on lower aggregate grant funds requested) such that all project areas can be funded with fiber.

6. If, following these negotiations, there still exist Project Areas for which the fiber applications for 100 percent coverage exceed the Extremely High Cost Per Location Threshold, the Commission will evaluate the proposed alternative (lower than 100 percent) pricing in applications for each project area that exceeds the Extremely High Cost Per Location Threshold and will repeat the above steps based on the next highest proposed alternative coverage pricing. This succession of steps will be repeated until all project areas have a fiber award, either at 100 percent coverage or at a lower coverage percentage, within the funding available.

7. If it is not possible to secure awards for fiber for all Project Areas through the process above because there exist project areas for which no applicant will agree to deploy fiber below the Extremely High Cost Per Location Threshold, the Commission will then evaluate applications that propose an alternative, non-fiber technology that meets the BEAD program's requirements for reliable broadband service.

8. If it is not possible to secure awards for alternative, non-fiber technology that meets the BEAD Program's requirements for reliable broadband service through the process above, the Commission will then consider applications for non-fiber technologies that do not meet the BEAD Program's requirements for reliable broadband service (while otherwise satisfying the BEAD Program's technical requirements) because no technology meeting the reliable broadband

service requirements can be deployed for less than the Extremely High Cost Per Location Threshold in those Project Areas.

9. For all Project Areas for which no satisfactory application – for any technology – is received, as well as for locations that are removed from grant commitments because the alternative coverage percentage proposal is awarded, the Commission may undertake an additional grant round and seek alternative proposals or may otherwise seek alternative solutions for securing broadband to those areas and locations.

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

8.1. Positions of Parties

The California Broadband and Video Association urges the Commission to reduce the extent of the negotiation phase, arguing the Commission cannot rely on non-public negotiations with individual applicants to extract additional commitments or cost concessions once applications have already been submitted. The California Broadband and Video Association opines that would be inconsistent with the NTIA's NOFO and neither fair nor transparent, risking the potential for arbitrary decisions that undermine the integrity of the competitive selection process. At a minimum, the California Broadband and Video Association contends the Commission should specify how it will choose among "one or more applicants to determine whether and under what circumstances they would be willing to serve" Project Areas that have not received any

applications.¹⁰³ Instead, the California Broadband and Video Association recommends that the Commission conduct additional funding rounds, which will ensure that subgrantees are selected to serve those areas through a competitive process, rather than through the opaque negotiations described above.¹⁰⁴ AT&T also contends the Commission should use a more transparent and objective process to de-conflict overlapping applications instead of utilizing the negotiation process allowed for under NTIA guidelines.¹⁰⁵ AT&T opines that the Commission instead could award the overlapped area to the applicant with the highest overall score or a combination of score and number of locations to be served, or if overlapping applications cannot be resolved via transparent assessment of scores, the Commission could also consider running a second or third application round.¹⁰⁶

WISPA recommends the Commission revise the negotiation process into phases in which the Commission would renegotiate project areas and funding for areas that receive no bids, such that before undertaking this process, the Commission add these areas to the set of Extremely High Cost Per Location Threshold areas and solicit alternative technologies.¹⁰⁷

8.2. Discussion

In response to comments, the proposed negotiation process, including the use of the Extremely High Cost Per Location Threshold, was revised prior to submitting the Initial Plan to the NTIA in December 2023. The revised process

¹⁰³ California Broadband and Video Association, Opening Comments, at 15-16.

¹⁰⁴ *Id.*, at 16.

¹⁰⁵ AT&T Opening Comments at 5-6.

¹⁰⁶ *Id.*, at 6.

¹⁰⁷ WISPA, Opening Comments, at 7.

contains five steps. After scoring (Step 1) and ranking (Step 2) applications, the Commission would preliminary assign non-overlapping Project Areas (Step 3) where the proposed project cost falls below the Extremely High Cost Per Location Threshold, then start the deconfliction process for applications that propose to serve the overlapping Project Areas (Step 4), beginning with the highest-scoring application assigned to a given county¹⁰⁸ where the proposed project cost falls below the Extremely High Cost Per Location Threshold. In the event the highest scoring application does not fall below the Extremely High Cost Per Location Threshold, the Commission will repeat the process with the next highest scoring applicant, until all locations have been preliminarily assigned. The Commission may offer applicants the opportunity to reduce their proposals below the Extremely High Cost Per Location Threshold.

Following completion of Step 4, the Commission will identify the remaining BEAD eligible broadband serviceable locations that do not yet have a preliminary assignment and offer non-winning applicant(s) an award based on the original proposal and available budget for the revised Project Area, so that amount does not exceed the Extremely High Cost Per Location Threshold. These offers would be made in order of highest scoring applications. If the offers are not accepted, the Commission will then make an equivalent offer to other applicants that have provided proposals in nearby or adjacent broadband serviceable locations, in order of highest scoring applicant. If no applicant is willing to accept the Commission's offer for end-to-end fiber for the remaining broadband serviceable locations, the Commission will then repeat the same process with applications for alternative technologies (such as coaxial cable or

¹⁰⁸ Recognizing that many grant applications will traverse county boundaries, each application will be assigned to the county in which it has the most eligible locations.

fixed wireless) that meet NTIA's definition of Reliable Broadband Service. Alternatively, depending on the number and location of the remaining eligible locations, as well as the available BEAD funding, the Commission may undertake a second round to solicit additional grant applications for the remaining locations. The Commission's options for such a second round will depend in part on the time available under the compressed timeline required by the BEAD rules. The second-round process may include revised Project Area boundaries, limitations to unserved locations only, or other variations.

If unserved and underserved broadband serviceable locations remain, the Commission will assign a technology that does not meet NTIA's definition of Reliable Broadband Service but still fulfills BEAD's technical requirements for speed (100 Mbps download and 20 Mbps upload) and latency (no more than 100 milliseconds latency).

In response to significant substantive curing instructions from the NTIA, Initial Proposal Volume Two was revised such that it clarified the negotiation and deconfliction processes. In particular:

- PAUs were clarified to be no smaller than a census block group (CBG) but may include more than one contiguous CBGs
- The selection process was clarified to show that selection would be based on score, so negotiations would not be invoked arbitrarily and overwrite a clear selection process.
- The score-based selection process and order will ensure like-to-like comparisons of Project Areas that overlap but differ in aggregated PAUs
- The Initial Proposal also was revised to clarify that the Commission will not utilize inducements to encourage

applicants to serve all unserved and underserved locations.¹⁰⁹

- In response to curing instructions from the NTIA, the Initial Proposal further clarified that if fiber is not feasible or cost-effective to achieve the principal goal of universal coverage, the Extremely High Cost Per Location Threshold will determine which locations would be more effectively served by alternative technologies. Thus, wherever applications propose to deploy end-to-end fiber at a cost below the Extremely High Cost Per Location Threshold, such applications will be funded. Additionally, consistent with the NTIA's NOFO, the Commission anticipates the need to fund alternative technologies as necessary where costs for end-to-end fiber exceed the Extremely High Cost Per Location Threshold and thus the available BEAD program funds.
- Language was added to indicate that the Commission will repeat the same process as with Priority Broadband technology for applications proposing to use alternative technologies (such as coaxial cable or fixed wireless) that meet NTIA's definition of Reliable Broadband Service.¹¹⁰
- Language also was added to clarify that, in addition to offering non-winning applicants an award, the Commission may allow applicants to submit cost proposal to serve less than 100 percent of BEAD-eligible locations with priority broadband service. The applications would then be re-ranked first by applications proposing to descope the lowest percentage of BEAD-eligible locations from the project area, in order of: first, coverage percentage and, second, score. Awards may then be made to the highest-scoring application that proposes to exclude the fewest total BEAD-eligible locations, so long as the cost

¹⁰⁹ NTIA Curing Request, February 28, 2024. Additionally, the proposal to allow negotiations for lower pricing with the applicant based on the potential award of multiple aggregated Project Areas was removed ahead of December 2023 submission to the NTIA.

¹¹⁰ *Id.*

proposed is within the budget/Extremely High Cost Per Location Threshold.¹¹¹

The Commission adopts this revised proposal, which is consistent with NTIA curing instructions.

As part of its review and scoring of applications, and proposing a draft BEAD Final Proposal for public comment and Commission approval, the Commission delegates to Staff the ability to negotiate with applicants to meet the goal of serving 100 percent of unserved and underserved locations in California with the best feasible technology, including removing very costly locations from proposed Project Areas with Priority and non-Priority Reliable Broadband Service, attempting to add locations to nearby preliminary awarded Project Areas, and reducing or increasing the amount of BEAD funds requested by an applicant. Staff may undertake these negotiations after preliminary assignments have taken place based on scoring and proposed costs that are in line with the area budgets. Staff may enter into such strategic negotiations for projects if PAUs remain that have not received any cost proposals within area budget, or certain locations are descoped from a Project Area. Staff also must focus efforts on meeting the dual goals of providing broadband service to all unserved and underserved locations in California and providing fiber first, and other Reliable Broadband Service next, to as many unserved and underserved locations as possible, staying within California's allotted funds

9. Match Requirement

Except in certain specific circumstances, such as projects in designated "high-cost areas," as defined in Section 60102(a)(2)(G) of the IIJA, and other cases in which NTIA has waived the matching requirement pursuant to Section

¹¹¹ NTIA Curing Request, August 6, 2024.

60102(h)(3)(A)(ii)) of the IIJA, the NTIA's NOFO requires a 25 percent match for BEAD projects.¹¹² A matching contribution may be provided by the applicant, the Commission subgrantee, a unit of local government, a utility company, a cooperative, a nonprofit or philanthropic organization, a for-profit company, regional planning or governmental organization, a federal regional commission or authority, or any combination thereof.¹¹³

Funds from federal programs, including funds from the FCC's Universal Service Fund programs, generally may not be used as matching funds; however, the IIJA expressly provides that matching funds for the BEAD Program may come from a federal regional commission or authority 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,¹¹⁴ the CARES Act,¹¹⁵ the Consolidated Appropriations Act, 2021,¹¹⁶ the American Rescue Plan Act of 2021,¹¹⁷ to the extent permitted by those laws.¹¹⁸

The NTIA has encouraged the Commission to require a match from the subgrantee rather than utilizing other sources where it deems the subgrantee capable of providing matching funds.¹¹⁹

¹¹² NTIA NOFO at 20.

¹¹³ *Id.*

¹¹⁴ Public Law 116-127; 134 Stat. 178

¹¹⁵ Public Law 116-136; 134 Stat. 281

¹¹⁶ Public Law 116-260; 134 Stat. 1182

¹¹⁷ Public Law 117-2; 135 Stat. 4

¹¹⁸ NTIA NOFO at 20-21.

¹¹⁹ *Id.*

The NTIA's NOFO allows the Commission to seek from the NTIA a full or partial waiver of the non-federal match requirement, where warranted.¹²⁰

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

9.1. Positions of Parties

SANDAG recommends the Commission designate \$150 million in California Advanced Services Fund (CASF) funds to support BEAD proposals that target the most remote and hard-to-reach, low-income, and disadvantaged, locations in the State, noting that doing so complies with the NTIA requirements and the CASF Infrastructure Account remains the most viable and flexible source of funding to ensure that the State fulfills its commitment to deploy to the hardest to reach communities.¹²¹

9.2. Discussion

On July 30, 2024, the Commission received additional guidance from the NTIA regarding eligible matching fund options for BEAD grantees. This NTIA staff-level guidance, while general in nature, comments on several questions the Commission raised directly with the NTIA regarding what State broadband program funding may be used as matching funds. First, BEAD applicants are reminded that the 25 percent match requirement applies to all applications except in certain specific circumstances, such as projects in in designated "high-cost areas," as defined in Section 60102(a)(2)(G) of the IIJA, and other cases in which NTIA has waived the matching requirement pursuant to Section

¹²⁰ *Id.*

¹²¹ SANDAG, Reply Comments, at 4.

60102(h)(3)(A)(ii)) of the IIJA. Second, other Commission broadband grant programs, such as FFA and CASF Infrastructure Account, may qualify as eligible matching grants, though this will need to be determined on a case-by-case basis. Finally, BEAD applicants should know that while it is possible to request a waiver from the matching fund requirement, the high bar the NTIA has set suggests that very few waiver requests will be granted. In the event that the CPUC believes that a match waiver is warranted, it may offer an award contingent on NTIA's approval of such a waiver in the Final Proposal, per the BEAD NOFO, which requires approval by NTIA of any match waiver. "

10. Low-Cost Pricing Plan Requirements

In passing the IIJA, Congress determined that "[a]ccess to affordable, reliable, high-speed broadband is essential to full participation in modern life in the United States," and that "[t]he persistent 'digital divide' in the United States is a barrier to" the nation's "economic competitiveness [and the] equitable distribution of essential public services, including health care and education."¹²² The IIJA requires a BEAD subgrantee to offer not less than one low-cost broadband service option.¹²³

The NTIA states that a low-cost broadband service option should address, at a minimum: 1) all recurring charges to the subscriber, as well as any non-recurring costs or fees to the subscriber (e.g., service initiation costs); 2) the plan's basic service characteristics (download and upload speeds, latency, any limits on usage or availability, and any material network management practices, 3) whether a subscriber may use any Affordable Connectivity Benefit subsidy

¹²² IIJA § 60101.

¹²³ IIJA § 60102(h)(4)(B) (135 Stat. 199.).

toward the plan's rate; and 4) any provisions regarding the subscriber's ability to upgrade to any new low-cost service plans offering more advantageous technical specifications.¹²⁴ The NTIA's NOFO includes an example of a low-cost broadband service option as follows:

- Costs \$30 per month or less, inclusive of all taxes, fees, and charges if the subscriber does not reside on Tribal Lands, or \$75 per month or less, inclusive of all taxes, fees, and charges if the subscriber resides on Tribal Lands, with no additional non-recurring costs or fees to the consumer;
- Allows the end user to apply the Affordable Connectivity Benefit subsidy to the service price;
- Provides the greater of (a) typical download speeds of at least 100 Mbps and typical upload speeds of at least 20 Mbps, or the fastest speeds the infrastructure is capable of if less than 100 Mbps download and 20 Mbps upload or (b) the performance benchmark for fixed terrestrial broadband service established by the Federal Communications Commission pursuant to Section 706(b) of the Communications Act of 1934, as amended;
- Provides typical latency measurements of no more than 100 milliseconds; and
- Is not subject to data caps, surcharges, or usage-based throttling, and is subject only to the same acceptable use policies to which subscribers to all other broadband internet access service plans offered to home subscribers by the participating subgrantee must adhere.¹²⁵

In the event the provider later offers a low-cost plan with higher speeds downstream and/or upstream, permits eligible subscribers that are subscribed to a low-cost broadband service option to upgrade to the new low-cost offering at

¹²⁴ NTIA NOFO at 67.

¹²⁵ *Id.*

no cost.¹²⁶ Additionally, BEAD subgrantees are required to participate in the Affordable Connectivity Program (ACP) or any successor program, and eligible subscribers that are eligible for a broadband service subsidy can apply the subsidy to the proposed service option.¹²⁷

If adopted, the November Proposal would require all applicants to offer a service option that meets, at a minimum, the following criteria:

- Will be available to all households that meet the eligibility requirements of the federal ACP;
- Cost \$30 per month or less (\$75 per month or less on Tribal Lands), inclusive of all government taxes and fees, with application of an annual inflation factor based on the Producer Price Index for the State of California;
- Available to households with income equal to or below 200 percent of the federal poverty line;
- Allows the end user to apply the ACP subsidy to the cost of service and encourages ISPs to ensure that prospective customers are aware of their participation in the ACP;
- Meets performance requirements as established by the BEAD Program, with download speeds of at least 100 Mbps and upload speeds of at least 20 Mbps;
- Delivers typical latency of no more than 100 milliseconds;
- Is not subject to data caps, surcharges, or usage-based throttling, and is subject only to the same acceptable use policies to which subscribers to all other broadband internet access service plans offered to home subscribers by the participating subgrantee must adhere;
- Allows subscribers to upgrade at no cost in the event the provider later offers a low-cost plan with higher speeds (downstream or upstream);

¹²⁶ *Id.*

¹²⁷ *Id.*

- Does not charge a fee for installation or setup;
- Provides a free modem or router; and
- Does not require a minimum term of service.

Subgrantees should offer a low-cost plan subject to these requirements for the life of the infrastructure,¹²⁸ but may submit a request to the Commission to waive or modify these requirements in the future should the need arise. The Commission will update these requirements as needed.

Additionally, due to the uncertainty surrounding the continued availability of funding for the ACP, the Commission will require subgrantees to offer the Low-Cost Broadband Service Option at a price of \$15 per month for all income-qualified customers if ACP funding is expended and no successor program guaranteeing an equivalent subsidized price of service for eligible customers is established.

All BEAD subgrantees will be required to participate in the ACP or any successor program.¹²⁹

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

10.1. Positions of Parties

AT&T, the California Broadband and Video Association, and the Small LECs all claim the proposal constitutes rate regulation.¹³⁰ AT&T also opines that

¹²⁸ Ten years after the State makes the last payment of the grant.

¹²⁹ November Proposal, Appendix B, at 195.

¹³⁰ AT&T, Opening Comments, at 8. California Broadband and Video Association, Opening Comments, at 16-24. The Small LECs, Opening Comments, at 8. CTIA also accuses the

Footnote continued on next page.

the IIJA does not permit broadband service rate regulation, nor does the IIJA otherwise provide an independent grant of authority to states to regulate broadband prices. AT&T states that it “does not oppose the adoption of the \$30 low-cost option outlined in the BEAD NOFO” but it does “object to the attempt by the Commission to require a \$15 offering if ACP is not replaced and a “no cost” option for ACP-eligible customers, as these proposals constitute impermissible rate regulation.”¹³¹ AT&T further declares that “California state law preempts a state agency from regulating broadband prices and, more generally under current federal law, states are preempted from regulating broadband prices.”^{132,133} Cal Advocates disagrees with the legal analysis offered by these parties, asserting it is not accurate, as the Ninth Circuit United States Court of Appeals¹³⁴ expressly held that such requirements do not amount to “rate regulation ... because service providers may leave and set their own rates if they do not wish to comply with ... subsidy requirements... Commission’s proposed affordability requirements do not constitute rate regulation, because providers are free to opt out of accepting public funds to construct new networks or to improve their existing, substandard networks.”¹³⁵

Commission of proposing rate regulation, but in the context of the Affordability Criterion used to score applications (CTIA, Opening Comments, at 4-6).

¹³¹ AT&T, Opening Comments, at 8.

¹³² *Id.*, at 8-9.

¹³³ AT&T cites the following cases: *Charter Advanced Servs. v. Lange*, 903 F.3d 715, 719 (8th Cir. 2018) (“[A]ny state regulation of an information service conflicts with the federal policy of nonregulation,’ so such regulation is preempted by federal law.” (quoting *Minn. PUC v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007))); *N.Y. State Telecomms. Ass’ns v. James*, 544 F. Supp. 3d 269, 280-83 (E.D.N.Y. 2021) appeal docketed, 21-1975 (2d Cir. 2021) (finding that conflict preemption and field preemption each bar New York state from regulating broadband service pricing).

¹³⁴ *Nat’l LifeLine Ass’n v. Batjer*, 2023 U.S. App. LEXIS 2432 at 9 (9th Cir. Jan. 31, 2023).

¹³⁵ Cal Advocates, Reply Comments, at 2-3.

AT&T opposes the Commission's attempt to require a "no cost" option, without any regard to the availability of ACP or a successor program" claiming this fails to recognize that subgrantees need flexibility for future price changes.¹³⁶ CTIA also opposes the \$15 per month requirement, contending that "The Commission offers no explanation for why broadband providers would be in a position to, or would be willing to, offer the same plan previously offered at \$30 for half that price simply due to a change in regulations."¹³⁷ CTIA recommends the Commission instead follow the FFA model of requiring applicants to participate in the ACP or an identified equivalent successor to the ACP.¹³⁸ The California Broadband and Video Association argues the proposed requirement that subgrantees offer a low-cost option at \$15 per month if ACP funding is expended and no successor program is established goes beyond what the IIJA or NTIA's NOFO contemplates and would introduce massive uncertainty for applicants, adding that households that do not qualify for ACP (e.g., middle-income households) are not eligible for the low-cost broadband service option,¹³⁹ a point the Small LECs agree with.¹⁴⁰ The California Broadband and Video Association further opines that the "proposed price is arbitrary and not apparently based on any actual facts or analysis, making its proposal equally capricious..." and that the proposal does not "even attempt to justify its proposed

¹³⁶ AT&T, Opening Comments, at 8.

¹³⁷ CTIA, Opening Comments, at 8.

¹³⁸ *Id.*

¹³⁹ California Broadband and Video Association, Opening Comments, at 21.

¹⁴⁰ The Small LECs, Opening Comments, at 7.

price, which is half the price of what Congress deemed an appropriate subsidy for an income-constrained household.”¹⁴¹

The California Broadband and Video Association asks the Commission to consider the low-cost service option requirement to be met if the applicant’s price is: 1) consistent with either the low-cost offerings the applicant currently (at the time of application) makes available in unsubsidized areas within the state, or the low-cost offerings available from other providers in unsubsidized areas within the state (including for applicants without an existing low-cost option); and 2) below the maximum ceiling of the residential rates provided in the FCC’s Urban Rate Survey for the service tier with specified speeds of 100 Mbps download and 20 upload.¹⁴²

AT&T asks the Commission to confirm the following two items: 1) future increases to the speed offered in the low-cost broadband service option are not prohibited, nor are any accompanying modifications to the prices of the low-cost broadband service option; and 2) nothing prohibits a subgrantee from making price changes expected in the normal course of business to account for issues such as increased costs due to inflation, labor, equipment costs, increases in taxes, or other economic factors. AT&T adds the NTIA has made clear in their recent FAQ guidance that States are permitted to allow for reasonable cost adjustments over time, and that the adjustment could be tied to metrics such as CPI, Urban Rate Survey, or others.¹⁴³ CTIA proposes the Commission clarify that providers are permitted to adjust the Low Cost Broadband Service Option for inflation and cost of living increases, rather than a set rate for the life of the

¹⁴¹ California Broadband and Video Association, Opening Comments, at 30.

¹⁴² *Id.*, at 28.

¹⁴³ AT&T, Opening Comments, at 9-10.

infrastructure.¹⁴⁴ The California Broadband and Video Association asserts that the Commission must clarify that applicants may annually adjust the low-cost option's required price to account for any increases in inflation, and expand such adjustment to also include governmental fees that are or may become applicable to broadband service and adopt an eight-year definition of the "life of the infrastructure" for which the low-cost service option must remain available, as aligned with Treasury's definition of the same for American Rescue Plan Act broadband grant projects, and the approach currently being adopted by many other States.¹⁴⁵

Regarding the requirement that applicants make the Low-Cost Broadband Service Option available to households that qualify for ACP and those with households' incomes at or below 200 percent of the Federal Poverty Guidelines, AT&T requests the Commission specify that households in BEAD-funded areas who participate in ACP or who meet any ACP eligibility criteria qualify for the Low-Cost Broadband Service Option, asserting that households whose incomes are at or below 200 percent of the Federal Poverty Guidelines are eligible for ACP, such that the income eligibility criterion is duplicative and unnecessary. Also, by specifying that consumers in BEAD-funded areas who meet any ACP eligibility criteria qualify for the Low-Cost Broadband Service option will ensure Californians in BEAD-funded areas have access to the combined benefits of ACP and the Low-Cost Broadband Service option even if ACP eligibility criteria were to change in the future.¹⁴⁶

¹⁴⁴ CTIA, Opening Comments, at 8.

¹⁴⁵ The California Broadband and Video Association, Opening Comments, at 30.

¹⁴⁶ AT&T, Opening Comments, at 10.

Cal Advocates requests the Commission ensure the proposed low-cost broadband service requirements to ensure the benefit reaches low-income Californian households that do not qualify under federal standards, but that earn at levels that would classify them as “low-income” under the thresholds developed by the California Department of Housing and Community Development.¹⁴⁷

10.2. Discussion

In response to comments, the language in the November Proposal was revised prior to when the Initial Plan was submitted to the NTIA in December 2023. Due to the uncertainty surrounding the continued availability of funding for a successor to ACP, BEAD subgrantees must offer the Low-Cost Broadband Service Option at a price of \$30 per month, instead of \$15 per month, for all income-qualified customers with household income below 200 percent of the Federal Poverty Level, if ACP funding is expended and no successor program is established.

In response to curing requests from the NTIA, the Initial Proposal was revised further to allow subgrantees to request a modification to the \$30 target price for the low-cost service offering. These modifications can raise the price to a maximum of \$50, but only if the applicant provides evidence that the lower rate would be financially unsustainable. BEAD subgrantees may increase prices charged to end users after 12 months has passed and at a rate that does not exceed the Consumer Price Index for All Urban Consumers (CPI-U) 12-month percentage point change for the “All Items” category, published by the U.S. Bureau of Labor Statistics. Existing customers must be informed via mail, billing

¹⁴⁷ Cal Advocates, Opening Comments, at 4-5.

announcement, or email, no later than 30 days before a price increase. Applicants must also agree to participate in any future low-income connectivity programs, including successors to the ACP or similar state or federal programs.

BEAD subgrantees are required to offer a low-cost plan for the life of the infrastructure, though applicants may include a waiver request for their specific project in the application. Applicant requesting a waiver from specific elements of the low-cost service option must include the following information in their waiver request:

- The proposed price to be charged to income-qualified customers for a plan meeting the technical requirements of the low-cost service option and justification of why this proposed price will ensure affordability for low-income customers;
- An explanation of why it would be infeasible for the prospective subgrantee to meet the low-cost service option requirement and why this would imperil core objectives of the BEAD program; and
- Supporting documentation, such as business plans or a pro forma.

We dismiss all claims that requiring grantees that have chosen to apply for a grant to offer an affordable pricing plan, as a condition of the grant they have volunteered to apply for, constitutes rate regulation. These arguments do not represent current law. As several parties note, the Ninth Circuit United States Court of Appeals expressly held this is not rate regulation because providers are free to opt out of accepting public funds. Further, *N.Y. State Telecomms. Ass'n v. James*, cited by AT&T, was overturned.¹⁴⁸

¹⁴⁸ Second Circuit Court of Appeals in New York, *State Telecommunications Ass'n, Inc. v. James*, 101 F.4th 135 (2d Cir. 2024)

The Commission adopts this revised proposal, which is consistent with NTIA curing instructions.

11. Middle Class Affordability Plan

The NTIA's NOFO requires the Commission to include "in its Initial and Final Proposals a middle-class affordability plan to ensure that all consumers have access to affordable high-speed internet."¹⁴⁹ In developing middle-class affordability plans, the NTIA expects States will adopt diverse strategies to achieve this objective, such as requiring providers receiving BEAD funds to offer low-cost, high-speed plans to all middle-class households using the BEAD-funded network, or provide consumer subsidies to defray subscription costs for households not eligible for the ACP benefit or other federal subsidies, or use their regulatory authority to promote structural competition, or assign especially high weights to selection criteria relating to affordability.¹⁵⁰

Under the November Proposal, the Commission would encourage BEAD applicants to offer price points that accommodate subscribers' ability and desire to pay for reliable, high-speed service.

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

11.1. Positions of Parties

RCRC supports the proposed Middle-Class Affordability Plan and agrees with including considerations for affordability within the BEAD program, stating

¹⁴⁹ NTIA NOFO at 66.

¹⁵⁰ *Id.*

that “This holistic approach stands to reach – and benefit – a wide array of households who grapple with our high-cost state.”¹⁵¹

Cal Advocates asks the Commission to modify its plan to address middle-class affordability to include a requirement that BEAD- funded networks must offer a broadband plan that is affordable to middle-class Californians, including a requirement that all applicants must provide a generally available (i.e., not income qualified) middle-class affordable plan, offering 100 Mbps download and 20 Mbps upload for no more than \$84 per month.¹⁵²

Cal Advocates notes that the Commission has not proposed a methodology for how to monitor the affordability of available service options or proposed actions to take if that monitoring reveals broadband services are not affordable, recommending that the Commission should use the data collected in the Affordability Rulemaking¹⁵³ to adopt program-specific affordability benchmarks which should resemble the FCC's methodology: voice and broadband service expenditures exceed two percent of low-income households' disposable income. Cal Advocates recommends the Commission define middle-class as those families earning two-thirds to double the area median household income for a family of three.¹⁵⁴

AT&T recommends the Commission adopt strategies that maximize the most participation in the BEAD program by providing various options which enables “middle-class consumers to select the internet service tier and price point

¹⁵¹ RCRC, Opening Comments, at 8.

¹⁵² Cal Advocates, Opening Comments, at 6.

¹⁵³ R.18-07-006, Order Instituting Rulemaking to Develop Methods to Assess The Affordability Impacts Of Utility Rate Requests And Commission Proceedings” issued July 23, 2018. The Commission has issued D. 20-07-032 and D. 22-08-023 in this proceeding.

¹⁵⁴ Cal Advocates, Opening Comments, at 7-8.

that best meets their needs” opining that the NTIA’s guidance is that “a state’s Middle Class Affordability strategy focus on the state’s strategies, and not any subgrantee offer.”¹⁵⁵

11.2. Discussion

In response to comments, the November Proposal was revised prior to the Initial Proposal’s submission to the NTIA in December 2023.

To ensure that middle-class Californians who do not qualify for the Low-Cost Broadband Service Option despite facing significant cost burdens have access to affordable internet service, the Commission also will require BEAD applicants to include a plan for a Middle Class Affordable Service Option that costs no more than \$84 per month, inclusive of all fees and charges, for a plan offering speeds of 100 Mbps download and 20 Mbps upload the following criteria:

- Proposes a monthly non-promotional price, including all taxes, fees, and charges billed to the customer or subscribers, and justification for the price;
- Provides consistent and reliable download speeds of at least 100 Mbps and typical upload speeds of at least 20 Mbps;
- Provides typical latency measurements of no more than 100 milliseconds;
- Is not subject to data caps, surcharges, or usage-based throttling and is subject only to the same acceptable use policies to which subscribers to all other broadband internet access service plans offered to home subscribers by the participating subgrantee must adhere; and
- Only allows prices charged to end users to increase after 12 months has passed and at a rate that does not exceed the Consumer Price Index for All Urban Consumers (CPI-U)

¹⁵⁵ AT&T, Opening Comments, at 11-12.

12-month percentage point change for the “All Items” category, published by the U.S. Bureau of Labor Statistics. Existing customers must be informed via mail, billing announcement, or email, no later than 30 days before a price increase.

The Commission will consider waiver requests. Applicants must include their waiver request with each project application, including the following information:

- The proposed price to be charged to customers for a plan meeting the technical requirements of the MCASO and justification of why this proposed price will ensure affordability for middle-class customers;
- The length of time for which the MCASO will be available;
- An explanation of why it would be infeasible for the prospective subgrantee to meet the MCASO requirement and why this would imperil core objectives of the BEAD program; and
- Supporting documentation, such as business plans or a pro forma.

The proposed price justification shall consider the median income for counties included in the proposed service area, what share of monthly income is accounted for by the proposed price for households at the top (double the Area Median Income) and bottom (two-thirds of Area Median Income) of the middle-class range, and an explanation of how the proposed price will ensure that high-quality broadband services are available to all middle-class families in the BEAD-funded network’s service area at a reasonable price. In evaluating a prospective subgrantee’s MCASO, the Commission also will consider the price required for providers to achieve economic viability for projects.

The Commission adopts this revised proposal, which is consistent with NTIA curing instructions.

12. Labor Protections

The NTIA requires the Commission to obtain and evaluate information on a prospective subgrantee's record of compliance with federal labor and employment laws, as well as the records of any other entities that will participate in the project, including contractors and subcontractors. This information must include, at a minimum, material on these entities' compliance with federal labor and employment laws on broadband deployment projects in the last three years (e.g., data on an applicant's historical use of contracting and subcontracting arrangements, including staffing plans, and at least one example of each contractor and subcontractor's past performance in the context of a similar project).¹⁵⁶ The NTIA requires the Commission to require BEAD applicants to provide, at a minimum, the following materials:

- a certification from an Officer/Director-level employee (or equivalent) of the prospective subgrantee evidencing consistent past compliance with federal labor and employment laws by the subgrantee, as well as all contractors and subcontractors;
- written confirmation that the prospective subgrantee discloses any instances in which it or its contractors or subcontractors have been found to have violated laws such as the Occupational Safety and Health Act, the Fair Labor Standards Act, or any other applicable labor and employment laws for the preceding three years; and
- plans for ensuring compliance with Federal labor and employment laws that address, at a minimum, how the applicant will ensure compliance in its own labor and employment practices, as well as that of its contractors and subcontractors, including 1) information on applicable wage scales and wage and overtime payment practices for

¹⁵⁶ NTIA NOFO at 56.

each class of employees expected to be involved directly in the physical construction of the broadband network; and 2) how the subgrantee will ensure the implementation of workplace safety committees that are authorized to raise health and safety concerns in connection with the delivery of deployment projects.¹⁵⁷

The NTIA's NOFO requires the Commission to describe in both its Initial and Final Proposals the specific information it will require of applications describes an effective plan for compliance with federal labor and employment laws as one that "can include an applicant's binding commitment to strong labor standards and protections for the project workforce (including contractors and subcontractors), which include:

- Using a directly employed workforce, as opposed to a subcontracted workforce;
- Paying prevailing wages and benefits to workers, including compliance with Davis-Bacon and Service Contract Act requirements, where applicable, and collecting the required certified payrolls;
- Using project labor agreements (i.e., pre-hire collective bargaining agreements between unions and contractors that govern terms and conditions of employment for all workers on a construction project);
- Use of local hire provisions;
- Commitments to union neutrality;
- Use of labor peace agreements;¹⁵⁸

¹⁵⁷ *Id.*, at 56-57.

¹⁵⁸ *See*, NTIA NOFO at footnote 72. Where a governmental entity receives NTIA grant funds, whether directly as an Eligible Entity or as a subgrantee, and the governmental entity uses those funds for the construction of facilities over which it will maintain a proprietary interest (e.g., governmental ownership of the network), it is authorized and encouraged to require labor peace agreements, unless prohibited by state or local law. Subgrantees that are non-governmental entities, and construct broadband facilities over which no governmental entity

Footnote continued on next page.

- Use of an appropriately skilled workforce, e.g., through Registered Apprenticeships or other joint labor-management training programs that serve all workers, particularly those underrepresented or historically excluded);
- Use of an appropriately credentialed workforce (i.e., satisfying requirements for appropriate and relevant pre-existing occupational training, certification, and licensure); and
- Taking steps to prevent the misclassification of workers.¹⁵⁹

If the State includes any of these as mandatory requirements for all subgrantees (including contractors and subcontractors), the NTIA's NOFO asks for a description of the requirements in detail its Initial and Final Proposal and explanation of how the requirements will be binding legal commitments. An Eligible Entity taking this approach can reduce the showing that prospective subgrantees need to make in their applications regarding their plans to comply with federal labor and employment laws.¹⁶⁰

Under Section 8 of the November Proposal, the Commission will require the following from all applicants:

1. Certification from an Officer/Director-level employee, or an equivalent, of consistent past compliance with federal labor and employment laws on broadband deployment projects in the last three years, including:
 - Certification that the prospective subgrantee, as well as its contractors and subcontractors, have not been found to have violated laws such as the Occupational Safety and Health Act, the Fair Labor Standards Act, or any

maintains a proprietary interest, are authorized and encouraged to require labor peace agreements, unless prohibited by state or local law.

¹⁵⁹ NTIA NOFO at 57.

¹⁶⁰ *Id.*

other applicable labor and employment laws for the preceding three years, or

- Disclosure of any findings of such violations.
2. Certification that the potential subgrantee, and its proposed contractors and subcontractors, have existing labor and employment practices in place and that the subgrantee will recertify this annually for the duration of the BEAD implementation period, including:
 - Applicable wage scales and wage and overtime payment practices for each class of employees expected to be involved directly in the physical construction of the network; and
 - Certification that the potential subgrantee will ensure the implementation of workplace safety committees that are authorized to raise health and safety concerns in connection with the delivery of deployment projects and that the applicant will recertify this annually for the duration of the BEAD implementation period.
 3. Discussion of the potential subgrantee's workforce plan, including information on training and safety, job quality, local hire and targeted hire, apprenticeship utilization, accountability and subcontracting practices, and ongoing operational workforce.
 4. Discussion of current and planned future practices regarding using a directly employed workforce, robust in-house training, wages and benefits, and a locally based workforce.
 5. Current and planned future practice regarding public disclosure of workforce plans and labor commitments on a website or online portal.
 6. Discussion of job quality considerations as part of the applicant's workforce development strategies.
 7. Discussion of track record and commitment to maintaining high standards of workplace safety practices, training

- certification or licensure for all relevant workers, and compliance with State and federal workplace protections.
8. Certification of compliance with relevant workplace protections including the Occupational Safety and Health Act, the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, and California labor and employment laws.
 9. Discussion of whether the construction workforce will be directly employed or subcontracted, the anticipated size of the workforce required to carry out the proposed work, a description of plans to maximize use of local or regional workforce, and a description of the expected workplace safety standards and training to ensure the project is completed at a high standard.¹⁶¹

Using the information provided above, the Commission will review and evaluate the applicant based on completeness, sufficiency, and whether any omissions or other indications that should raise concerns.

Following an award, successful applicants will be required to submit ongoing workforce reports which shall be incorporated as material conditions of their subgrant from the Commission. The applicants' representations in the Workforce Plan section of their application will become binding commitments upon award of a subgrant, and the subgrantees will be subject to regular reviews to ensure compliance.¹⁶²

In the event that successful applicants fail to meet the Program Requirements or Workforce Plan Data requirements, or otherwise falsify information regarding such requirements, the Commission will investigate the failure and issue an appropriate action allowable by law.

¹⁶¹ November Proposal, Appendix B, at 60-62.

¹⁶² *Id.*, Appendix B, at 62.

To encourage public confidence in the BEAD Program, applicants' disclosures responding to the workforce criteria will be publicly available on the Commission's website.

Subgrantees would be required to provide in regular reports containing the information discussed below, which may be anonymized and aggregated to protect individual privacy:

- Whether the workforce will be directly employed by the subgrantee/ISP or whether work will be performed by a subcontracted workforce;
- The entities that the subgrantee plans to subcontract with in carrying out the proposed work, if any;
- The job titles and size of the workforce (FTE positions) required to carry out the proposed work over the course of the project;
- For each job title required to carry out the proposed work, a description of wages, benefits, applicable wage scales including overtime rates and a description of how wages are calculated; and
- Any in-house training program, including whether the training program is tied to titles, uniform wage scales, and skill codes recognized in the industry; Safety training, certification, and/or licensure requirements, including whether employees are required to have completed OSHA safety training or any training required by law.¹⁶³

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

¹⁶³ *Id.*, Appendix B, at 62-63.

12.1 Positions of Parties

Asserting that “shovel-ready” broadband workforces currently are scarce and that rigorous competition for this scarce workforce means that workers, benefitting from the high standards of California labor laws, are already protected by that competition, and the influx of broadband deployment capital expenditures, both in California and nationally, means that these competitive dynamics will be sustained in the coming years, the California Broadband and Video Association urges the Commission to take a light-touch approach to implementing the BEAD labor and workforce directives.¹⁶⁴ The California Broadband and Video Association urges the Commission to provide applicants flexibility to address labor standards and achieve a highly skilled workforce without prescriptive requirements that could deter qualified applicants with a history of fair employment practices. The California Broadband and Video Association writes the Staff Proposal largely achieves these objectives.

The California Broadband and Video Association supports the Staff Proposal in terms of the flexibility afforded to how applicants demonstrate a skilled workforce in their applications. The California Broadband and Video Association also supports the reasonable accommodation of allowing a seven-day period to cure any responses deemed incomplete or insufficient, asserting it will help ensure that all applicants, including new entrants with no prior labor and workforce compliance history, can put their best foot forward on workforce matters.

The California Broadband and Video Association urges the Commission to allow flexibility regarding the level of detail required at the application stage and

¹⁶⁴ California Broadband and Video Association, Opening Comments, at 37.

what specific workforce-related representations will become binding agreements upon award of a subgrant. In particular, given the delay between the time in which applications are due and construction on the projects begin, project-specific details may evolve, the California Broadband and Video Association recommends requiring the proposed level of detail regarding specific experience levels, certifications, job titles, and workforce size be made after the grant is approved, instead when the application is submitted.¹⁶⁵

Joint Labor Respondents also support the labor standards disclosure requirements outlined in the Initial Proposal.¹⁶⁶ Regarding the ongoing workforce reports, Joint Labor Respondents ask the Commission to clarify that the initial disclosures also require that if an applicant will be subcontracting work, that they should disclose what the entity will be, or submit the information as soon as it is available.¹⁶⁷

Joint Labor Respondents also recommend that the Commission also incorporate disclosures regarding ongoing network operations, for example, in situations where the applicant will operate the network, the applicant should disclose if it has an existing workforce to perform the customer service and operations work, whether that workforce be based locally and directly hired by the employer and, if those functions will be outsourced, where those jobs will be overseas. Additionally, Joint Labor Respondents recommend requiring applicants describe the wage scales, minimum wage rates, and benefits this workforce will receive.¹⁶⁸

¹⁶⁵ *Id.*, at 38.

¹⁶⁶ Joint Labor Respondents, Opening Comments, at 14.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

AT&T asks the Commission to clarify the applicability and requirements associated with the California prevailing wage laws and the inapplicability of the federal Davis-Bacon prevailing wage law, claiming the BEAD provisions of the IIJA are not the same as the Davis-Bacon Act and the IIJA does not limit the ability of States to apply their own prevailing wage laws.¹⁶⁹

12.2. Discussion

In response to comments, the Initial Proposal submitted to the NTIA in December 2023 reflects that BEAD applicants will be required to pay prevailing wage using requirements that will be modeled on those utilized for the California Advanced Services Fund (CASF) in evaluating compliance with California Labor Code, Section 1720. For projects located on Tribal Lands, this requirement will not apply, but applicants must comply with any related Tribal or federal labor law.

Additionally, BEAD applicants are encouraged, but not required, to utilize the following practices:

- Using a directly employed workforce, as opposed to a subcontracted workforce;
- Using project labor agreements (i.e., pre-hire collective bargaining agreements between unions and contractors that govern terms and conditions of employment for all workers on a construction project);
- Use of local hire provisions;
- Commitments to union neutrality;
- Use of labor peace agreements;
- Use of an appropriately skilled workforce (e.g., through Registered Apprenticeships or other joint labor-management training programs that serve all workers,

¹⁶⁹ AT&T, Opening Comments, at 24.

particularly those underrepresented or historically excluded);

- Use of an appropriately credentialed workforce (i.e., satisfying requirements for appropriate and relevant pre-existing occupational training, certification, and licensure); and
- Taking steps to prevent the misclassification of workers.

Revisions to the proposed scoring rubric are discussed in the sections that detail those topics

The Commission adopts this revised proposal, which is consistent with NTIA curing instructions.

13. Workforce Development Requirements

The NTIA's NOFO encourages States to consider workforce development goals when selecting subgrantees, such as setting requirements applicable to all BEAD subgrantees or establishing scoring factors. Examples include:

- Ensuring that subgrantees require their contractors and subcontractors to provide registered apprenticeships and pre-apprenticeships tied to a registered apprenticeship, joint labor management partnerships, and other high-quality, on-the-job training opportunities, which may include minimum requirements of contractor or subcontractor job hours to be performed by apprentices; and ensuring that such programs lead to employment with wages at rates not less than the rates prevailing on projects and other eligible activities of a similar character in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code;
- Ensuring that subgrantees offer "quality" jobs. For example, the Commission should consider scoring applicants based in part on the extent to which they will deliver on the quality jobs standard; and

- Ensuring that subgrantees prioritize hiring local workers and have robust and specific plans to recruit historically underrepresented populations facing labor market barriers and ensure that they have reasonable access to the job opportunities created by subgrantees. Such populations may include communities of color, women, and other groups (such as persons with disabilities, LGBTQI+ people, disconnected youth, individuals in recovery, individuals with past criminal records, including justice-impacted and reentry participants, serving trainees participating in the SNAP, TANF, and WIC, and veterans and military spouses).¹⁷⁰

Section 9 of the November Proposal would take the following approach:

- Require self-certification that applicants meet federal labor standards indicated in statute, as well as any applicable State laws that expand or exceed federal rules. As directed in the NOFO, California will prioritize firms that can certify compliance;¹⁷¹
- Require disclosure of any workforce violations within the past three years. If violations exist, require documentation of how the applicant has updated their policies and practices to ensure compliance moving forward;¹⁷²
- Require applicable wage scales and wages and overtime payment practices for each class of employee that will be directly in the physical construction of high-speed internet;¹⁷³

¹⁷⁰ NTIA NOFO at 59-60.

¹⁷¹ November Proposal, Appendix B, at 110, 117.

¹⁷² *Id.*, Appendix B, at 110, 118.

¹⁷³ *Id.*, Appendix B, at 110.

- Require plans for the implementation of workforce safety committees that will be authorized to raise any health and safety concerns;¹⁷⁴
- Require documentation of whether subgrantees, their partners and contractors qualify as a minority-owned enterprise, women-owned enterprise, or Labor Surplus Firm. The Commission may use answers to these questions as a tiebreaker in the event that multiple equally qualified and equally scoring applications for the same area are received;¹⁷⁵
- Require a written description or affirmation of subgrantee policies or practices for any of the following items:
 - Using a directly employed workforce, as opposed to a subcontracted workforce;
 - Use of project labor agreements;
 - Use of local hire provisions;
 - Use of labor peace agreements;
 - Commitment to union neutrality; and
 - Steps taken to prevent the misclassification of workers;¹⁷⁶
- Ask applicants to describe their usage of on-the-job training, internship, or apprenticeship programs, as well as credentials they confer upon program completion. This can not only lead to better retention of staff, but also allows pathways for workers with a wide range of educational backgrounds to participate;¹⁷⁷
- Ask applicants to describe the actions they take specific to recruiting a diverse workforce, and/or future plans to do more outreach to diverse groups. This answer may include

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*, Appendix B, at 118.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

a description of specific outreach or materials intended to be welcoming to women, people of color, or other groups not typically represented in most telecommunications construction workforces; and¹⁷⁸

- Require subgrantees to certify compliance with Davis-Bacon prevailing wages, as well as compliance with relevant aspects of California Labor Code § 1770 et seq., “Prevailing wage determination,” except as noted for projects occurring on Tribal lands.¹⁷⁹

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

13.1. Positions of Parties

CENIC asks the Commission to add Salary Surfer, the California Community Colleges’ website that lists the various degrees and certificate programs offered throughout the state’s community college system to the list of programs in the Initial Plan.¹⁸⁰

13.2. Discussion

Prior to submitting the Initial Proposal to the NTIA in December 2023, the November Proposal was revised such that the Commission will request the following information from applicants, including information about contractors and subcontractors, to ensure compliance with labor laws:

- BEAD applicants’ record of past compliance with federal labor and employment laws, which:

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*, Appendix B, at 118.

¹⁸⁰ CENIC, Opening Comments, at 3-4.

- Must address information on these entities' compliance with federal labor and employment laws on broadband deployment projects in the last three years;
- Should include a certification from an Officer/Director-level employee (or equivalent) of the prospective subgrantee evidencing consistent past compliance with federal labor and employment laws by the subgrantee, as well as all contractors and subcontractors; and
- Should include written confirmation that the prospective subgrantee discloses any instances in which it or its contractors or subcontractors have been found to have violated laws such as the Occupational Safety and Health Act (OSHA), the Fair Labor Standards Act, or any other applicable labor and employment laws for the preceding three years.
- Prospective subgrantees' plans for ensuring compliance with federal labor and employment laws, which must address the following:
 - How the prospective subgrantee will ensure compliance in its own labor and employment practices, as well as that of its contractors and subcontractors, including:
 - Information on applicable wage scales and wage and overtime payment practices for each class of employees expected to be involved directly in the physical construction of the broadband network; and
 - How the subgrantee will ensure the implementation of workplace safety committees that are authorized to raise health and safety concerns in connection with the delivery of deployment projects.

BEAD applicants also must:

- Demonstrate how they will ensure an appropriately skilled workforce, e.g., through Registered Apprenticeships, existing training, or other joint labor-management training programs that serve all workers;

- Demonstrate that all members of the project workforce will have appropriate credentials, e.g., appropriate, and relevant pre-existing occupational training, certification, and licensure;
- Declare whether the project workforce will be unionized or not;
- Declare whether the workforce will be directly employed or whether work will be performed by a subcontracted workforce; and
- Require subgrantees to identify the entities that the proposed subgrantee plans to contract and subcontract with in carrying out the proposed work.

Should the workforce of subgrantee, contractor or subcontractor not be unionized, the Commission will require the subgrantee to provide the following with respect to the non-union workforce:

- The job titles and size of the workforce (FTE positions, including for contractors and subcontractors) required to carry out the proposed work over the course of the project and the entity that will employ each portion of the workforce;
- For each job title required to carry out the proposed work (including contractors and subcontractors), a description of:
 - Safety training, certification, and/or licensure requirements (e.g., OSHA 10, OSHA 30, confined space, traffic control, or other training as relevant depending on title and work), including whether there is a robust in-house training program with established requirements tied to certifications, titles; and
 - Information on the professional certifications and/or in-house training in place to ensure deployment activities meet a high standard.

Lastly, the Commission will request additional details from applicants, not mandated by the NOFO, to promote a skilled and diverse workforce, with equitable on-ramps to great paying jobs including:

- Description of the actions the applicants plan to take specific to recruiting a diverse workforce, and/or future plans to do more outreach to diverse groups. This answer may include a description of specific outreach or materials intended to be welcoming to women, people of color, or other groups not typically represented in most telecommunications construction workforces;
- Documentation of whether subgrantees, their partners and contractors qualify as a minority-owned enterprise, women-owned enterprise, or Labor Surplus Firm. The Commission will accept documentation from its own Supplier Diversity Program or from other California state and local government agencies. The Commission may use answers to these questions as a tiebreaker in the event that multiple equally qualified and equally scoring applications for the same area are received; and
- Certification of compliance by subgrantees with Davis-Bacon prevailing wages, as well as compliance with relevant aspects of California Labor Code § 1770 et seq., “Prevailing wage determination,” except as noted for projects occurring on Tribal lands.

The Commission adopts this revised proposal, which is consistent with NTIA curing instructions.

14. BEAD Application Requirements

The NTIA’s NOFO requires the Commission to ensure that all BEAD subgrantees are capable of carrying out activities funded by the BEAD subgrant in a competent manner and in compliance with all applicable federal, State,

Territorial, and local laws.¹⁸¹ Specific showings BEAD applicants as well as the information required in their applications are discussed below in greater detail.

14.1. Project Description

Under the November Proposal, applicants will be required to provide a detailed description of the proposed project consisting of the following elements:

- Network design and diagrams using shapefiles that display fiber routes, interconnect points, and required rights-of-way usage;
- Narrative descriptions of the geographic location, characteristics of the local community, anticipated labor requirements, and other related information that will provide the Commission with a complete picture of the community to be served;
- Descriptions of the proposed project's technical specifications and design, including project elements such as the proposed miles of fiber, number of interconnection points, technology types to be deployed, number of passings, and anticipated speeds and latency of the services to be offered over the completed network;
- Deployment timelines and milestones that reflect a construction and installation process of no longer than four years, including planning, design, procurement, construction, installation, network turn-up and testing, and service initiation. The proposed deployment timelines and milestones must include the need to obtain necessary permits and CEQA approvals; and
- In addition to the budget narrative and pro forma analysis provided as part of the showing of financial sustainability (including anticipated take-rates over time, average revenue per user, churn, and other related elements), this section of the application will require applicants to provide documentation of project costs, operational costs, and budgets and to connect these showings to other sections of

¹⁸¹ NTIA NOFO at 71.

the application to create a comprehensive description of the proposed project and showing of technical and financial feasibility.^{182,183}

Staff will review the timelines and milestones for the proposed project to ensure that they correspond and map directly with the capital expenditures and schedules provided as part of the applicant's showing of financial sustainability for the project. Staff also will review the description of the proposed project's technical specifications, network design, and diagrams to ensure that the related project budgets, financial analysis, and business case pro forma analysis coordinates and support the applicants' project-specific financial sustainability showing.¹⁸⁴

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

14.1.1. Positions of Parties

No party commented on this requirement.

14.1.2. Discussion

The Commission adopts this requirement without revision, which is consistent with NTIA curing instructions.

¹⁸² November Proposal, Attachment B, at 51-52.

¹⁸³ As each of these application elements must correspond and connect with each other to present a comprehensive picture of the proposal project, the Commission intends these showings to be complementary and not duplicative. Applicants can reference attachments and information provided in other parts of the application. See, November Proposal, Attachment B, at 52.

¹⁸⁴ November Proposal, Attachment B, at 52.

14.2. Subgrantee Financial Capacity Requirements

The NTIA's NOFO requires the Commission to ensure that BEAD subgrantees possess the financial capacity to meet the commitments of the subgrant, the requirements of the BEAD Program and such other requirements as have been prescribed by the Assistant Secretary or the Commission.¹⁸⁵

To demonstrate their financial capacity, the NTIA requires a BEAD applicant to submit to the Commission as part of their applications: 1) certifications regarding financial capacity; 2) a Letter of Credit for at least 25 percent of the proposed project's cost; 3) audited financial statements; 4) and business plans and related analyses that substantiate the sustainability of the proposed project, such as pro forma statements.¹⁸⁶

The November Proposal includes several requirements that prospective subgrantees must meet to demonstrate their financial viability to complete their proposed project and meet BEAD Program requirements, including maintaining available funds.

An applicant's officer or director must certify¹⁸⁷ that the applicant will have sufficient financial resources to complete its proposed project. Additionally, the officer or director must certify that the applicant understands the applicant will be reimbursed, requiring subgrantees to commit resources to construct the network and begin service prior to receiving grant award funding as reimbursement for eligible expenses.¹⁸⁸ The November Proposal also includes a

¹⁸⁵ NTIA NOFO at 71.

¹⁸⁶ *Id.*, at 72-73.

¹⁸⁷ The terminology the NTIA uses is "certify." By certify, the Commission means verify and attest, consistent with the Commission's Rules of Practice and Procedure, including Rules 1.1 and 1.11.

¹⁸⁸ November Proposal, Attachment B, at 44.

requirement that the applicant certify that it will have sufficient financial resources to provide the pledged matching funding as required by BEAD Program rules, and that it will have the financial resources to support all project costs necessary to complete the project, even if those costs exceed the amount of grant award and pledged matching funds.¹⁸⁹

The BEAD NOFO requires Eligible Entities to establish a model letter of credit substantially similar to the model letter of credit established by the FCC in connection with the Rural Digital Opportunity Fund.¹⁹⁰ During each Eligible Entity's application process for subgrantees seeking to deploy network facilities, each applicant must submit a letter from a bank meeting eligibility requirements consistent with those set forth in 47 C.F.R. § 54.804(c)(2) committing to issue an irrevocable standby letter of credit, in the required form, to the prospective subgrantee.¹⁹¹ Prior to entering into any subgrantee agreement, subgrantees must provide the Eligible Entity an irrevocable standby letter of credit in the required form, acceptable in all respects to the Eligible Entity, in a value of no less than 25 percent of the subaward amount.¹⁹² In addition, a subgrantee must provide the Eligible Entity an opinion letter from legal counsel stating that in a proceeding under the Bankruptcy Code the bankruptcy court would not treat the letter of credit as property of the winning subgrantee's bankruptcy estate.¹⁹³

¹⁸⁹ *Id.*, Attachment B, at 44-45.

¹⁹⁰ Rural Digital Opportunity Fund; Connect America Fund, Report and Order, 35 FCC Rcd 686, 773-33, Appx. C (2020).

¹⁹¹ BEAD NOFO at 72, § IV.D.2.a.ii.

¹⁹² *Id.*, at 72-73.

¹⁹³ *Id.*

The BEAD Program rules require subgrantees to obtain an irrevocable standby Letter of Credit from a qualified financial institution as part of its demonstration of financial capability to participate in the program and successfully complete a project. Pursuant to BEAD program rules and the BEAD Notice of Funding Opportunity Section IV.D.2.a.ii, the Commission will implement a letter of credit process using the framework adopted by the Federal Communications Commission for its Rural Digital Opportunities Fund Program.¹⁹⁴ Additionally, applicants will be required to present a letter of commitment from a qualified financial institution. The Commission will define a “qualified financial institution” as one that meets the program rules for the FCC’s RDOF Program.¹⁹⁵ This definition presents the applicants with a choice of different types of financial institutions to request a letter of commitment and ultimately fund the required letter of credit.

This letter of commitment must describe the type of financial institution that is making the commitment using the categories in 47 C.F.R. §54.804(c)(2). The letter of commitment must also state that the financial institution stands ready to issue an irrevocable standby Letter of Credit for the proposed project in the required amount and must specify the expected amount. The financial institution must also state that it has reviewed the model letter of credit and is prepared to comply with all terms and conditions for the letter of credit under

¹⁹⁴ 47 C.F.R. §54.804(c)

¹⁹⁵ 47 C.F.R. §54.804(c)(2)

this program.^{196,197} Upon completion of the Application Phase, successful subgrantees with awarded projects will be required to obtain their irrevocable standby letters of credit from the previously committed financial institutions. Submission of this Letter of Credit will be a condition of a final award agreement. A copy of the Letter of Credit for each funded project must be submitted directly from the issuing financial institution within 30 days of the notification of the award and prior to the finalization of the final award agreement. The Commission will ensure that funding will only be committed or distributed upon submission of a proper Letter of Credit. As an additional condition of the final award agreement, subgrantees will be required to submit a bankruptcy opinion letter from legal counsel that states the letter of credit is drafted in such a way that under a Title 11 bankruptcy proceeding the bankruptcy court will not treat the letter of credit or proceeds from the letter of credit as “property” of the subgrantee’s bankruptcy estate under Section 541 of the United States Bankruptcy Code.¹⁹⁸

The November Proposal also includes a requirement that applicants submit audited financial statements from the applicant’s prior fiscal year prepared by an independent certified public accountant that conforms to industry standards. If the submitted statements contain “qualifications” by the

¹⁹⁶ On November 1, 2023, the NTIA provided new guidance and a waiver regarding the Letter of Credit requirement. The November Proposal notes this development and seeks public comment regarding how to address the waiver and new requirements, though the language in the November Proposal was developed based on NTIA’s original guidance, which was not current as of November 7, 2023.

¹⁹⁷ “BEAD Letter of Credit Waiver,” NTIA, November 1, 2023, <https://broadbandusa.ntia.gov/funding-programs/policies-waivers/BEAD-Letter-of-Credit-Waiver>.

¹⁹⁸ November Proposal, Attachment B, at 46.

auditor, the applicant must describe and explain the qualification, the reason for the qualification, and, if applicable, measures taken by the company to address the qualification.¹⁹⁹

If an applicant does not utilize audited financial statements in the ordinary course of its business, the applicant must describe the circumstances and reasons for the lack of audited financial statements and provide financial statements from the prior fiscal year that contain substantially the same level of detail and information required and certify that it will provide audited financials within twelve weeks of submitting its application.

Other entities that may have alternative financial reporting requirements, such as public entities, will be allowed to submit relevant and applicable financial documentation that provides substantially similar information. A certification by an officer of the entity and a narrative explanation by the public entity must accompany the submitted financial documentation.

The November Proposal also includes a requirement that applicants submit a complete budget narrative, proposed budget, and pro forma business case analysis, using templates provided by the Commission. The application budget narrative template will require applicants to provide a detailed breakdown of the expected budget for standardized expense categories, a description of each expense, the entity or team responsible for that budget expense (if applicable and if known), and how each expense relates to the project objectives. If the applicant will be providing a cash or in-kind match in this cost category, this must be noted and explained in the justification to include a breakdown of the grant and match share of each proposed cost.

¹⁹⁹ *Id.*

Relying on the BEAD NOFO, the BEAD Program Guide developed by Staff and 2 CFR Part 200, applicants must demonstrate that proposed costs are reasonable, allowable, allocable, and necessary for the supported activity.

The pro forma business case analysis should present their financial projections to demonstrate sustainability. These templates will ask for assumptions regarding take-rates, churn, revenue-per-user, operating expenses, cash flow, and capital expenditures over the course of the construction and start-up operations for a ten-year period. The template will also request a proposed project budget with standard categories that correspond with the cost categories in the template budget narrative.

However, recognizing that applicants may have different internal record keeping and business planning processes, in addition to the required template information, the Commission will also accept additional documentation that gives applicants opportunity to present supplementary demonstration of financial sustainability tailored to the proposed project.²⁰⁰

The Commission will ensure that requests for the pro forma and business plan information in this section of the application will be complementary to, not duplicative of, documentation provided by the applicant in response to other sections of the application. To avoid inefficient and duplicative submissions, applicants will be allowed to reference submissions from other parts of its application to satisfy these requirements.

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the

²⁰⁰ November Proposal, Attachment B, at 47.

proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

14.2.1. Positions of Parties

RCRC asks the Commission to reduce the requirement to provide three years of financial statements, in favor of limiting the requirement to the prior fiscal year, to avoid excluding new entrants, particularly newly formed public and tribal entities. As an alternative, RCRC suggests that if a public or tribal entity applicant has been in existence for less than three years, financial statements for as long as applicant has been in existence, e.g. one or two years, should be acceptable²⁰¹ or allow newly formed organizations to submit financial statements from a parent or sponsoring organization.²⁰²

AT&T proposes that applicants with more than ten years of experience deploying fiber-to-the-premise networks and 10,000 or more active FTTP broadband customers, be exempt from this requirement, with all other applicants being required to submit the following:

1. Certification of financial resources necessary to complete a build valued up to an identified dollar amount with supporting banking or financial documents;²⁰³
2. Information on pre-existing broadband deployment commitments that could impact an applicant's ability to have adequate financial and human resources to complete milestones prior to reimbursement;
3. If business plans "to substantiate sustainability" are to be assessed, the applicant's existing broadband business

²⁰¹ RCRC, Opening Comments, at 7.

²⁰² *Id.*, at 7-8.

²⁰³ This dollar amount would establish reasonable limits on applicants and control irresponsible participation. An entity may be able to apply for grants that exceed its qualified dollar amount but should not be awarded more than they have qualified for.

should be evaluated, not just in the individual funded area; and the following documents (as part of a prequalification process discussed more in Section 14.10) at the parent, affiliate, or subsidiary level:

- a. Audited Financial Statements. Two years of audited financial statements. Subsidiaries may submit financial statements at the parent level.
- b. Legal Presence in State & Asset Report. All applicants must provide evidence that they are registered to do business in the state; provide a state-issued certificate of good standing; and list in their application the value of their existing assets in the state as they reported for tax purposes in their most recent tax filings.
- c. Bank Reference Letter. All applicants must provide a bank reference letter which includes the length of the banking relationship; the line of credit or credit facility limits, if applicable; and an indication of the applicant's record of meeting commitments on time. The line of credit or credit facility should exceed the amount of the BEAD grant.
- d. Comfort Letter. When the applicant is a wholly or majority-owned subsidiary, the parent or managing affiliate should be required to provide a "comfort letter." A comfort letter is not a guarantee of any kind but acknowledges that the parent/affiliate is aware of the BEAD grant application and regularly monitors the subsidiary.
- e. Binding Parent Financial Guarantee. The parent company of a wholly/majority owned subsidiary may provide a binding guarantee if the size of the grant being sought by the subsidiary does not (i) exceed 25 percent of the parent company revenues or (ii) seek to provide service to locations representing more than 25 percent of their current locations passed.²⁰⁴

²⁰⁴ AT&T, Opening Comments, Attachment B, at B2-B3.

Several parties filed comments on the proposed letter of credit requirements.

TURN and CforAT and Cal Advocates recommend the Commission modify the Letter of Credit requirement to incorporate the NTIA's latest guidance and expressly adopt all four of NTIA's waiver provisions, asserting that municipal, small, Tribal, and other non-traditional providers have raised concerns about their ability to participate in the BEAD program due to the challenges they would face in meeting the LOC requirement as currently drafted.²⁰⁵

RCRC suggests the Commission reduce the Letter of Credit requirements requirement to 10 percent of the subaward given that BEAD funding will be provided on a reimbursement basis.²⁰⁶

WISPA encourages the Commission to waive the Letter of Credit requirement for all providers and to work with its provider community to adopt an appropriate alternative to the Letter of Credit model.²⁰⁷ AT&T states that while it supports the alternatives set forth in NTIA's programmatic waiver, the Commission should still avoid a "one size fits all" Letter of Credit requirement would divert significant BEAD funding away from deployments, contending such requirements, or even the other alternatives set forth in NTIA's programmatic waiver are too costly compared to the risks they are intended to mitigate.²⁰⁸ Instead, AT&T recommends the Commission consider seeking a waiver from NTIA to adopt the approach proposed by the Commonwealth of

²⁰⁵ TURN and CforAT, Opening Comments, at 9-10. Cal Advocates, Reply Comments, at 12.

²⁰⁶ RCRC, Opening Comments, at 6.

²⁰⁷ WISPA, Opening Comments, at 12.

²⁰⁸ AT&T, Opening Comments, at 21-22.

Virginia, to “enable the Commission to customize the Letter of Credit requirements applicable to each subgrantee based on easy-to-apply, objective measures of the individual subgrantee’s creditworthiness and financial risk” including a proposed 2-Step “financial health” decision creditworthiness model.²⁰⁹ The California Broadband and Video Association recommends the Commission allow all applicants to use performance bonds and allowing applicants to commit to maintaining a letter of credit or performance bond in the amount of 10 percent of the subaward until they have demonstrated to the Commission’s satisfaction that they have completed the buildout of 100 percent of locations to be served by the project or until the period of performance of the subaward has ended, whichever occurs first, claiming this flexibility will help minimize the burden and cost of obtaining letters of credit for all applicants, while allowing the Commission to ensure that applicants have the financial capabilities to deliver on their commitments.²¹⁰

AT&T proposes the Commission require the letter of credit of the BEAD subgrantee after making the award.²¹¹

RCRC recommends allowing applicants to provide a “letter of information” from the Commission to in-state community banks and credit unions to facilitate letters of credit and connect local and community banks with service areas overlapping eligible locations to local grant participants.²¹²

RCRC supports exempting Tribes from the proposed Letter of Credit requirement, provided they can demonstrate their administrative/financial

²⁰⁹ *Id.*, at 22.

²¹⁰ The California Broadband and Video Association, Opening Comments, at 39-40.

²¹¹ AT&T, Opening Comments, Attachment C, at C1.

²¹² RCRC, Opening Comments, at 8.

capabilities, asserting this approach would be more consistent with FFA's exemption for Tribal and local governments from having to obtain a Letter of Credit.²¹³

TURN and CforAT recommend that the Commission harmonize the BEAD Letter of Credit requirement with the CASF Broadband Loan Loss Reserve Program (LLP) by expressly confirming that the LLP can be used to satisfy eligible subgrantees' Letter of Credit and performance bond conditional waivers, claiming the LLP provides similar, if not better, accountability guarantees than those sought by the NTIA in administering the BEAD program.²¹⁴ The Yurok Tribe agrees with this recommendation.²¹⁵

TURN and CforAT recommend the Commission create a fifth programmatic waiver for Tribal LLP participants, noting Tribes may lack the necessary discretionary funds and tax base.²¹⁶ The Yurok Tribe supports this recommendation.²¹⁷

Separately, to assist Tribes, TURN and CforAT propose an "Equity" match waiver that would allow Staff to initiate waiver process directly on behalf of Tribal applicants during the negotiation phase, upon review of the project proposal, and upon review of other financial information made available through the application process. TURN and CforAT state this approach would be consistent with a proposal made by the state of Colorado authorizing applicants

²¹³ *Id.*, at 6.

²¹⁴ TURN and CforAT, Opening Comments, at 13.

²¹⁵ Yurok Tribe, Reply Comments, at 2.

²¹⁶ TURN and CforAT, Opening Comments, at 13.

²¹⁷ Yurok Tribe, Reply Comments, at 2.

to request waivers in special circumstances.²¹⁸ The Yurok Tribe supports this recommendation.²¹⁹

The California Broadband and Video Association recommends the Commission align its approach with NTIA's recent conditional waiver of the Letter of Credit requirement, including by: allowing all applicants to use performance bonds; establishing a BEAD reimbursement period that spans no more than six months; and allowing applicants to commit to maintaining a letter of credit or performance bond in the amount of 10 percent of the subaward until they have demonstrated to the satisfaction of the state that they have completed the buildout of 100 percent of locations to be served by the project or until the period of performance of the subaward has ended, whichever occurs first. This flexibility will help minimize the burden and cost of obtaining letters of credit for all applicants, while allowing the Commission to ensure that applicants have the financial capabilities to deliver on their commitments.²²⁰

TURN and CforAT assert the Commission should make clear that Tribal applicants can satisfy the matching requirement using any combination of state funding sources, eligible sources of federal funding, and in-kind contributions.²²¹

WISPA urges the Commission to allow unaudited financial information if the prospective subgrantee has not been audited during the normal course of business, provided that the subgrantee commits to providing the audited documents if its proposal is selected.²²²

²¹⁸ TURN and CforAT, Opening Comments, at 15-16.

²¹⁹ Yurok Tribe, Reply Comments, at 3.

²²⁰ The California Broadband and Video Association, Opening Comments, at 39-40.

²²¹ TURN and CforAT, Opening Comments, at 17.

²²² WISPA, Opening Comments, at 7.

The California Broadband and Video Association recommends the Commission allow publicly traded entities or companies that have a bond rating of Investment Grade from Moody's, Standard and Poor's, or Fitch at the time of an application's submittal, be allowed to provide such documentation demonstrating their financial capabilities, in lieu of the Staff Proposal's required documentation. The California Broadband and Video Association claims these companies already must comply with other robust financial reporting requirements.²²³

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

14.2.2. Discussion

In response to comments, Initial Proposal Volume Two was revised prior to submission to the NTIA in December 2023 to reduce the requirement that applicants provide unqualified audited financial statements from the last three years prior to the requirement that applicants provide this information for the previous year.

The Commission also will align its Letter of Credit process using the framework adopted by the FCC for its RDOF Program²²⁴ and the more flexible guidelines issued by NTIA in its BEAD Letter of Credit Waiver.²²⁵

²²³ The California Broadband and Video Association, Opening Comments, at 42.

²²⁴ 47 C.F.R. §54.804(c)

²²⁵ See, NTIA BEAD Letter of Credit Waiver, available at <https://broadbandusa.ntia.gov/funding-programs/policies-waivers/BEAD-Letter-of-Credit-Waiver>.

The Letter of Credit Waiver expanded the eligibility of banking institutions that could issue such letters and allows performance bonds to be used as an alternative mechanism to meet this financial obligation. It further provides for a reduction of the Letter of Credit or bond once subgrantees meet certain milestones.

If applicants do not choose an alternative, they will be subject to the letter of credit requirement at no less than 25 percent as outlined in the NTIA guidance.

The Commission adopts this revised proposal, which is consistent with NTIA curing instructions.

14.3. Applicant Managerial Capability Requirements

The NTIA requires the Commission to ensure that BEAD subgrantees have the managerial capacity to meet the commitments under the subgrant, the requirements of the Program and such other requirements as have been prescribed by the NTIA or the Commission.²²⁶

The NTIA's NOFO requires applicants to submit the following materials to the Commission:

- Resumes for all key management personnel and any necessary organizational chart(s) detailing all parent companies, subsidiaries, and affiliates;
- A narrative describing the applicant experience and qualifications of key management for undertaking this project, experience undertaking projects of similar size and scope, recent and upcoming organizational changes including mergers and acquisitions, and relevant organizational policies.²²⁷

²²⁶ NTIA NOFO at 71.

²²⁷ *Id.*, at 73.

The NTIA prohibits the Commission from approving any BEAD deployment grant unless it determines that the documents submitted to it demonstrate the prospective subgrantee's managerial capability with respect to the proposed project.²²⁸ However, Eligible Entities may require a prospective subgrantee to agree to special grant conditions relating to maintaining the validity of representations a prospective subgrantee has made regarding its organizational structure and key personnel.

Under the November Proposal, the Commission will require applicants to demonstrate the managerial capability to construct and support a BEAD project well beyond the period of construction by showing ongoing commitment of resources, stable leadership, and continued improvement of processes and services to the funded area.²²⁹ Applicants must include a narrative description of its background and experience in managing broadband infrastructure projects of similar size and scope and under similar circumstances, such as the timeframes, reimbursement models, and geographic characteristics associated with its proposed project.²³⁰ Applicants also must describe the organization's experience, resources, and readiness to provide the required post build service offerings, level of service, and maintenance over the completed network, including plans to maintain a sufficient level of management resources through training, retention, and recruitment activities to support its service delivery efforts throughout the federal interest period.²³¹ An applicant also must submit information regarding its management capabilities to specifically address any unique needs of the

²²⁸ *Id.*, at 73-74.

²²⁹ November Proposal, Attachment B, at 48.

²³⁰ *Id.*, Attachment B, at 49.

²³¹ *Id.*, Attachment B, at 49.

proposed project. For example, if a proposed project will primarily serve a rural area, or a multi-dwelling unit, applicants should include specific references to key management personnel, organizational teams, and the entity's general experience with projects in similarly rural areas.²³²

Under the November Proposal, the Commission will require information that demonstrates that the applicant has sufficient managerial capabilities to support a successful BEAD funded project, with specific reference to the unique characteristics and needs of the project. In the event an applicant will rely on contractors, consultants or subcontractors, the applicant must describe the scope of the third-party contractor's role and the expected term of the engagement.²³³

In addition to organization specifics, under the November Proposal, applicants must provide current resumes of all key management personnel in roles such as officers and directors of the organization, executive level management, financial planning and strategy, technical design, risk management, equipment procurement, operations, and planning, as well as a narrative discussion of each individual's expected role in the project. Each of the identified individuals must be an employee of the organization, have at least five years of experience in the same or similar role within the communications industry, and have the demonstrated experience, skills, and authority to successfully fulfill the obligations of the role.²³⁴ Under the November Proposal, applicants also are required to submit detailed organizational charts of the organization's structure, key management personnel, and relevant operational

²³² *Id.*, Attachment B, at 49-50.

²³³ *Id.*, Attachment B, at 49.

²³⁴ *Id.*, Attachment B, at 48.

teams.²³⁵ The applicant should describe any recent or expected changes to the organization's structure, processes, and planning that may impact its BEAD project efforts.²³⁶

An applicant that is a new entrant will be required to demonstrate how it will develop its organization's managerial expertise and resources through the recruitment of directly employed key management personnel with the requisite leadership experience of at least five years in prior roles and positions in the communication industry.²³⁷

All applicants must certify that they will not engage in prohibited communications as defined in 47 CFR 1.2105(a) starting from the date of submission of preregistration application until final award.²³⁸ All applicants and partnerships must certify that there is no collusion, bias or conflict of interest or provide ownership and partnership disclosures as outlined in 47 CFR 1.2105(a). All applicants and partnerships must likewise disclose foreign interest if pertinent.²³⁹

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

²³⁵ These charts will also provide information regarding the organization's parent company and affiliates, if any. The organizational chart is expected to correspond to the other elements of the entity's showing of managerial capability, including mapping back to each identified key management personnel and functional teams.

²³⁶ November Proposal, Attachment B, at 48-49.

²³⁷ *Id.*, Attachment B, at 49.

²³⁸ *Id.*

²³⁹ *Id.*

14.3.1. Positions of Parties

While RCRC recognizes the criticality for subgrantees to demonstrate the necessary capabilities to utilize BEAD funds, the organization asserts the Commission should account for the inherent differences between incumbent service providers and public, non-profit, and Tribal applicants when demonstrating the technical, managerial, and financial quantifications. Local governments, for instance, should be able to demonstrate their capabilities and expertise with in-house or contracted expertise. Requiring direct employees of an organization to have a minimum of five years' experience within the communications industry of broadband network design, construction, maintenance, and operations may disenfranchise many municipal and/or Tribal and non-profit subgrantees.²⁴⁰

14.3.2. Discussion

In response to comments, the Commission removes the requirement that an applicant demonstrate managerial capability only through key personnel that are directly employed by the applicant.

The Commission adopts this revised proposal, which is consistent with NTIA curing instructions.

14.4. Applicant Technical Capabilities

The NTIA requires the Commission to ensure that BEAD subgrantees have the technical capacity to provide the services promised in the subgrant in the manner contemplated by the subgrant award.²⁴¹ A BEAD applicant must: 1) certify that it is technically qualified to complete and operate its proposed project and is capable of carrying out the BEAD-funded activities in a competent

²⁴⁰ RCRC, Opening Comments, at 6.

²⁴¹ NTIA NOFO at 71-72.

manner, including that it will use an appropriately skilled and credentialed workforce; 2) submit a network design, diagram, project costs, build-out timeline and milestones for project implementation, evidencing complete build-out and the initiation of service within four years of the date on which the entity receives the subgrant, all certified by a professional engineer, stating that the proposed network can deliver broadband service that meets the requisite performance requirements to all locations served by the proposed project.²⁴²

The NTIA requires that the Commission not approve any grant for the deployment or upgrading of network facilities unless it determines that the materials submitted to it demonstrate the prospective subgrantee's technical capability with respect to the proposed project.²⁴³

To meet the NTIA's requirements if adopted, the November Proposal would require applicants to provide certifications from an officer or director of the organization that they are licensed in California to conduct approved BEAD activities and comply with all post-award obligations, including a self-certification from the applicant that it is technically qualified to complete and operate a broadband network as part of a BEAD funded project.²⁴⁴ Applicants will further certify that they have the processes and resources in place to employ an appropriately skilled and credentialed workforce and that key technical personnel and technical team members are current on all required training, licensing, and license renewals. The Commission will provide a list of required licenses and certifications as part of the application materials posted on its

²⁴² *Id.*, at 74.

²⁴³ *Id.*, at 71-72.

²⁴⁴ November Proposal, Attachment B, at 50.

website and discussed during the Application Phase workshop.²⁴⁵ Applicants also will be required to provide a list of the business and technical certifications and licenses that it holds nationally and in California that will be relevant to their participation in the BEAD Program and demonstrate that the potential subgrantee is licensed and in good standing with applicable governing bodies. This list will include certifications and licenses held by key technical personnel as well as those held by the organization. The list will be required to include unique identifiers and license numbers to allow the Commission to validate the reported data.²⁴⁶

Under the November Proposal, applicants also will submit descriptions of workforce training and certification programs that they rely on, or expect to rely on, to support a continued commitment to a highly skilled and trained workforce. These programs should include certified apprenticeship programs, community college curricula, and for-profit certification programs, programs offered by trade and labor unions, as well as industry sponsored programs.^{247,248}

Applicants also will be required to list the employment categories, job titles, and job descriptions that will be necessary to successfully complete the proposed project, as well as any additional certifications, licenses, or other qualifications that are unique and specific to the proposed project. Applicants

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*, Attachment B, at 50-51.

²⁴⁸ Information regarding certifications, training, and licensing of key technical personnel submitted as part of this element of the Application Phase will be considered complementary to and not duplicative of the information and data submitted in other elements of the application. Applicants will be encouraged to cross-reference materials to avoid duplicative submissions. *See*, November Proposal, Attachment B, at 50-51.

must provide supporting documentation to demonstrate that they have completed, or are in the process of completing, these additional requirements to become fully and properly qualified to successfully complete the proposed project. Each applicant will also be required to describe the processes it will have in place to track and maintain required certifications, licenses, and training programs for construction and post-construction activities to ensure that the organization will maintain a highly skilled workforce throughout the federal interest period of the project.²⁴⁹

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

14.4.1. Positions of Parties

As noted above, RCRC recognizes that it is critical for subgrantees to demonstrate the necessary capabilities to utilize BEAD funds, but asks the Commission to account for the inherent differences between incumbent service providers and public, non-profit, and Tribal applicants when demonstrating technical quantifications. RCRC asserts that local governments, for instance, should be able to demonstrate their capabilities and expertise with in-house or contracted expertise. Further, RCRC contends that requiring direct employees of an organization to have a minimum of five years' experience within the communications industry of broadband network design, construction,

²⁴⁹ November Proposal, Attachment B, at 51.

maintenance, and operations may disenfranchise many municipal and/or Tribal and non-profit subgrantees.²⁵⁰

14.4.2. Discussion

The Commission adopts this proposal with one revision. While many of the requirements in the proposal are taken directly from the NTIA's NOFO, the Commission may remove the mandate that an applicant can only meet these requirements through direct employees. The Commission makes that revision, which is consistent with NTIA curing instructions.

14.5. Subgrantee Compliance with Applicable Laws and Regulations

The NTIA's NOFO requires a BEAD applicant to provide with its Letter of Credit, an opinion letter from legal counsel clearly stating, subject only to customary assumptions, limitations, and qualifications, that in a proceeding under Title 11 of the United States Code, 11 U.S.C. § 101 et seq. (the "Bankruptcy Code"), the bankruptcy court would not treat the letter of credit or proceeds of the letter of credit as property of the winning subgrantee's bankruptcy estate under Section 541 of the Bankruptcy Code.²⁵¹

Under the November Proposal, BEAD applications must include a legal opinion by an attorney licensed in California that the organization is aware of the federal and State laws applicable to BEAD-funded broadband deployment projects and that the organization possesses the qualifications and resources to perform BEAD-related commitments in compliance with all applicable federal and State laws. The legal opinion must attest to the organization's current compliance with all relevant federal and State laws and describe any violations

²⁵⁰ RCRC, Opening Comments, at 6.

²⁵¹ NTIA NOFO at 73.

of applicable laws and regulations, current or pending investigations, and current or pending legal actions.²⁵² The legal opinion must be accompanied by a description of the expertise and qualifications of the attorney and demonstration of the attorney's familiarity with relevant areas of the law including preemption and issues of jurisdiction. The attorney must also describe their familiarity with the operations of the organization and broadly describe the types of documents, policies, and procedures that they reviewed to render the opinion.

BEAD application supporting materials will reference the types of laws that applicants must consider as part of its demonstration of compliance, including federal procurement laws such as applicable Build America, Buy America requirements, Secure and Trusted Communications Networks Act of 2019,²⁵³ California State-specific procurement regulations, federal Uniform Guidance regulations, Department of Commerce Standard Terms and Conditions for grant funding, federal and State environmental and historic preservation regulations, federal and State labor laws and regulations regarding contractor diversity, and any specific award conditions that the Commission or NTIA may develop.

In addition to a narrative description of the processes applicants have in place to conduct funded activities in compliance with federal and State laws, including descriptions and documentation of procurement practices, applicants must provide an explanation of any special circumstances or considerations that may prevent compliance with specific applicable laws. The narrative must address specific requirements and discuss the participant's plans to mitigate the

²⁵² November Proposal, Attachment B, at 53.

²⁵³ 47 U.S.C. §1608

impact of any noncompliance on its participation in the program. Included in this narrative description must be a discussion that the applicant understands California's CEQA requirements and has begun efforts to determine compliance, including contacting Commission Staff to review CEQA obligations and obtain a CEQA questionnaire.²⁵⁴

Separately, applicants must certify that they have no history of failure to comply with environmental and historic preservation requirements or the Build America, Buy America Act (BABA),²⁵⁵ to the extent applicable. Applicants that cannot certify a track record of full compliance will be required to provide more detailed narrative and documentation regarding its histories of challenges or noncompliance.²⁵⁶ Applicants also must certify that they have, or will have, processes in place to monitor and support compliance with specific State and federal safety regulations applicable to work on BEAD program projects, including federal Occupational Safety and Health Act and California's equivalent OSHA regulations, as well as related State and federal regulations. As part of this showing, applicants must provide documentation of the organization's policies and practices regarding compliance with health and safety laws and regulations,

²⁵⁴ November Proposal, Attachment B, at 54.

²⁵⁵ Build America, Buy America Act, Pub. L. 117-53, Sections 70901-70952 (41 U.S.C. §8301 et seq.) (BABA) adopts a domestic content procurement preference and requires that certain inputs and construction materials used to design and build broadband infrastructure, including fiber optic network equipment, are produced in the United States. The Department of Commerce has proposed a limited waiver of the BABA requirements (see "Limited Applicability Nonavailability Waiver of the Buy America Domestic Content Procurement Preference," <https://www.commerce.gov/sites/default/files/2023-09/BEAD%20BABA%20Waiver%20Replacement.pdf>.) This waiver provides limited exemptions for all BEAD subgrantees from the requirements of the Buy American preference as applied to some, but not all, network equipment and construction materials used to design and build broadband infrastructure.

²⁵⁶ November Proposal, Attachment B, at 54.

including documentation of communications with workers and worker representative organizations regarding the applicable labor laws and fair labor standards, as well as the formation of worker-led health and safety committees.^{257, 258}

If adopted, the November Proposal requires applicants to provide a separate certification that they are in compliance with any applicable federal laws and regulations implemented by the FCC, including submission of required reporting under the FCC's Form 477 regulations for reporting deployment and subscription data, compliance with the Broadband DATA Act²⁵⁹ and implementing regulations including the FCC's Broadband Data Collection process. If an applicant cannot provide the required certification regarding these FCC regulations, it must provide a narrative explanation of any pending or completed enforcement action, litigation, or other action regarding violations or non-compliance with applicable FCC regulations, and a description of any efforts by the organization to cure the noncompliance or violations of the applicable regulations.²⁶⁰

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

²⁵⁷ *Id.*

²⁵⁸ Documentation of a participant's outreach to workers on these topics may include sample emails, copies of posters, worker surveys, worker meetings, phone call and social media scripts, as well as organizing activities by worker-led organizations. *See*, November Proposal, Attachment B, at 54.

²⁵⁹ Public Law 116-130 (2020).

²⁶⁰ November Proposal, Attachment B, at 54.

14.5.1. Positions of Parties

RCRC asks the Commission to remove the requirement that BEAD applicants provide an attestation from a licensed California attorney, arguing that it is inappropriate, and should be replaced with a sworn certification by the participant's management addressing the items the attorney must opine on.²⁶¹

The California Broadband and Video Association asks the Commission to clarify that if the Department of Commerce grants a limited waiver of BABA requirements, the Commission should expressly provide that it will align its approach with the waiver.²⁶²

14.5.2. Discussion

In response to comments, the Commission revises the Initial Proposal by removing the requirement that applicants must obtain a legal opinion from a California-licensed attorney that is in compliance with applicable state and federal laws. Instead, the Commission will ask applicants to self-certify that compliance.

In response to comments, the Commission clarifies it will align its approach to BABA requirements with the BEAD NOFO and the U.S. Department of Commerce Limited General Applicability Nonavailability Waiver of the Buy America Domestic Content Procurement Preference as Applied to Recipients of Broadband Equity, Access, and Deployment Program.

In response to curing instructions from the NTIA, the Initial Proposal was revised to require applicants to certify that they will permit workers on BEAD

²⁶¹ RCRC, Opening Comments, at 7.

²⁶² California Broadband and Video Association, Opening Comments, at 42.

deployment projects to create worker-led health and safety committees that management will meet with upon reasonable request.²⁶³

The Commission adopts this revised proposal, which is consistent with NTIA curing instructions.

14.6. Subgrantee Operational Capability Requirements

If adopted, the November Proposal, will require an officer or director of an applicant to certify that the applicant possesses the operational expertise, capabilities, and resources to successfully complete and operate a BEAD funded project, specifying that the applicant has at least two years of experience providing voice, broadband, or electric transmission or distribution services to end users, or is a wholly owned subsidiary of a parent entity that has two years of operational experience in the communications industry.²⁶⁴

If applicants reference operations in other states as part of its demonstration of managerial, technical, or operational capabilities, the organization will be required to provide a list or chart describing operations providing voice and broadband services in other states. The list must include licensing and certification identifiers, years of operating experience, and descriptions of the services provided in each state either by the organization directly or by its affiliates and parent organization.²⁶⁵

If an applicant is a provider of electricity transmission or distribution services without two years of experience offering communications services or is a new entrant to the communications market, the applicant must provide additional documentation of its operational capabilities to successfully complete

²⁶³ NTIA Curing Request, February 28, 2024.

²⁶⁴ November Proposal, Attachment B, at 54.

²⁶⁵ *Id.*, Attachment B, at 54-55.

and operate a BEAD-funded project, such that it can substantiate the expertise and resources of the organization to deploy and operate a broadband network in compliance with BEAD program requirements. Such documentation could include additional operational or financial reports that the electric service provider or new entrant may have originally submitted to a financial institution or another applicable regulatory agency. These additional reports must be accompanied by a certification from an officer or director of the organization that they are true and correct copies of the reports originally provided to the financial institution or regulatory agency.²⁶⁶ Additionally, electric service providers and new entrants must provide documentation of plans to acquire additional resources to increase the organizations' organizational capabilities, including third-party contractors and partners with relevant operational expertise, to the extent that they cannot demonstrate that they have already acquired those capabilities.²⁶⁷

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

14.6.1. Positions of Parties

RCRC requests that the Commission remove the requirement for entities to have provided a voice, broadband, and/or electric transmission or distribution service for at least two consecutive years prior to submitting their application. RCRC speculates that while this provision is likely intended to avoid nascent

²⁶⁶ *Id.*, Attachment B, at 55.

²⁶⁷ *Id.*

applicants from defaulting on their obligations, as evidenced by the FCC's Notice of Apparent Liability for the Phase 1 RDOF Auction, it will have severe negative impacts on public, tribal and non-profit applicants, the vast majority of whom are new entrants and indeed may effectively prevent those entities from accessing BEAD funding.²⁶⁸

14.6.2. Discussion

The Commission adopts this proposal without revision, which is consistent with NTIA curing instructions. Many of the requirements in the proposal are taken directly from the NTIA's NOFO including those referenced by RCRC and suggestions provided by RCRC.

14.7. Certification by Professional Engineer

The NTIA's NOFO requires applicants to submit, with the applications, a certification from a professional engineer that the engineer has reviewed the applicant's network design, diagrams, project costs, build-out timelines and milestones for project implementation, and a capital investment schedule, stating that the proposed network can deliver broadband service that meets the requisite performance requirements to all locations served by the project. The Commission may not approve any grant for the deployment or upgrading of network facilities unless it determines that the materials submitted to it demonstrate the applicant's technical capability with respect to the proposed project.²⁶⁹

The November Proposal requires applicants to produce a certification by an independent Professional Engineer that maintains all professional licenses from the State of California. This certification must state that the engineer has reviewed all necessary elements of the proposed project, including descriptions

²⁶⁸ RCRC, Opening Comments, at 4.

²⁶⁹ NTIA NOFO at 74.

and documentation of the network design, build-out timelines, business case, and budgets. The engineer must certify that the proposed project meets all applicable program requirements and is designed to be successfully completed and capable of meeting all performance commitments and requirements to all locations served by the project within the proposed timeline. The applicant will be required to upload documentation of the professional engineer's licenses as well as any written reports, letters, or analysis provided by the engineer regarding the proposed project.²⁷⁰

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

14.7.1. Positions of Parties

RCRC asks the Commission to remove the certification requirement by an independent professional engineer.²⁷¹ WISPA encourages the Commission to consider the waiver conditions the FCC granted to its own professional engineering certification rules and to work with the provider community to determine alternative authorities who could qualify to certify that network plans are appropriately designed.²⁷² The California Broadband and Video Association suggests the Commission modify this requirement so that an applicant that has operated as a broadband provider in California for more than ten years, or currently serves more than 30,000 California broadband customers can certify its network designs and diagrams using a Society of Cable Telecommunications

²⁷⁰ November Proposal, Attachment B, at 53-54.

²⁷¹ RCRC, Opening Comments, at 7.

²⁷² WISPA, Opening Comments, at 12.

Engineers-certified in-house engineer who designs and oversees the implementation of those designs in the regular course of business.²⁷³

14.7.2. Discussion

In response to comments, the Commission revises its Initial Proposal to adopt the NTIA's waiver permitting professional engineers licensed in any state to provide the required BEAD certifications. The revised proposal is consistent with NTIA curing instructions.

14.8. Ownership Information

The NTIA's NOFO states that Eligible Entities shall require each prospective subgrantee to provide ownership information consistent with the requirements set forth in 47 C.F.R. § 1.2112(a)(1)-(7).²⁷⁴

Under the November Proposal, applicants must document their ownership structure and shareholder interests in a manner consistent with federal regulations developed for specific funding and auction programs implemented by the FCC, as contained in 47 C.F.R. §1.2112(a)(1)-(7). Applicants must provide a narrative description of their ownership structure and corporate entity type (e.g., publicly held corporation, limited partnership, limited liability company, general partnership, cooperative), which references and correspond to the organizational charts, identification of executive leadership, and financial statements provided in other elements of the application. Applicants must submit a list of the required ownership information specific to the type of corporate entity, including the name, address, and citizenship and proportion of ownership interest of those

²⁷³ The California Broadband and Video Association, Opening Comments, at 40-41.

²⁷⁴ NTIA NOFO at 75.

owning and controlling the organization, including partners and shareholders with more than a ten percent ownership interest.²⁷⁵

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

14.8.1. Positions of Parties

No party commented on this issue.

14.8.2. Discussion

The Commission adopts this proposal, which is consistent with NTIA curing instructions.

14.9. Information Regarding Other Public Funding

The NTIA's NOFO requires the Commission to require a BEAD subgrantee to disclose, for itself and for its affiliates,²⁷⁶ any application the subgrantee or its affiliates have submitted or plan to submit, and every broadband deployment project that the subgrantee or its affiliates are undertaking or have committed to undertake at the time of the application using public funds, including but not limited to funds provided under:

- The Families First Coronavirus Response Act;²⁷⁷

²⁷⁵ November Proposal, Attachment B, at 55-56.

²⁷⁶ See, NTIA NOFO at Footnote 95. The term "affiliate" shall be defined consistent with 47 U.S.C. § 153(2) ("The term 'affiliate' means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.").

²⁷⁷ Public Law 116-127; 134 Stat. 178

- The Coronavirus Aid, Relief, and Economic Security (CARES) Act;²⁷⁸
- The Consolidated Appropriations Act, 2021;²⁷⁹
- The American Rescue Plan of 2021;²⁸⁰
- Any federal Universal Service Fund high-cost program (e.g., RDOF, CAF); and
- Any Eligible Entity or local universal service or broadband deployment funding program.²⁸¹

At a minimum, the NTIA requires that the Commission mandates that BEAD applicants submit the above information for each broadband deployment project, of: (a) the speed and latency of the broadband service to be provided (as measured and/or reported under the applicable rules), (b) the geographic area to be covered, (c) the number of unserved and underserved locations committed to serve (or, if the commitment is to serve a percentage of locations within the specified geographic area, the relevant percentage), (d) the amount of public funding to be used, (e) the cost of service to the consumer, and (f) the matching commitment, if any, provided by the subgrantee or its affiliates.²⁸²

The November Proposal requires the information listed above, including that BEAD applicants disclose receipt of any of the Commission's broadband grant programs, as well as any State or local universal service or broadband deployment funding program.²⁸³

²⁷⁸ Public Law 116-136; 134 Stat. 281

²⁷⁹ Public Law 116-260; 134 Stat. 1182

²⁸⁰ Public Law 117-2; 135 Stat. 4

²⁸¹ NTIA NOFO at 75.

²⁸² *Id.*, at 75-76.

²⁸³ November Proposal, Attachment B, at 55-56.

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

14.9.1. Positions of Parties

No party commented on this issue.

14.9.2. Discussion

The Commission adopts this proposal without modification, which is consistent with NTIA curing instructions.

14.10. AT&T's Proposed Prequalification Exemptions

In comments, AT&T proposes that the Commission grant exemptions from the requirements in this section based on an applicant's experience and the size of its customer base, including the following:

- Applicants that have more than ten years of experience deploying FTTP networks and 10,000 or more active FTTP broadband customers are exempt from providing managerial resumes, professional engineer certifications and all other information required in this section;
- Applicants that have five or more years of experience but less than ten years of experience deploying FTTP networks and more than 1,000 active fiber broadband customers are exempt from providing managerial resumes, required to provide professional engineer PE certifications for the proposed network design and required to submit proof of FCC Form 477/Broadband Data Collection (BDC) (national broadband map) submission;
- Applicants that have two or more years of experience but less than five years of experience deploying FTTP networks and/or fewer than 1,000 active fiber broadband customers are required to provide managerial resumes, professional engineer certifications for proposed network design, and proof of FCC Form 477/BDC submissions; and

- Applicants that have no experience deploying FTTP networks are not qualified for FTTP Priority Broadband Projects.²⁸⁴

The exemptions AT&T seeks are not in the NTIA's NOFO and would require the Commission to seek a waiver from the NTIA. That process would take time, success is not guaranteed, and even if successful, the time it would take would lead to little, if any, gain in efficiency for the twelve months the Commission has to review and propose applications to the NTIA.

AT&T's proposal that the Commission preemptively exclude applicants is not consistent with the law nor the NTIA's NOFO, both of which prohibit the Commission from excluding cooperatives, nonprofit organizations, public-private partnerships, private companies, public or private utilities, public utility districts, or local governments from eligibility as a subgrantee.²⁸⁵

Although we do not adopt AT&T's proposal, we revise the Initial Proposal to allow applicants to submit certain information contained in their applications ahead of the application deadline. This may assist applicants, as well as Staff. Prior to announcing the Application window, which will be after NTIA approves the final eligibility map in late 2024 or early 2025, Commission staff will provide an opportunity for prospective applicants to submit evidence demonstrating they meet the criteria including, but not limited to, the list below.

Organizational Information

- Sam.gov registration unique entity identifier.
- Organizational information chart indicating management personnel and company structure.

²⁸⁴ AT&T, Opening Comments, Attachment B, B1-B2.

²⁸⁵ Public Law 117-58 Sec. 60102 (h)(1)(A)(iii) 135 STAT. 1197 (2021). NTIA NOFO at 37.

- Ownership information (consistent with 47 C.F.R. § 1.2112(a)(1)-(7)), including 10 percent or more owners.
- State license to do business and other relevant state certifications and licenses.
- Certifications and licenses held by the business and individual employees, organized by role.
- Resumes of key personnel, including financial, technical, and management personnel.

Financial Information

- Audited financial statements from the prior year or equivalent financial information (or a justification as to why such statements may not be available).
- Letter of Credit or performance bond acknowledgment indicating the applicant's understanding of the BEAD Program's Letter of Credit or bond requirements and its plan for complying.

Experience and Past Projects

- Past performance on broadband projects (especially those similar in size and scope to the anticipated BEAD project).
- Other public funding the applicant or its affiliates have received, applied for, or intend to apply for (including federal, local, and state funding) for broadband deployment projects – as well as project details for those public-funded projects including project technology, project area, amount of funding requested, and amount of match committed.

Other Compliance Requirements

- Cybersecurity and supply chain plans in alignment with the National Institute of Standards and Technology (NIST) Framework for Improving Critical Infrastructure Cybersecurity, Executive Order 14028, NISTIR 8276, and NIST 800-161, or certify that the organization will have such.

- Federal employment and labor law compliance certifications, including contractor compliance.
- Build America, Buy America Act restrictions on purchases of fiber equipment, and the Secure and Trusted Communications Networks Act of 2019 – certify compliance, including contractor compliance.
- National Environmental Preservation Act and Historic Preservation Act awareness and commitment to comply with requirements.

15. Subgrantee Applicant Scoring

The NTIA's BEAD NOFO requires the Commission conduct a competitive grant application process and score applications against primary and secondary criteria. The Commission must award 75 percent of total points to a combination of the following three primary criteria:²⁸⁶ minimal BEAD Program outlay;²⁸⁷ affordability;²⁸⁸ and fair labor practices.²⁸⁹ As a secondary criterion, the Commission also must evaluate and score an application based on an

²⁸⁶ NTIA NOFO at 43.

²⁸⁷ The total BEAD funding that will be required to complete the project, accounting for both total projected cost and the prospective subgrantee's proposed match (which must, absent a waiver, cover no less than 25 percent of the project cost), with the specific points or credits awarded increasing as the BEAD outlay decreases. In comparing the project's BEAD outlay and the prospective subgrantee's match commitments, Eligible Entities should consider the cost to the Program per location while accounting for any factors in network design that might make a project more expensive, but also more scalable or resilient.

²⁸⁸ The prospective subgrantee's commitment to provide the most affordable total price to the customer for 1 Gbps/1 Gbps service in the project area.

²⁸⁹ Eligible Entities must give priority to projects based on a prospective subgrantee's demonstrated record of and plans to be in compliance with Federal labor and employment laws. New entrants without a record of labor and employment law compliance must be permitted to mitigate this fact by making specific, forward-looking commitments to strong labor and employment standards and protections with respect to BEAD-funded projects. This prioritization requirement is described in further detail in Section IV.C.1.e of this NOFO.

application's proposed speed to deployment,²⁹⁰ but the potential amount awarded must be less than any individual primary criterion.²⁹¹

The NTIA's NOFO permit states to develop additional secondary criteria, encouraging states to incorporate the following criteria:²⁹² equitable workforce development and job quality;²⁹³ open access;²⁹⁴ and local and Tribal coordination.²⁹⁵

The November Proposal would award up to 40 points for affordability. For priority broadband projects (i.e., fiber), applications will be scored based on their commitments to offer a symmetrical 1 Gbps service to BEAD-funded locations at \$50 per month, inclusive of all taxes and fees. Full points will be awarded to applications that make this commitment in clear and unambiguous terms, without caveats that compromise the commitment. For every additional

²⁹⁰ All subgrantees that receive BEAD Program funds for network deployment must deploy the planned broadband network and begin providing services to each customer that desires broadband services within the project area not later than four years after the date on which the subgrantee receives the subgrant from the Eligible Entity. Eligible Entities must give secondary criterion prioritization weight to the prospective subgrantee's binding commitment to provide service by an earlier date certain, subject to contractual penalties to the Eligible Entity, with greater benefits awarded to applicants promising an earlier service provision date.

²⁹¹ NTIA NOFO at 43.

²⁹² *Id.*, at 44.

²⁹³ NTIA encourages Eligible Entities to adopt selection criteria relating to the subgrantee's enforceable commitments with respect to advancing equitable workforce development and job quality objectives, see Section IV.C.1.f of this NOFO.

²⁹⁴ NTIA encourages Eligible Entities to adopt selection criteria promoting subgrantees' provision of open access wholesale last-mile broadband service for the life of the subsidized networks, on fair, equal, and neutral terms to all potential retail providers.

²⁹⁵ NTIA encourages Eligible Entities to adopt selection criteria reflecting a prospective subgrantee's support from the local and/or Tribal Government with oversight over the location or locations to be served.

\$1 per month that the applicant proposes to price its symmetrical 1 Gbps service, one point will be deducted from the 40-point maximum.²⁹⁶

For other, non-priority last-mile broadband deployment projects, under the November Proposal, applications will be scored based on applicants' commitments to offer 100Mbps downstream and 20 Mbps upstream to BEAD-funded locations at \$30 per month, inclusive of all fees. Full points will be awarded to applications that make this commitment in clear and unambiguous terms, without caveats that compromise the commitment. For every additional \$1 per month that the applicant proposes to price its 100 Mbps downstream and 20 Mbps upstream service, one point will be deducted from the 40-point maximum.²⁹⁷

Under the November Proposal, up to 20 points would be awarded for labor standards, with 10 points based on 1) a demonstrated history of compliance with federal labor laws; 2) demonstrated commitments to future compliance with federal labor laws; and 3) the quality and contents of labor practice-related items submitted during the Application Phase. Projects on Tribal Lands will receive the proposed ten points for labor standards as long as the project complies with Tribal and applicable federal law concerning labor standards. Additionally, up to ten points will be awarded to all projects on the basis of workforce capacity building and development commitments, especially those prioritizing equitable workforce development. New entrants without a lengthy record of labor and employment law compliance will receive points in this category based on specific, concrete commitments to strong labor and employment standards and

²⁹⁶ November Proposal, Attachment B, at 31.

²⁹⁷ *Id.*

protections and equitable workforce development commitments going forward. Up to ten points will be deducted for official labor relations complaints or violations in the five years preceding the date of application.²⁹⁸

Under the November Proposal, up to 15 points would be awarded for the minimum BEAD outlay criterion, with applicants being scored based on the grant amount requested and amount of matching funding committed by the applicant. Applicants will earn 10 points for meeting the 25 percent match requirement. Applicants will receive 15 points for a 50 percent match amount.²⁹⁹

Under the November Proposal, up to five points will be awarded for the speed to deployment criterion, with five points for priority broadband projects and one point for other last-mile broadband projects. Applicants must demonstrate that the proposed project will be complete within two years of receiving funds (barring CEQA)³⁰⁰ to receive points under this criterion. Applications that do not demonstrate compliance with this timeline will receive zero points.³⁰¹

The November Proposal also includes awarding up to ten points for an equity criterion, with applicants able to receive up to ten points for the number of locations that are located in a disadvantaged or low-income community. One point will be awarded per ten percent (rounded down) of the locations in a

²⁹⁸ *Id.*

²⁹⁹ November Proposal, Attachment B, at 32.

³⁰⁰ The Initial Proposal submitted to the NTIA in December 2023 clarifies this statement to mean excluding time to comply with state environmental laws, including CEQA.

³⁰¹ November Proposal, Attachment B, at 32.

proposed project that are located in a disadvantaged or low-income community, for a total of ten points.³⁰²

Under the November Proposal, the Commission would award up to ten points for applications meeting a resilience criterion, with applications receiving up to 10 points for the number of locations located in a Tier 2 or Tier 3 High-Fire Threat District. One point will be awarded per ten percent (rounded down) of locations in a Tier 2 or Tier 3 High-Fire Threat District, for a total of 10 points.^{303,304}

The November Proposal would award up to four points for an applicant's technical capability for non-priority projects. Applicants will be awarded a total of up to four points for offering a plan below the top pricing tier that can achieve 500 Mbps downstream service speed. For every commitment of 100 Mbps slower for the downstream service speed, one point will be deducted from the four-point maximum.³⁰⁵

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ The High-Fire Threat District (HFTD) is composed of Tier 2 and Tier 3 areas on the Commission's CPUC Fire-Threat Map as well as Tier 1 High Hazard Zones (HHZ) on the U.S. Forest Service-CAL FIRE joint map of Tree Mortality HHZs. The Commission's Fire-Threat Map is available at:

<https://capuc.maps.arcgis.com/apps/webappviewer/index.html?id=5bdb921d747a46929d9f00dbdb6d0fa2>

The Commission adopted this map in 2018, classified Tier 2 areas as having an elevated wildfire risk and Tier 3 areas as having an extreme wildfire risk. The High-Fire Threat District (HFTD) is composed of Tier 2 and Tier 3 areas on the CPUC Fire-Threat Map as well as Tier 1 High Hazard Zones (HHZ) on the U.S. Forest Service-CAL FIRE joint map of Tree Mortality HHZs.

³⁰⁵ November Proposal, Attachment B, at 32.

proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

15.1. Positions of Parties on Affordability Criterion

Community Legal Services supports the proposal to allow up to 40 points for the affordability criterion,³⁰⁶ as does Cal Advocates,³⁰⁷

The California Broadband & Video Association requests the Commission decrease the points available for the Affordability criterion from 40 points to no more than 15 points and then increase the Minimal BEAD Outlay criterion by the corresponding number of points, asserting that this approach gives due credit to realistic affordability commitments without encouraging the selection of projects that will not remain financially viable over time. The California Broadband & Video Association argues that the Minimal BEAD Outlay criterion is the most important of the scoring criteria.³⁰⁸ AT&T recommends redistributing at least ten points from the affordability criterion to the minimal BEAD program outlay scoring criteria, to strike more balance among the three primary scoring Criteria.³⁰⁹ TURN and CforAT explicitly disagree with the California Broadband and Video Association's proposal to incentivize matching funds in the scoring rubric over affordability.³¹⁰

The California Broadband and Video Association asks the Commission to award full points under this criterion to applicants that commit to offer symmetrical 1 Gbps service (for priority projects) or 100 Mbps downstream and

³⁰⁶ Community Legal Services, Opening Comments, at 15.

³⁰⁷ Cal Advocates, Opening Comments, at 15.

³⁰⁸ California Broadband & Video Association, Opening Comments, at 27.

³⁰⁹ AT&T, Opening Comments, at 15.

³¹⁰ TURN and CforAT, Reply Comments, at 13-14.

20 Mbps upstream service (for non-priority projects) to BEAD-funded locations at a cost that does not exceed the cost for the same service in unsubsidized areas of the state.³¹¹ Alternatively, the California Broadband and Video Association contends applicants should be permitted to commit to provide service based on rates that are no higher than the reasonable comparability benchmark rates based on the fixed broadband URS conducted annually by the FCC pursuant to 47 C.F.R. § 54.313(a)(3) for each tier of service offered, including the symmetrical gigabit-level service specified in the NOFO.³¹²

The California Broadband and Video Association also criticizes this criterion, stating that “[a]ffordability conditions...would improperly regulate broadband rates in a manner that is incompatible with the IIJA’s express prohibition on use of the BEAD Program to regulate broadband rates.”³¹³ CTIA contends that the proposal for offering affordability points based on a providing a particular rate would be in essence a rate cap at target prices, and is in disfavor of it. CTIA opines that the “NTIA is barred from regulating rates, and it cannot impose conditions on or provide incentives to Eligible Entities to accomplish that goal indirectly” CTIA also claims that broadband is an interstate information service and may not be subject to common carrier regulations. CTIA strongly encourages the use of a market-based approach instead. For example, using the FCC’s reasonable comparability benchmark, or the average of BEAD applicants’ proposed pricing as a benchmark.³¹⁴ AT&T makes the same legal arguments as

³¹¹ California Broadband & Video Association, Opening Comments, at 24-26.

³¹² *Id.*, at 26.

³¹³ *Id.*, at 16.

³¹⁴ CTIA, Opening Comments, at 5.

CTIA and the California Broadband & Video Association and suggests awarding points scaled to the FCC urban rate benchmark.³¹⁵

Cal Advocates, #OaklandUndivided and the Greenlining Institute disagree with the legal analysis offered by the California Broadband and Video Association, CTIA, and AT&T, asserting that the analysis provided by those parties is not accurate, as the Ninth Circuit United States Court of Appeals³¹⁶ expressly held that such requirements do not amount to rate regulation because service providers may leave and set their own rates if they do not wish to comply with subsidy requirements. Thus, the parties argue, the proposed affordability criterion does not constitute rate regulation, because providers are free to opt out of accepting public funds to construct new networks or to improve their existing, substandard networks.³¹⁷

#OaklandUndivided and the Greenlining Institute also note that federal Universal Service Fund providers are held to grant conditions which ensure consumers residing within USF subsidized locations are able to access affordable and high quality service through price and service conditions on retail broadband carriage, such as the FCC's "reasonable comparability" benchmark or the FCC's Emergency Broadband Benefit December 1, 2020 pricing restriction on providers.³¹⁸ Cal Advocates, #OaklandUndivided and the Greenlining Institute also contend that the argument that this criterion will disincentivize provider participation in BEAD, arguing that the industry parties fail to provide

³¹⁵ AT&T, Opening Comments, at 12-13.

³¹⁶ *Nat'l LifeLine Ass'n v. Batjer*, 2023 U.S. App. LEXIS 2432 at 9 (9th Cir. Jan. 31, 2023).

³¹⁷ Cal Advocates, Reply Comments, at 2-3. #OaklandUndivided and the Greenlining Institute, Reply Comments, at 4-5.

³¹⁸ #OaklandUndivided and the Greenlining Institute, Reply Comments, at 5.

supporting quantitative evidence for this assertion and that the NTIA and BEAD as a whole aim to incentivize provider participation by paying for significant portions of capital expenses with public funds.³¹⁹

15.2. Positions of Parties on Fair Labor Practices Criterion

Community Legal Services supports the proposal to allow up to 20 points for the labor standards criterion.³²⁰

Joint Labor Respondents support the allocation of up to 20 points for labor practices,³²¹ favor increasing the point allocation to 25 points and oppose decreasing it.³²² Joint Labor Respondents support the emphasis on scoring forward-looking measures, asserting that allocating points towards forward-looking plans for compliance, as opposed to backwards-looking records of compliance, will better promote an effective program. Joint Labor Respondents recommend the Commission consider clarifying that the forward-looking labor measures receive greater weight in the first ten-point allocation.³²³ Joint Labor Respondents recommend that past compliance account for 20 percent of the points allocated for Fair Labor Practices and plans for ensuring compliance be allocated 80 percent of the total points allocated for Fair Labor Practices.³²⁴

Joint Labor Respondents support the inclusion of direct employment, in-house training, wages and benefits, and locally based workforce in the BEAD

³¹⁹ Cal Advocates, Reply Comments, at 4. #OaklandUndivided and the Greenlining Institute, Reply Comments, at 6.

³²⁰ Community Legal Services, Opening Comments at 15.

³²¹ Joint Labor Respondents, Opening Comments, at 31.

³²² *Id.*, at 11-12.

³²³ *Id.*

³²⁴ *Id.*

application scoring rubric. Joint Labor Respondents urge the Commission to ensure the prioritization of these factors, for example, by clarifying a point value allocated to each factor or to forward-looking labor compliance factors more broadly. Joint Labor Respondents include several examples:

- An application that proposes more robust standards to ensure and promote ongoing labor compliance will receive greater credit;
- An application that describes a more comprehensive in-house training program, for example, a program tied to certifications, titles, and uniform wage scales and/or participation in a labor-management apprenticeship program, will receive greater credit;
- An application that commits that a greater proportion of the broadband deployment workforce (a core set of job titles central to the success of the project) will be directly employed by the entity that will own the network will receive greater credit;
- An application that describes paying higher wages and more robust benefits to workers will receive greater credit. If Applicant uses a contracted workforce, having a plan to monitor compliance and job quality;
- An application that commits to a high percentage of the workforce that will reside in California and/or includes policies or practices that promote career pathways for local residents and hiring for marginalized communities or the local community, will receive a higher score; and
- An application that describes more robust high road practices for the workforce that will perform ongoing customer service, installation, and maintenance work, for example, good jobs, a locally based workforce, and/or a directly hired workforce, will receive greater credit.³²⁵

³²⁵ *Id.*, at 7-8.

Joint Labor Respondents ask the Commission to clarify how the workforce category will be defined, and include within this category commitments to direct employment, by the entity that will own the network, of a core set of job titles central to the success of the project; robust in-house training with established requirements that are tied to uniform and progressive wage scales, job titles, and certifications or skill codes recognized by the industry; and a locally based workforce.³²⁶

Cal Advocates supports the recommendations of Joint Labor Respondents.³²⁷

The California Broadband and Video Association contends that scoring for this criterion should be based only on the applicant's demonstrated record of and plans to comply with federal labor and employment laws and refrain from awarding additional points for commitments that the BEAD NOFO treats as optional.³²⁸

15.3. Positions of Parties on Minimum BEAD Outlay Criterion

Community Legal Services supports the proposal to allow up to 15 points for minimal BEAD outlay.³²⁹ The California Broadband and Video Association recommends the Commission allocate significantly more points, such as 40 to 50 percent of the total points available, to the minimal BEAD outlay criterion and utilize a scaled approach that awards no points for meeting the 25 percent minimum match requirement and more points to applicants proposing greater

³²⁶ *Id.*, at 9-10.

³²⁷ Cal Advocates, Reply Comments, at 13.

³²⁸ California Broadband and Video Association, Opening Comments, at 32.

³²⁹ Community Legal Services, Opening Comments, at 15.

matches.³³⁰ WISPA supports awarding 40 points for the Minimal BEAD Outlay criterion.³³¹ As noted above, AT&T recommends redistributing at least 10 points from the affordability criterion to the minimal BEAD program outlay criterion scoring criteria, to strike more balance among the three primary scoring criteria.³³²

Community Legal Services proposes the number of points within this criterion be applied differently, such that the most cost-efficient per location application for each project area receives ten points, while all other applications receive a percentage of the ten points available based on their relative distance from the most cost-efficient proposal. In addition, applicants will receive three points for meeting the 25 percent match requirement, four points for a 26 percent-49 percent match, and five points for a 50 percent or greater match.³³³

AT&T recommends the Commission reconsider the match percentages that would be required to earn full, partial, or no points, asserting that some areas may be so costly to serve that even a 25 percent match may not be financially feasible.³³⁴ AT&T also supports using three minimal BEAD program outlay subcategories to avoid disadvantaging higher cost areas and to prioritize applications with larger scale by establishing a relative cost outlay subcategory to help ensure that higher-cost areas are not disadvantaged, arguing that awarding the most points solely based on the highest match percentage will result in directing BEAD funds only to areas in California that are relatively easy, or less

³³⁰ California Broadband and Video Association, Opening Comments, at 8.

³³¹ WISPA, Opening Comments, at 7.

³³² AT&T, Opening Comments, at 15.

³³³ Community Legal Services, Opening Comments, at 17.

³³⁴ AT&T, Opening Comments, at 15.

costly, to serve and disadvantages high-cost areas.³³⁵ In order to meet this objective, AT&T proposes the Commission award a portion of the minimal BEAD program outlay points based on the percentage of totally unserved locations in the proposed project.³³⁶ Alternatively, AT&T recommends the Commission calculate a “Cost per Eligible Location” for each project (calculated by dividing amount of BEAD funding the application requests by the number of eligible locations the project would serve) and rank each application from the highest cost per eligible location to the lowest cost per eligible location, awarding decreasing amounts of points for the lowest to highest cost per eligible location. Under AT&T’s proposal, the remaining points could be awarded based on the percentage of “high cost” eligible locations a project includes, with the Commission awarding more points to projects that have a higher percentage of high-cost locations. To use this approach, AT&T notes that the Commission would need to identify the higher cost eligible locations before the BEAD competitive funding process begins.³³⁷

AT&T also recommends the Commission establish another minimal BEAD program outlay subcategory that would award some portion of the category’s points based on the number of eligible locations the project would serve, awarding more points to projects covering more locations, asserting doing so would recognize that larger scale projects have cost efficiencies compared to smaller scale projects.³³⁸

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*, at 16-17.

³³⁸ *Id.*, at 17.

15.4. Positions of Parties on Speed to Deployment Criterion

The California Broadband and Video Association suggests that the Commission award at least as many points for this criterion as it does to any other optional criteria (i.e., 10 points), claiming that because this criterion is one of the few factors expressly mandated in the IJA, it is all the more imperative that the Commission afford it greater weight. To maintain a total of 100 points available in the scoring process, corresponding deductions could be made in the points available for equity and resiliency, which are not required selection criteria.³³⁹

AT&T does not support this criterion, arguing that all subgrantees have four years from the date they receive their subgrant from a state to complete deployment and that the quality of the deployment and the qualifications of applicants are more important than how quickly a project is deployed. AT&T further opines that deployment depends on many elements outside of the applicant's control, including environmental reviews, permitting, labor supply, weather, and supply chain issues, and large projects covering more locations are inherently disadvantaged by speed to deployment metrics.³⁴⁰ Alternatively, AT&T proposes weighting points in this criterion to take the size of the project into account.³⁴¹

³³⁹ California Broadband and Video Association, Opening Comments, at 33.

³⁴⁰ AT&T, Opening Comments, at 18.

³⁴¹ *Id.*

15.5. Positions of Parties on Speed of Network and Other Technical Capabilities Criterion

Community Legal Services proposes that the scoring for the Speed of Network and Other Technical Capabilities criterion for non-fiber applications be as follows:

- 3 points for speeds of at least 1000 Mbps downstream and 250 Mbps upstream, with a maximum latency of 100 milliseconds.
- 2 points for speeds of at least 400 Mbps downstream and 100 Mbps upstream, with a maximum latency of 100 milliseconds.
- 1 point for speeds of at least 200 Mbps downstream and 50 Mbps upstream, with a maximum latency of 100 milliseconds.
- .5 point for speeds of at least 100 Mbps downstream and 20 Mbps upstream, with a maximum latency of 100 milliseconds
- Non-fiber applicants will also be awarded one additional point if they certify a useful network life of at least ten years.³⁴²

Tarana Wireless recommends that the applicants submitting applications under the Other Last-Mile Broadband Deployment Project category be awarded up to four points for offering a plan capable of surpassing the 100 downstream and 20 Mbps upstream performance floor.³⁴³

WISPA encourages the Commission to reconsider the goal of symmetrical 1 Gbps service, claiming that while state broadband offices should plan for tomorrow's needs to the greatest extent possible, a focus on the delivery of symmetrical speeds is not reflective of consumer experience or anticipated

³⁴² Community Legal Services, Opening Comments, at 18-19.

³⁴³ Tarana Wireless, Opening Comments, at 6.

demand.³⁴⁴ WISPA asks the Commission to better define the criteria it will use to score this criterion, asserting further detail will help clarify the Commissions' expectations and help providers prepare their BEAD applications appropriately.³⁴⁵

15.6. Positions of Parties on Equity Criterion

The Greenlining Institute and #Oakland Undivided support maintaining the proposed scale for equity points, stating that "it is a high priority for our organizations to have the Commission include a sliding scale within the scoring matrix rather than merely opting for a binary allocation of additional points when scoring applicant projects."³⁴⁶ Community Legal Services recommends reducing the equity criterion from ten points to eight points.³⁴⁷

To the extent the Commission is intent on separately allocating points for the equity criterion, the California Broadband and Video Association urges the Commission to use it to prioritize applications that propose to serve a greater percentage of unserved and underserved locations, relative to the total number of locations proposed to be served in a project, asserting that the starkest contrast in the digital divide is between those who have access to high-speed broadband and those who do not.³⁴⁸ At minimum, the California Broadband and Video Association recommends splitting the available points in to evaluate both (1) the percentage of unserved and underserved locations relative to the total number of locations proposed to be served in a project, as described above; and (2) the

³⁴⁴ WISPA, Opening Comments, at 7.

³⁴⁵ *Id.*

³⁴⁶ The Greenlining Institute and #Oakland Undivided, Opening Comments at 7.

³⁴⁷ Community Legal Services, Opening Comments at 20-21.

³⁴⁸ California Broadband and Video Association, Opening Comments, at 34.

number of locations in a disadvantaged or low-income community proposed to be served as suggested in the Staff Proposal.³⁴⁹

WISPA asks the Commission to better define the criteria it will use to score this criterion, asserting further detail will help clarify the Commissions' expectations and help providers prepare their BEAD applications appropriately.³⁵⁰

SANDAG recommends the Commission reassess the proposed scoring rubric to prioritize projects for "covered populations, "as defined by the California Department of Technology (CDT)."³⁵¹ Additionally, SANDAG recommends the Commission broaden the scope of the equity definition and incorporate data sets that include a cross-section of priority communities including those in low-income census tracks, areas with high enrollment in public assistance programs, and communities where households pay more than 2 percent of their income for internet. This approach will better identify communities that need additional assistance in bridging the digital divide.³⁵² SANDAG asserts the BEAD Program is an opportunity for the Commission to subsidize digital infrastructure that will serve these unserved and underserved low-income, disadvantaged, and hardest to reach communities that otherwise would not make economic sense for ISPs to provide, further opining that while the Commission must comply with the NTIA's rules, the proposed point

³⁴⁹ *Id.*, at 35.

³⁵⁰ WISPA, Opening Comments, at 7.

³⁵¹ SANDAG, Reply Comments, at 3.

³⁵² *Id.*, at 5.

allocation may be insufficient incentive for ISPs to invest in areas of utmost need.³⁵³

15.7. Positions of Parties on Resilience Criterion

Community Legal Services recommends reducing the resilience criterion from ten points each to eight points.³⁵⁴ The California Broadband and Video Association asks the Commission to clarify whether it will, in fact, consider factors other than project locations in a Tier 2 or 3 High Fire Threat District in its subgrantee selection and, if so, how such factors would be evaluated and incorporated into the proposed scoring rubric.³⁵⁵ WISPA asks the Commission to better define the criteria it will use to score this criterion, asserting further detail will help clarify the Commissions' expectations and help providers prepare their BEAD applications appropriately.³⁵⁶

15.8. Other Criteria Proposed by Parties

Community Legal Services recommends adding a criterion for open access and awarding up to four points for applicants that allow for open access to their network.³⁵⁷ Cal Advocates supports awarding five points.³⁵⁸ Greenlining Institute and #Oakland Undivided also support adding an open access criterion.³⁵⁹ TURN and CforAT assert the Commission should implement open access as a grant condition or requirement, claiming the NTIA's NOFO requires the Commission to incorporate an express open access requirement into the adopted Initial

³⁵³ *Id.*, at 2-3.

³⁵⁴ Community Legal Services, Opening Comments at 20-21.

³⁵⁵ California Broadband and Video Association, Opening Comments, at 35-36.

³⁵⁶ WISPA, Opening Comments, at 7.

³⁵⁷ Community Legal Services, Opening Comments, at 20-21.

³⁵⁸ Cal Advocates, Opening Comments, at 15-17.

³⁵⁹ The Greenlining Institute and #Oakland Undivided, Opening Comments, at 5.

Proposal. TURN and CforAT opine that the “The NTIA’s NOFO’s conduit access points, interconnection, and wholesale access requirements effectively require open access for BEAD program-funded middle-mile networks. In addition, the NTIA’s NOFO confers discretion to the state to further encourage open access networks, though the November Proposal does not directly advance that support as an express grant condition or confer priority through additional points in the selection process.³⁶⁰ TURN and CforAT recommend that an open access grant condition for both middle and wholesale last-mile networks, as opposed to a priority, would best serve the state’s broadband goals. In particular, the Commission should adopt an open access requirement.³⁶¹

Cal Advocates also recommends awarding points for reliability if the project proponent commits to ensuring its broadband network is supported by at least 72 hours of backup power, asserting the proposed resiliency criterion “does not ensure that the projects themselves will be resilient.”³⁶²

SANDAG recommends that Commission include points for projects utilizing state facilities, to incentivize participation from additional actors and reduce costs, contributing to a more comprehensive broadband expansion.³⁶³

iFoster urges the Commission to “recognize foster youth as a covered population for digital adoption and digital equity programs, and to encourage future BEAD subgrantees -- such as community-based organizations, non-profit organizations, social welfare agencies, and local governments -- to propose BEAD programs that reach out to foster youth as recipients of affordable

³⁶⁰ TURN and CforAT, Reply Comments, at 9-10.

³⁶¹ *Id.*, at 10-11.

³⁶² Cal Advocates, Opening Comments, at 17.

³⁶³ SANDAG, Reply Comments, at 5.

computing devices, affordable Internet service, and digital literacy training on a statewide basis, independent of the Lifeline program.”³⁶⁴

15.9. Discussion

In response to comments, the November Proposal was revised prior to the Commission submitting the Initial Plan to the NTIA.

The affordability criterion was revised such that the total number of points an applicant could receive was 35 points, instead of 40. For fiber projects, applications will be scored based on applicants’ commitments to offer a symmetrical 1 Gbps service to BEAD-funded locations at \$55 per month (instead of \$50 per month), inclusive of all taxes and fees. Full points will be awarded to applications that make this commitment in clear and unambiguous terms, without caveats that compromise the commitment. For every additional \$1 per month that the applicant proposes to price its symmetrical 1 Gbps service, 1 point will be deducted from the 35-point maximum. For other last-mile broadband deployment projects, applications will be scored based on applicants’ commitments to offer 100 Mbps download and 20 Mbps upload to BEAD-funded locations at \$35 per month (instead of \$30 per month), inclusive of all fees. Full points will be awarded to applications that make this commitment in clear and unambiguous terms, without caveats that compromise the commitment. For every additional \$1 per month that the applicant proposes to price its 100 Mbps download and 20 Mbps upload service, 1 point will be deducted from the 35-point maximum.

Under the proposed labor scoring criterion, applicants would still be eligible for up to 20 points, though the manner in which the scoring will be

³⁶⁴ iFoster, Opening Comments, at 6.

applied was revised. Up to 20 points will be awarded, with 10 points based on 1) a demonstrated history of compliance with federal and state labor laws; 2) demonstrated commitments to future compliance with federal and state labor laws; and 3) the quality and contents of labor practice-related items submitted during the Application Phase. Two points will be awarded on the basis of the applicant's history of compliance, while eight points will be awarded on the basis of future compliance and quality and contents of labor practice-related items. In scoring past and future compliance with state labor laws, the Commission will consider payment of the prevailing wage a required component of compliance for applicants, aligned with the requirements of California Labor Code Section 1720. However, the Commission will not apply this requirement to projects located on Tribal Lands, for which compliance will be based on compliance with applicable Tribal and federal law. In scoring the quality and contents of labor practice-related items, the Commission will consider the following optional practices and award points on the basis of robust and binding commitments:

- Using a directly employed workforce, as opposed to a subcontracted workforce;
- Using project labor agreements (i.e., pre-hire collective bargaining agreements between unions and contractors that govern terms and conditions of employment for all workers on a construction project);
- Use of local hire provisions;
- Commitments to union neutrality;
- Use of labor peace agreements;
- Use of an appropriately skilled workforce (e.g., through Registered Apprenticeships or other joint labor-management training programs that serve all workers,

particularly those underrepresented or historically excluded);

- Use of an appropriately credentialed workforce (i.e., satisfying requirements for appropriate and relevant pre-existing occupational training, certification, and licensure); and
- Taking steps to prevent the misclassification of workers.

Additionally, up to ten points will be awarded to all projects on the basis of workforce capacity building and development commitments, especially those prioritizing equitable workforce development.

New entrants without a lengthy record of labor and employment law compliance will receive points in this category based on specific, concrete commitments to strong labor and employment standards and protections and equitable workforce development commitments going forward.

The maximum number of points awarded for the Minimum BEAD Outlay criterion increased from 15 points to 20 points. Additionally, the manner in which this criterion is scored was revised. Applicants will receive 20 points for offering matching funds equal to 65 percent or more of the requested BEAD funding. Applicants will be deducted 1 point for every 2 fewer percentage points of matching funds offered, meaning applicants would receive 15 points for a 55 percent match, 10 points for a 45 percent match, or 5 points for a 35 percent match. Scoring for these points will include matching funds originating from other state programs to deploy broadband, including the CASF, FFA, and Loan Loss Program.³⁶⁵

³⁶⁵ Through its outreach, the Commission has found that some communities, particularly on Tribal lands, lack access to reliable electrical infrastructure, which is a barrier to servicing unserved and underserved locations and meeting the 100% coverage goal outlined in the BEAD NOFO. For this reason, the Commission will explore with NTIA whether costs related to

Footnote continued on next page.

The Equity Criterion was clarified such that applicants may receive up to 10 points for the number of locations they propose to serve that are located in a Disadvantaged Community or Low-Income Area.³⁶⁶ One point will be awarded for proposing a project area consisting of at least 10% BSLs located within a Disadvantaged Community or Low-Income Area. An additional point will be awarded for each additional 10 percentage points (rounded down) of the BSLs in a proposed project that are located in a Disadvantaged Community or Low-Income Area, for a total of 10 points possible. For the purposes of scoring this section, a Disadvantaged Community includes the following:

- Census tracts receiving the highest 25 percent of overall scores in
- CalEnviroScreen 4.0;
- Census tracts lacking overall scores in CalEnviroScreen 4.0 due to data gaps but receiving the highest 5 percent of CalEnviroScreen 4.0 cumulative pollution burden scores;
- Census tracts identified in the 2017 DAC designation as disadvantaged, regardless of their scores in CalEnviroScreen 4.0; and
- Lands under the control of federally recognized Tribes.

The Resilience Criterion was revised with a specific emphasis on encouraging back-up power. The Commission has already acted to mandate wireless and wireline providers ensure 72-hour backup power is available for facilities located in Tier 2 or Tier 3 High Fire Threat Districts. To encourage applications that seek to enhance resilience of the communications networks

securing reliable electric infrastructure in specific locations to enable broadband deployment to those locations could qualify as an in-kind match to help achieve the 100% coverage goal set forth in the NOFO.

³⁶⁶ For the purposes of scoring this section, a low-income community is a census tract where aggregated household incomes are less than 80 percent of area or state median income.

serving Californians, the Commission will include an additional prioritization factor for both Priority Broadband Projects and Other Last-Mile Broadband Deployment Projects for Resilience, for which applicants will receive up to 10 points based on the number of locations to be served by resilient infrastructure. For locations outside Tier 2 or Tier 3 High-Fire Threat Districts, the location will be considered to be served by resilient infrastructure if the applicant proposes to ensure that 72-hour backup power will be supplied to all facilities necessary to maintain its service to that location. For locations within Tier 2 or Tier 3 High-Fire Threat Districts, for which 72-hour backup power is already required, the location will be considered to be served by resilient infrastructure if the applicant includes reasonable plans to deploy infrastructure serving that location utilizing appropriate risk mitigation and infrastructure hardening practices, such as by undergrounding cables and network facilities, utilizing galvanized steel instead of wooden poles, using fire-resistant coatings on infrastructure such as poles or other equipment, or ensuring more than 72 hours of backup power is available to maintain service to a location. One point will be awarded for proposing a Project Area consisting of at least ten percent of locations meeting the above criteria, with an additional one point awarded for every additional ten percentage points (rounded down) meeting the above criteria.

The Technical Capability Criterion was clarified to indicate that, for projects proposing to deploy multiple technologies to serve end-users, scoring for this category will be based on the speed of the technology used to serve the highest number of locations in the Project Area.

In response to curing requests from the NTIA, the Initial Proposal was revised. The manner in which points for the Fair Labor Practices Criterion was revised to be consistent with NTIA's NOFO, such that eight points (from two

points) will be awarded on the basis of the applicant's history and commitment to future of compliance and twelve points (from eight points) will be awarded on the basis of quality and contents of labor practice-related items.³⁶⁷ The Fair Labor Practices Criterion was further revised such that scoring for history of compliance was modified to allow new entrants without history a chance to earn points, with up to eight points for new entrants who do not have a history, distributed in the following manner: five points will be awarded if the applicant commits to future compliance with federal labor laws plus three additional points will be awarded if the applicant can demonstrate that principals of the organization have a documented history of compliance with federal labor practices.³⁶⁸ The Speed of Deployment Criterion to add one additional point for Priority Broadband Projects that can be completed between two and three years.³⁶⁹ The Speed of Network and Other Technical Capabilities Criterion was revised such that applications committing to deliver less than 200 Mbps download and 50 Mbps upload at 100 maximum latency in milliseconds but more than 100 download and 20 Mbps upload shall receive one point, removing language that applications committing to deliver less than 200 Mbps download and 50 Mbps upload at 100 maximum latency in milliseconds shall receive one point.³⁷⁰

The Commission adopts these revisions which are consistent with NTIA curing instructions. We believe these choices balance the many priorities of BEAD, including increasing the likelihood of unserved communities, many

³⁶⁷ NTIA Curing Request, February 28, 2024.

³⁶⁸ NTIA Curing Request, July 1, 2024.

³⁶⁹ NTIA Curing Request, May 14, 2024.

³⁷⁰ NTIA Curing Request, July 1, 2024.

disadvantaged communities, receiving affordable broadband service in the not near-term future.

We reject the claims made by the California Broadband and Video, Association, AT&T, and CTIA that incenting affordable broadband service via the scoring rubric adopted in this decision constitutes ratemaking. A more detailed discussion regarding these misstatements of fact and law is above in Section 10. Affordability is one of the primary criteria required by the NTIA and one of the Commission's top goals. Companies that oppose affordable broadband service are not required to apply for BEAD funds.

16. Open Access

The NTIA's NOFO encourages Eligible Entities to adopt selection criteria promoting subgrantees' provision of open access wholesale last-mile broadband service for the life of the subsidized networks, on fair, equal, and neutral terms to all potential retail providers. Under the November Proposal, the Commission recommended a scoring criteria that reward open access.

The November Ruling seeks input on whether the Commission should prioritize subgrantee proposals that plan to use the statewide open-access middle mile network. It also asks whether applicants proposing to build middle mile infrastructure with BEAD funds should be required to make their networks open access.

16.1. Positions of Parties

Cal Advocates, Greenlining Institute, #Oakland Undivided and Community Legal Services all support awarding points for open access

commitment. TURN and CforAT recommend instead to make open access a requirement for all BEAD projects.³⁷¹

16.2. Discussion

In response to comments, the November Proposal was revised prior to the Initial Proposal's submission to the NTIA in December 2023. The CPUC opted not to award points for open access, however, it will require that BEAD awardees commit to open access operations of any middle mile segments for which BEAD funding is requested. As part of their applications, applicants will be required to certify their willingness to operate their BEAD-funded middle mile elements on an open access basis and such commitments will be included in all grant agreements, consistent with the requirements of SB 156.

The Commission adopts the revised proposal, which is consistent with NTIA curing instructions.

17. Climate Assessment

The NTIA's NOFO requires the Commission to demonstrate that it has accounted for current and future weather- and-climate-related risks to new infrastructure projects, both current risks but also for how the frequency, severity, and nature of these extreme events may plausibly evolve as our climate continues to change over the coming decades.³⁷²

BEAD will prioritize fiber optic deployments in California but alternative technologies such as fixed wireless may make up a relatively significant portion of the BEAD deployments, as fixed wireless deployments leverage a lower initial

³⁷¹ TURN and CforAT, Opening Comments, at 4-5, 9-11. Community Legal Services, Opening Comments, at 20-21. Cal Advocates, Opening Comments, at 15-16. The Greenlining Institute and #Oakland Undivided, Opening Comments, at 5.

³⁷² NTIA NOFO at 62.

cost and can deploy faster (though they incur higher ongoing maintenance costs and per-subscriber equipment expenses).

Recognizing that Californians rely on their phones and the internet, whether wireline or wireless, to receive emergency communications, the Commission has led the nation in ensuring that networks are resilient, as the State faces unprecedented climate threats. The Commission adopted six groups of resiliency strategies for all facilities-based wireless and wireline service providers with facilities located in Tier 2 and Tier 3 high fire threat districts.¹⁷⁶

Through this work and continuing with its BEAD subgrant deployments, the Commission will focus on the following:

- Strengthen the ability and preparedness of service providers to maintain a minimum level of communication services and coverage during a disaster or commercial power grid outage events/incidents;
- Strengthen service providers' ability to recover from or adjust to adversity or change through an array of strategies;
- Ensure the existence of resilient and dependable communications networks aiding first responders;
- Ensure the existence of timely and reliable access to essential communication services for the public;
- Ensure the capability to assess and identify the weaknesses in service providers' resiliency planning and implementation so that we may develop solutions that will increase safety, the Commission will ask all subgrantee applicants to have a business continuity plan which includes their natural hazard risk mitigation to broadband deployment and ask applicants whose project area includes identified high-risk areas to provide specific responses to how they will incorporate mitigation measures into their deployment planning. Additionally, the Commission will outline the following among the

possible strategies grant participants can engage in to address natural hazard risks:

- Favoring buried fiber compared to aerial to largely eliminate the above risks in many cases;
- Retrofitting and hardening existing network assets that are deemed critical to BEAD expansion projects;
- Favoring redundancy in network designs to reduce single points of failure;
- Considering average down time and emergency response time in applicant selection; and
- Encouraging the use of backup generator power systems where applicable.³⁷³

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

17.1. Positions of Parties

RCRC supports the creation of fast-track screening for environmental compliance and the Commission's assistance for awardees to navigate the environmental and historic preservation review process.³⁷⁴

WISPA encourages the Commission to consider including climate-related concerns in its scoring model, opining that fixed wireless deployments may be part of an overall green strategy that the Commission could pursue in considering its final BEAD rules.³⁷⁵

³⁷³ November Proposal at 186-187

³⁷⁴ RCRC, Opening Comments, at 8.

³⁷⁵ WISPA, Opening Comments, at 13.

17.2. Discussion

This section of the Initial Proposal was revised to include additional information, but no substantive revisions were made to the rules the Commission will impose on BEAD applicants.

Thus, the Commission adopts this proposal without substantive modification which is consistent with NTIA curing instructions.

18. Contracting Requirements

Pursuant to 2 C.F.R. § 200.321, the NTIA's NOFO requires the Commission to take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible, including the following:

- Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
- Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;
- Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;
- Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;
- Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and
- Requiring subgrantees to take the affirmative steps listed above as it relates to its subcontractors.³⁷⁶

³⁷⁶ NTIA NOFO at 88-89.

The NTIA strongly encourages States to establish MBE and WBE utilization plans consistent with their Initial and Final Proposals.³⁷⁷

Section 10 of Volume Two of the Commission's Initial Plan includes how the Commission will promote and require recruiting, utilizing, and retaining minority business enterprises (MBE), women's business enterprises (WBE), and labor surplus area firms (LSAF), when possible, pursuant to 2 C.F.R. 200.321.³⁷⁸ This includes the November Proposal, the workforce plan scoring criteria discussed in Section 15 of this decision, the Commission encouraging subgrantees to ensure that they take steps to include qualified MWBEs and LSAFs whenever possible. The Commission also may take steps that include, but are not limited to:

- Providing subgrantees with opportunities to connect with qualified MBEs, WBEs and LSAFs;
- Demonstrating diversity in suppliers and equitable procurement practices; and

³⁷⁷ Id., at 89.

³⁷⁸ See, November Proposal, at 133. If adopted, the Commission would certify that it will:

- Place qualified small and minority businesses and women's business enterprises on solicitation lists;
- Assure that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;
- Divide total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;
- Establish delivery schedules, where the requirements permit, which encourages participation by small and minority businesses, and women's business enterprises
- Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and
- Require each subgrantee to take these affirmative steps as they relate to its subcontractors.

- Formal commitment from subgrantee confirming organizational commitment to supplier diversity and equity inclusion.

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

18.1. Positions of Parties

NDC recommends the Commission revise Section 9.4 of Initial Proposal Volume Two to incorporate the goals of General Order 156 and require BEAD applicants comply with supplier diversity requirements for all BEAD-funded projects, in order to encourage the creation of an actual diverse supplier base in the communities where these projects are approved. NDC also recommends the Commission require projects to demonstrate how the project will ensure supplier diversity quota compliant outcomes for each project, including, but not limited to, programs that will follow a first preference policy to recruit, train and qualify suppliers from the local community of the BEAD project to meet General Order 156 compliance quotas.³⁷⁹

SBUA asks the Commission to establish separate verification criteria for qualified MWBE small businesses not covered by the existing verification program through General Order 156, such as developing a self-certification program designed specifically for MWBEs with gross revenues below \$5 million.³⁸⁰ SBUA also recommends giving preference to applications from

³⁷⁹ NDC, Opening Comments, at 8.

³⁸⁰ SBUA, Opening Comments, at 2-3.

MWBEs, small businesses/microbusinesses, or LSAFs instead of using these qualifications as a mere tiebreaker.³⁸¹

SBUA urges the Commission to also host special events for small businesses and MWBEs designed with the intent to facilitate networking, education, and exchange of information between them and prospective and future subgrantees.³⁸²

18.2. Discussion

This section of the Initial Proposal was revised to include additional information, but no substantive revisions were made to the rules the Commission will impose on BEAD applicants. Thus, the Commission adopts this proposal without substantive modification, which is consistent with NTIA curing instructions.

19. Cybersecurity and Supply Chain Risk Management

The NTIA's NOFO requires the Commission to ensure that BEAD applicants have in place cybersecurity and supply chain risk management plans.

An applicant must have a cybersecurity risk management plan in place that is either: 1) operational, if the prospective subgrantee is providing service prior to the award of the grant; or 2) ready to be operationalized upon providing service, if the prospective subgrantee is not yet providing service prior to the grant award.³⁸³ The plan must reflect the latest version of the National Institute of Standards and Technology (NIST) Framework for Improving Critical Infrastructure Cybersecurity (currently Version 1.1) and the standards and controls set forth in Executive Order 14028 and specifies the security and privacy

³⁸¹ SBUA, Opening Comments, at 3.

³⁸² *Id.*, at 4-5.

³⁸³ NTIA NOFO at 70.

controls being implemented and be reevaluated and updated on a periodic basis and as events warrant.³⁸⁴ The plan must be submitted to the Commission prior to the allocation of funds. If the subgrantee makes any substantive changes to the plan, a new version will be submitted to the Commission within 30 days.³⁸⁵

An applicant must have a supply chain risk management (SCRM), prior to the Commission allocating any funds to the subgrantee.³⁸⁶ At a minimum, the subgrantee attest that it has a SCRM plan in place that is either: 1) operational, if the prospective subgrantee is already providing service at the time of the grant; or 2) ready to be operationalized, if the prospective subgrantee is not yet providing service at the time of grant award.³⁸⁷ The plan must be based upon the key practices discussed in the NIST publication NISTIR 8276, Key Practices in Cyber Supply Chain Risk Management: Observations from Industry and related SCRM guidance from NIST, including NIST 800-161, Cybersecurity Supply Chain Risk Management Practices for Systems and Organizations and specifies the supply chain risk management controls being implemented and be reevaluated and updated on a periodic basis and as events warrant. The plan will be submitted to the Eligible Entity prior to the allocation of funds. If the subgrantee makes any substantive changes to the plan, a new version will be submitted to the Eligible Entity within 30 days.³⁸⁸

To the extent a BEAD subgrantee relies in whole or in part on network facilities owned or operated by a third party (e.g., purchases wholesale carriage

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.*, at 70-71.

on such facilities), it must obtain the above attestations from its network provider with respect to both cybersecurity and supply chain risk management practices.³⁸⁹

Section 17.4 of Volume 2 of the November Proposal contains the proposed Commission approach for cybersecurity and supply chain risk management, both goals for the Commission, as well as requirements of BEAD grantees. The November Proposal included a certification by the Commission that it would ensure BEAD subgrantees meet the requirements listed above.³⁹⁰

The November Ruling asks parties to comment on whether the proposed rules comply with federal requirements, should the Commission adopt the proposed rules, should the Commission modify the proposed rules and, if yes, how would parties modify the proposal?

19.1. Positions of Parties

No parties filed comments on this issue.

19.2. Discussion

This section of the Initial Proposal was revised to include additional information, but no substantive revisions were made to the rules the Commission will impose on BEAD applicants. Thus, the Commission adopts this proposal without substantive modification, which is consistent with NTIA curing instructions.

20. Post Grant Award Monitoring and Compliance

Consistent with 2 C.F.R. Part 200 Subpart D, the NTIA's NOFO requires the Commission to include sufficient accountability procedures within its BEAD program to ensure subgrantee compliance, including reasonable provisions that

³⁸⁹ *Id.*

³⁹⁰ November Proposal, Attachment B, at 206-207.

allow for recovery of funds in the event of a subgrantee's noncompliance with BEAD Program requirements. Noncompliance includes but is not limited to failure to deploy network infrastructure in accordance with mandated deadlines.³⁹¹ The NTIA requires the Commission use the following practices: 1) distribution of funding to subgrantees for, at a minimum, all deployment projects on a reimbursable basis (which would allow the Commission to withhold funds if the subgrantee fails to take the actions the funds are meant to subsidize); 2) the inclusion of clawback provisions (i.e., provisions allowing recoupment of funds previously disbursed) in agreements between the Commission and any subgrantee; 3) timely subgrantee reporting mandates; and 4) robust subgrantee monitoring practices.³⁹² NTIA will review proposed subgrant processes during the Initial Proposal and Final Proposal review phases and will reject Proposals that fail to provide sufficient recourse against subgrantees that do not fulfill their legal and contractual responsibilities. NTIA likewise will pursue clawback of funds directly from States that fail to ensure subgrantee accountability to the fullest extent of the law.³⁹³

If the November Proposal is adopted, the Commission will issue BEAD subgrants on a reimbursement-only basis. The Commission will require the following from subgrantees before dispersing BEAD funds:

- The timely reporting of the completion of grant milestones;
- Providing compliant documentation, in which BEAD subgrantees support a request for reimbursement through a certification and a submittal of as-builts and GIS location

³⁹¹ NTIA NOFO at 51.

³⁹² *Id.*

³⁹³ *Id.*

data, which will be verified according to procedures outlined in the contracting documents; and

- Reports using a milestone process (based on percentage of completion) and invoices and other proof of expenses prior to payment.³⁹⁴

Under the November Proposal, the Commission would reserve the right to conduct a financial audit at any time within three years of project completion.³⁹⁵

The Commission also may withhold grant payments or terminate the award with ten days' notice if the awardee does not follow the project plan, including commencement of work within six months or completion of project within 24 months³⁹⁶

If the subgrantee fails to meet its obligations under the BEAD award, including those provided in the application, under the November Proposal, the Commission may can deny a reimbursement request, require partial or full forfeiture of BEAD funds, or issue financial penalties for fraud, misconduct, or non-performance. For these purposes, the Commission considers performance to include effective, timely broadband deployment, continuing to offer low-cost service options for the useful life of the assets, meeting reporting deadlines, providing accurate deployment data, and fulfilling all additional BEAD requirements such as broadband speeds.³⁹⁷

³⁹⁴ November Proposal, Attachment B, at 204.

³⁹⁵ Project completion is the date the Commission has accepted all final reports from the applicant.

³⁹⁶ November Proposal, Attachment B, at 204-205.

³⁹⁷ *Id.*

Under the November Proposal, applicants report on their awards on a timely basis to identify and mitigate risks, as well as applicants' compliance with statutory and BEAD requirements. These reports include:

- Regular check-ins with the Commission to discuss the project progress;
- Periodic reporting on project progress and fiscal performance;
- Responses to intermittent requests from the Commission about the project; and
- On-site inspections.³⁹⁸

The monitoring activities listed in the November Proposal include:

- Desk reviews, which are periodic review of subgrantees' progress and financial reports designed to ensure that Commission's own reports to NTIA contain timely information;
- Field engineering reviews or audits, which are engineering teams evaluate constructed segments and full projects against as-built reporting and application requirements; and
- Site visits, which are periodic visits using a standardized agenda to capture first-hand observations of recipient performance along various dimensions, including subgrantee capacity, performance validation, safety practices, and employment practices.³⁹⁹

20.1. Positions of Parties

Joint Labor Respondents support the Commission's plans to conduct desk review, field engineering reviews, and site visits. Joint Labor Respondents recommend that the Commission conduct periodic and random site visits, which

³⁹⁸ *Id.*

³⁹⁹ *Id.*, Attachment B, at 205-206.

should include inspections of pole attachments and handholds. Joint Labor Respondents further recommend subgrantees submit “as-built” technical documentation, certified by a licensed Professional Engineer, that verifies project completion and demonstrates that the deployed infrastructure, service area, and equipment match those in the approved final application and are capable of delivering the minimum proposed speeds consistently to all potential customers in the project area. Recipients should be required to identify any differences between the network design in the approved final application and the “as-built,” and explain the reasons for the differences and any impacts or changes to the final application resulting from these differences. Joint Labor Respondents assert that BEAD subgrantees should also be required to validate the performance characteristics of any deployed infrastructure and equipment that differs from the specifications in the approved final application.⁴⁰⁰

The California Broadband and Video Association asks the Commission to adopt the timing for the proposed desk reviews, field engineering reviews/audits, and site visits, and to reporting requirements, recommending that reports be submitted on a semiannual basis for the duration of the grant and that the Commission provide “reasonable” advance notice of any on-site inspections and specify the documentation or other materials that should be prepared.⁴⁰¹ The California Broadband and Video Association also ask the Commission to establish a BEAD reimbursement period that spans no more than six months.

⁴⁰⁰ Joint Labor Respondents, Opening Comments, at 15.

⁴⁰¹ California Broadband and Video Association, Opening Comments, at 44.

20.2. Discussion

The NTIA requires that subgrantees submit progress reports on at least a semi-annual basis. The Commission clarifies that it adopts the same requirement.

While we do not dispute the reasonableness of the California Broadband and Video Association's request that the BEAD reimbursement process take no more than six months, we note that the review of BEAD invoices will not solely be conducted by Commission Staff, but also by other entities, including the State Controller's Office. Since the review of the State Controller's Office is outside the control of the Commission, we cannot commit to any review time.

The Commission delegates to Staff the authority to finalize BEAD grantee reimbursement rules, and include in written guidance given to applicants, provided the guidance:

- Complies with 2 C.F.R. Part 200 Subpart D, as amended with NTIA's Waiver;
- Complies with the NTIA's direction on ensuring subgrantee accountability, as detailed in the NTIA's NOFO at page 51;
- Complies with the NTIA's direction regarding eligible uses of funding in connection with last-mile broadband deployment projects, as detailed in the NTIA's NOFO at page 39;
- Complies with all Reporting Requirements, including those detailed in page 90-92 of the NTIA's NOFO and BABA compliance;⁴⁰²
- Complies with relevant sections of the General Terms and Conditions for NTIA BEAD Program Funds (e.g, para. 51 at page 21);

⁴⁰² See, the BABA Section of NTIA's BEAD Technical Assistance webpage at [BABA Compliance and Self Certification | BroadbandUSA \(doc.gov\)](#).

- Complies with the State Administrative Manual, including Section 8422.1, which requires invoices; and
- Is similar to the reimbursement processes for the CASF Instructure Grant Account and the FFA.

21. Non-Deployment Projects

The NTIA's NOFO allows the Commission to consider awarding BEAD grants for non-deployment activities.⁴⁰³ Under the November Proposal, if BEAD funds remained after considering broadband deployment applications, the Commission would consider grants for the following activities:

- User training with respect to cybersecurity, privacy, and other digital safety matters;
- Remote learning or telehealth services/facilities;
- Digital literacy/upskilling (from beginner level to advanced);
- Computer science, coding, and cybersecurity education programs;
- Implementation of California digital equity plans (to supplement, but not to duplicate or supplant, planning grant funds received by the Eligible Entity in connection with the Digital Equity Act of 2021);
- Broadband sign-up assistance and programs that provide technology support;
- Multi-lingual outreach to support adoption and digital literacy;
- Prisoner education to promote pre-release digital literacy, job skills, online job acquisition skills, etc.;
- Digital navigators;
- Direct subsidies for use toward broadband subscription, where California can show the subsidies will improve

⁴⁰³ NTIA NOFO, Section 7(a)(iii), <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf>, at. 39.

- affordability for the end user population (and to supplement, but not to duplicate or supplant, the subsidies provided by the ACP);
- Costs associated with stakeholder engagement, including travel, capacity-building, or contract support; and
- Other allowable costs necessary to carrying out programmatic activities of an award, not to include ineligible costs described in Section V.H.2 of the NOFO.⁴⁰⁴

Due to limited funds and tight federal timelines for reviewing BEAD deployment applications, the November Proposal did not propose rules for non-deployment activities.

21.1. Positions of Parties

iFoster argues that not including rules for non-deployment projects does not comply with federal requirements. iFoster proposes that least 20 percent of the funding should be provided for broadband adoption and digital equity programs, administered by the Commission, and that the Commission should assess how to expand existing programs and add new programs with BEAD funding to address pressing broadband adoption and digital equity issues raised by the local and Tribal communities from the State's Digital Equity Plan statewide planning meetings.⁴⁰⁵ iFoster also urges the Commission to "recognize foster youth as a covered population for digital adoption and digital equity programs, and to encourage future BEAD subgrantees -- such as community-based organizations, non-profit organizations, social welfare agencies, and local governments -- to propose BEAD programs that reach out to foster youth as recipients of affordable computing devices, affordable Internet service, and

⁴⁰⁴ November Proposal at 57-58.

⁴⁰⁵ iFoster, Opening Comments, at 3-4.

digital literacy training on a statewide basis, independent of the Lifeline program.”⁴⁰⁶

21.2. Discussion

At this time, consistent with NTIA curing instructions, the Commission does not adopt rules for non-deployment projects. If the Commission determines that it may have funds remaining, it will begin planning and preparing a non-deployment activity plan to submit as part of its Final Proposal.

22. Additional Proposed Rules from Parties

The California Broadband and Video Association proposes several revisions or clarifications to the Commission’s Rights of Way rules or General Order aimed at what it claims will make the pole attachment process more efficient.⁴⁰⁷ These proposals are well outside the scope of this proceeding and are not adopted.

23. Adoption of Initial Proposal Volume Two

Initial Proposal Volume Two contains significant information, plans, and other text that are required by the NTIA but not rules the Commission will be imposing on BEAD grantees. The Commission adopts Initial Proposal Volume Two in its entirety.

24. Application Deadlines

Once NTIA approves the final eligibility map, Commission staff will announce application window within 60 days. Prior to submittal of applications, interested participants may submit evidence demonstrating compliance with the criteria outlined in Section 14.10, beginning on page 118. Applicants will be provided an opportunity to cure their applications.

⁴⁰⁶ *Id.*, at 6.

⁴⁰⁷ California Broadband and Video Association, Opening Comments, at 46-47

25. Summary of Public Comment on Docket Card

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.

As of writing, the Commission received a total of 614 comments, not including the public comments discussed in D.24-05-029. Roughly 30 percent of commenters discussed their experiences with their current internet service providers, as well as emphasizing the limited options for internet service available to them. Eighty-six comments discussed low connectivity issues within their area, with the top three comprising Caliente, Carmel, and Big Sur. Others also commented on the lack of affordable broadband prices, especially to those in the low-income bracket. Comments received by the Commission include those listed below.

- “...I'm supportive of the aims for the program toward Digital Equity (DE) for underserved areas. Many of the other public comments show that rural areas suffer incredibly and that lack of options in the market are a burden for everyone in the state. In our modern era, especially following the changes brought by the COVID-19 pandemic, access to reliable and quality internet services are essential for a wide range of daily activities. Whether it's school, business, travel, or just staying connected to friends and family. Digital Equity is also tied to health equity, because of its role in things like telehealth services, mental health and human interaction, and access to health information and resources. In addition, these gaps in internet access impact communities that already face obstacles to other services, or they are implemented in...[a].. way that doesn't fit the population being served.

There are three things that I would need to be fully on-board with bringing the plan to California: 1) A well-defined state implementation plan and oversight committee that fully represents the diverse population of affected people 2) Better communication to state residents, city/local/tribal communication about availability of the program 3) Transparent and frequent reporting to residents and tax payers on the successes, challenges, etc. of the program following requirements provided by the NTIA..."⁴⁰⁸

- Those who live in rural, agricultural, and mountain communities have suffered long enough with lack of availability of reasonable internet. The prices are high, the service and the customer service are very poor, and the technology/product is not easy for the layman to navigate and make effective decisions. This is one piece of the problem. Another other piece is the high price of access, where more affordable options should be available to those in need. And finally, the pricing and options combined with the technology are kept complex enough that the average person probably pays too much for too little service. I see this constantly, especially for those in the 50 and older generations. They receive poor service because there is no incentive for the ISP to provide improved connections for the customer. I personally was paying for a high speed line but was not receiving that speed simply because the ISP failed to offer me or inform me of the need for upgraded equipment. They were happy to charge me top dollar for receiving low dollar internet speeds. In conclusion the BEAD must address issues of 1. availability 2. pricing 3. access/service levels."⁴⁰⁹
- I am writing to express my strong support for the Broadband Equity, Access, and Deployment (BEAD) Program and its mission to expand access to high-speed

⁴⁰⁸ Justin Hanenberg, Sherman Oaks, CA, submitted on October 24, 2023.

⁴⁰⁹ Jarrod Coombes, Discovery Bay, CA, submitted on October 27, 2023.

internet services across the United States. As the digital age continues to advance, reliable and fast internet access has become essential for education, healthcare, employment, and more. Therefore, it is crucial that we take steps to ensure that all Americans, regardless of their geographic location or socioeconomic status, have access to these vital services. One of the most important aspects of the BEAD Program is its commitment to digital inclusion for historically disadvantaged communities. The digital divide has disproportionately affected communities of color, low-income households, and rural areas, exacerbating existing inequalities. By prioritizing these communities, the BEAD Program will help to level the playing field and ensure that everyone has the opportunity to succeed in the digital economy. According to The World Bank, a 10% increase in broadband penetration can lead to a 1.21% jump in GDP growth.

<https://www.worldbank.org/en/topic/digitaldevelopment/brief/connecting-for-inclusion-broadband-access-for-all>

In conclusion, I strongly support the BEAD Program and its goals of expanding broadband access and promoting digital equity. I urge you to consider the significant benefits that increased internet access can have for our nation's economy, education system, and society as a whole, and to take action to ensure that all Americans can participate in the digital age.”⁴¹⁰

- “Internet access should be as inexpensive as possible because for many of us, it's the ONLY way to stay in touch. I have T-Mobile's internet after being with Spectrum and Frontier. It's still too expensive and should be far more equitable for those of on tight budgets. I think internet should be a free utility for all at 200mps and up - that's what I have with my current provider and it's good enough. Or at least most of the time.”⁴¹¹

⁴¹⁰ Darren Overby, San Anselmo, CA, submitted November 1, 2023.

⁴¹¹ Anne Proffit, Long Beach, CA, submitted November 3, 2023.

- ...[Tech Exchange] want[s] to emphasize the ongoing need for digital literacy skills services and outreach efforts in California, as well as the importance of empowering established regional and local community based organizations (CBOs) like Tech Exchange to act as trusted messengers to implement these programs. Similarly, when it comes to Tech Support (3.2) the State should prioritize working with and supporting organizations with diverse outreach teams and a track record of providing multilingual, culturally-competent tech support services.
- Tech Exchange applauds the workforce and talent pipeline development efforts illustrated in the plan, and the commitment to introducing individuals from historically underserved communities to STEM careers pathways. We would like to also emphasize the importance of supporting local and regional organizations like Tech Exchange in their capacity as trusted messengers and proven service providers to implement these efforts. In order to truly uplift and empower covered populations, the State of California should make every effort to work with and empower local CBOs to proceed with this work, using the already-established and proven program models with which these organizations have already had success. We caution the State to resist the temptation to create new program models and force organizations to adopt unproven methods, instead of making use of decades of institutional knowledge, ready-to-implement program models, and the social capital of local CBOs' trusted reputations in serving diverse communities...

...The State of California should support the creation of more municipally-owned Internet Service Providers and Leases that would allow for more affordable high speed internet services in communities. Similarly, in order to reduce the general cost of high speed internet for California residents, the State should partner with cities,

counties, and CBOs to create local ISPs, as well as state subsidies to reduce high speed internet costs.”⁴¹²

26. Procedural Matters

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

27. 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. On September 12, 2024, the following parties filed opening comments: CforAT; Community Legal Services; the California Broadband & Video Association; SBUA; Cal Advocates; TURN; AT&T; and Tarana Wireless. On September 17, 2024, SBUA and the Small LECs filed reply comments.

In response to comments and reply comments, the Commission makes the revisions to the decision, as well as corresponding revisions to IP Volume Two, included in Appendix A, as discussed below.

This decision is revised at pages 60 to 61, such that BEAD grantees may increase prices for their Low-Cost Broadband Service Option at a rate that does not exceed the CPI-U.⁴¹³

⁴¹² Ulises Zatarain, Tech Exchange, Oakland, CA, submitted January 25, 2024.

⁴¹³ See, AT&T, Opening Comments on Proposed Decision, filed September 12, 2024, at 9.

This decision is revised at page 102 and at Finding of Fact 25 on page 172, to remove "a capital investment schedule" from the engineer certification requirements list.⁴¹⁴

This decision is revised at Finding of Fact 24 on page 173, to make it consistent with IP Volume Two and the remainder of this decision.⁴¹⁵

The decision is revised at page 144 to make the decision and IP Volume Two consistent by deleting the words "but more than 100 Mbps download and 20 Mbps upload."⁴¹⁶

In response to CforAT's request that when reviewing requests from BEAD applicants to deviate from the low-income and middle-class affordable plans, the Commission require applicants to provide evidence of the pricing effects not only on the applicant, but also on projected affordability and adoption rates,⁴¹⁷ we note that the Commission already will require the submission of pro forma with eight-year estimates, which appears to be sufficient.

In response to the request of the California Broadband & Video Association that the Commission ensure the low-cost option requirement includes only those programs that are successors to the ACP or are substantially similar programs, applicants will participate in other low-income connectivity program or programs as determined by the Commission.⁴¹⁸ The Commission revises IP Volume Two to use the approach taken by the Commission in the FFA

⁴¹⁴ *Id.*, at 10.

⁴¹⁵ *See*, TURN, Opening Comments on Proposed Decision, filed September 12, 2024, at 9.

⁴¹⁶ *See*, California Broadband & Video Association, Opening Comments on Proposed Decision, filed September 12, 2024, at 10-11.

⁴¹⁷ CforAT, Opening Comments on Proposed Decision, filed September 12, 2024, at 5-6.

⁴¹⁸ California Broadband & Video Association, Opening Comments on Proposed Decision, filed September 12, 2024, at 11-12.

program: “[i]f there is no such successor program, the applicant must agree to participate in other low-income connectivity programs, as determined by the Commission, such as Lifeline, California LifeLine, and/or any similar low-income connectivity program or subsidy offered federally or by the State.

The Commission does not adopt Cal Advocates’ recommendation to reduce the price of the low-cost plan on Tribal Lands.⁴¹⁹ We agree with the sentiment offered regarding the need to ensure affordable broadband service on Tribal Lands. The \$75 threshold reflects the challenges of operating networks in Tribal areas in a sustainable manner and is consistent with ACP allowable discount of \$75. Removing the ability of Tribal providers who seek to deploy in Tribal areas to recover costs will disincentivize them from seeking BEAD funds to help deploy needed infrastructure. Finally, applicants who charge a more sustainable price may be able to recover some of those funds for their subscribers through federal or state subsidy programs, which will benefit both low-income subscribers and the sustainability of the network.

28. Assignment of Proceeding

Darcie L. Houck is the assigned Commissioner and Thomas J. Glegola is the assigned Administrative Law Judge 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.

⁴¹⁹ Cal Advocates, Opening Comments on Proposed Decision, filed September 12, 2024, at 4.

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

4. 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.”

5. The IIJA requires States to prioritize BEAD funding on unserved locations, followed by underserved locations as the second priority, and then community anchor institutions as the third.

6. The Commission must prioritize projects deploying fiber-optics, where economically possible.

7. 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 permit, deploy reliable broadband service to Community Anchor Institutions. Further, the NTIA’s NOFO directs States to prioritize fiber-optic deployments.

8. School districts in California can be over 300 square miles.

9. Applicants must apply to serve 100 percent of serviceable locations within their proposed CBGs.

10. The NTIA requires the Commission to submit with its Final Plan proof of a Tribal Government’s consent to any BEAD deployment on Tribal Lands. The term Tribal Land is construed broadly and includes Tribal communities within ancestral Tribal territory where Tribal members reside.

11. The NTIA requires States to use an Extremely High Cost Per Location Threshold to determine the cost at which it is infeasible to fund fiber to eligible locations. For locations with costs above that aforementioned threshold, alternative and lower-cost technologies may be funded based on the Extremely High Cost Per Location Threshold calculation that shows funding more fiber to those locations would exceed a state's available BEAD budget.

12. The NTIA's NOFO allows the Commission to negotiate with applicants to revise their proposed Project Areas, either to remove broadband serviceable locations from a proposed Project Area, to add broadband serviceable locations, to negotiate the grant amount for projects that exceed the Extremely High Cost Per Location Threshold, or to revise the technology offered to a specific broadband serviceable location.

13. Except in certain specific circumstances, such as projects in designated "high-cost areas," as defined in Section 60102(a)(2)(G) of the IIJA, and other cases in which NTIA has waived the matching requirement pursuant to Section 60102(h)(3)(A)(ii) of the IIJA, the NTIA's NOFO requires a 25 percent match for BEAD projects. A matching contribution may be provided by the applicant, the Commission subgrantee, a unit of local government, a utility company, a cooperative, a nonprofit or philanthropic organization, a for-profit company, regional planning or governmental organization, a federal regional commission or authority, or any combination thereof.

14. Funds from federal programs, including funds from the FCC's Universal Service Fund programs, generally may not be used as matching funds; however, the IIJA expressly provides that matching funds for the BEAD Program may come from a federal regional commission or authority 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, 2021, or the American Rescue Plan Act of 2021, to the extent permitted by those laws.

15. Any matching funds contributed to a BEAD subgrant that are sourced from a State match program must be necessary, reasonable, and allowable for that project (among other requirements), consistent with the terms of the Infrastructure Act, BEAD NOFO, 2 C.F.R. § 200.306, and the other terms and conditions of the Commission's BEAD award. Any conditions on matching funds derived from a state grant program (or any funds proposed as match) may not impede the ability to use those funds consistent with all BEAD requirements.

16. Congress determined that "[a]ccess to affordable, reliable, high-speed broadband is essential to full participation in modern life in the United States," and that "[t]he persistent 'digital divide' in the United States is a barrier to" the nation's "economic competitiveness [and the] equitable distribution of essential public services, including health care and education."

17. The IIJA requires a BEAD subgrantee to offer not less than one low-cost broadband service option.

18. The NTIA states that a low-cost broadband service option should address, at a minimum: 1) all recurring charges to the subscriber, as well as any non-recurring costs or fees to the subscriber (e.g., service initiation costs); 2) the plan's basic service characteristics (download and upload speeds, latency, any limits on usage or availability, and any material network management practices, 3) whether a subscriber may use any Affordable Connectivity Benefit subsidy toward the plan's rate; and 4) any provisions regarding the subscriber's ability to upgrade to any new low-cost service plans offering more advantageous technical specifications.

19. The federal Affordable Connectivity Benefit subsidy has expired and a successor has not yet been found.

20. The NTIA's NOFO requires the Commission to include "in its Initial and Final Proposals a middle-class affordability plan to ensure that all consumers have access to affordable high-speed internet."

21. The NTIA requires the Commission to obtain and evaluate information on the prospective subgrantee's record of compliance with federal labor and employment laws, as well as the records of any other entities that will participate in the project, including contractors and subcontractors. This information must include, at a minimum, material on these entities' compliance with federal labor and employment laws on broadband deployment projects in the last three years (e.g., data on an applicant's historical use of contracting and subcontracting arrangements, including staffing plans, and at least one example of each contractor and subcontractor's past performance in the context of a similar project).

22. The NTIA's NOFO encourages States to consider workforce development goals when selecting subgrantees, such as setting requirements applicable to all BEAD subgrantees or establishing scoring factors.

23. The NTIA's NOFO requires the Commission ensure that all BEAD subgrantees are capable of carrying out activities funded by the BEAD subgrant in a competent manner and in compliance with all applicable federal, State, Territorial, and local laws. This includes:

- (a) the financial capacity to meet the commitments of the subgrant, the requirements of the BEAD Program;
- (b) the managerial capacity to meet the commitments under the subgrant, the requirements of the Program and such other requirements; and

(c) the technical capacity to provide the services promised in the subgrant in the manner contemplated by the subgrant award.

24. The NTIA requires a BEAD applicant to submit a Letter of Credit for at least 25 percent of the proposed project's cost, subject to waivers described in the NTIA's Waiver Guidance.

25. The NTIA's NOFO requires applicants to submit, with the applications, a certification from a professional engineer that the engineer has reviewed the applicant's network design, diagrams, project costs, build-out timelines and milestones for project implementation, stating that the proposed network can deliver broadband service that meets the requisite performance requirements to all locations served by the project.

26. The NTIA's NOFO requires BEAD applicants to provide ownership information consistent with the requirements set forth in 47 C.F.R. § 1.2112(a)(1)-(7).

27. The NTIA's NOFO requires the Commission to requires a BEAD subgrantee to disclose, for itself and for its affiliates, any application the subgrantee or its affiliates have submitted or plan to submit, and every broadband deployment project that the subgrantee or its affiliates are undertaking or have committed to undertake at the time of the application using public funds.

28. The NTIA's BEAD NOFO requires the Commission conduct a competitive grant application process and score applications against primary and secondary criteria with 75 percent of total points awarded to a combination of the following three primary criteria: minimal BEAD Program outlay; affordability; and fair labor practices. As a secondary criterion, the Commission evaluates and scores

an application based on an application's proposed speed to deployment, but the potential amount awarded must be less than any individual primary criterion.

29. The NTIA's NOFO permits States to develop additional secondary criteria, encouraging states to incorporate the following criteria: equitable workforce development and job quality; open access; and local and Tribal coordination.

30. The NTIA's NOFO requires the Commission to demonstrate that it has accounted for current and future weather- and-climate-related risks to new infrastructure projects, both current risks but also for how the frequency, severity, and nature of these extreme events may plausibly evolve as our climate continues to change over the coming decades.

31. Pursuant to 2 C.F.R. § 200.321, the NTIA's NOFO requires the Commission to take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

32. The NTIA's NOFO requires the Commission to ensure that BEAD applicants have cybersecurity and supply chain risk management plans in place.

33. Consistent with 2 C.F.R. Part 200 Subpart D, the NTIA's NOFO requires the Commission to include sufficient accountability procedures within its BEAD program to ensure subgrantee compliance, including reasonable provisions allowing for recovery of funds in the event of a subgrantee's noncompliance with BEAD Program requirements, including but not limited to failure to deploy network infrastructure in accordance with mandated deadlines.

34. The NTIA's NOFO allows, but does not require, the Commission to consider awarding BEAD grants for non-deployment activities.

Conclusions of Law

1. The Governor designated the Commission to serve as the recipient of

and administering agent for the BEAD program for California.

2. The NTIA has the authority to review, revise, and approve a State's Initial Proposal. As the grantee, the Commission is required to accept the NTIA's determinations.

3. The NTIA permits the Commission to seek a waiver of its de-duplication process.

4. Scoring broadband grant applications using an affordability criterion, among other criteria, does not constitute rate regulation.

5. Requiring broadband grant applicants to offer a low-price broadband service plan, as a condition of receiving a grant, does not constitute rate regulation.

6. This decision complies with the IIJA.

7. This decision complies with NTIA requirements.

8. The Commission has the authority to delegate to Staff the ministerial review of BEAD Program applications, including the following activities, all of which will be included in a proposed Final BEAD Plan that must be adopted by the Commission, after first receiving public comment:

- (a) Developing the Extremely High Cost Per Location Threshold, as directed by the Commission in Section 7 of this decision;
- (b) Implementing the Extremely High Cost per Location Threshold, as directed by the Commission in Section 8 of this decision;
- (c) To remove broadband serviceable locations from a proposed Project Area, to add broadband serviceable locations to a proposed Project Area, to negotiate the grant amount for projects that exceed the Extremely High Cost Per Location Threshold, or to revise the technology offered to a specific broadband serviceable location, subject

to the restrictions and direction provided by the Commission in Section 8 of this decision;

- (d) Scoring BEAD applications, as directed by the Commission in Section 15 of this decision;
- (e) Developing BEAD grant reimbursement guidelines, subject to Commission's directions in Section 20 of this decision;
- (f) Developing guidance for BEAD applicants, consistent with this decision; and
- (g) Preparing the Commission's Final BEAD Proposal, which the Commission will consider via resolution prior to submitting to the NTIA.

9. It is reasonable for the Commission to delegate to Staff the authority discussed in Conclusion of Law 8.

O R D E R

IT IS ORDERED that:

1. The requirements and process for scoring applications under the Broadband Equity, Access, and Deployment Program, contained in the California Public Utilities Commission's Final Initial Proposal Volume Two, as approved by the National Telecommunications and Information Administration, and included in Appendix A, is adopted.

2. Consistent with the direction provided in this decision, the California Public Utilities Commission delegates to its Communications Division Staff, the authority to review grant applications for the Broadband Equity, Access, and Deployment (BEAD) Program, including the following activities, all of which will be included in a proposed Final BEAD Plan that must adopted by the Commission, after first receiving public comment:

- (a) Developing the Extremely High Cost Per Location Threshold;
- (b) Implementing the Extremely High Cost per Location Threshold;
- (c) To remove broadband serviceable locations from a proposed Project Area, to add broadband serviceable locations to a proposed Project Area, to negotiate the grant amount for projects that exceed the Extremely High Cost Per Location Threshold, or to revise the technology offered to a specific broadband serviceable location;
- (d) Scoring BEAD applications;
- (e) Developing BEAD grant reimbursement guidelines;
- (f) Developing guidance for BEAD applicants;
- (g) Providing notice of the BEAD grant application windows; and
- (h) Preparing the Commission's Final BEAD Proposal, which the Commission will consider via resolution prior to submitting to the National Telecommunications and Information Administration.

3. Rulemaking 23-02-016 remains open.

This order is effective today.

Dated September 26, 2024, at San Francisco, California.

ALICE REYNOLDS

President

DARCIE L. HOUCK

JOHN REYNOLDS

KAREN DOUGLAS

Commissioners

Commissioner Matthew Baker recused himself from this agenda item and was not part of the quorum in its consideration.