

**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 23-02-16  
(Filed February 23, 2023)

**OPENING COMMENTS OF AT&T ON  
INITIAL PROPOSAL VOLUME I & II**

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Pursuant to the *Administrative Law Judge’s Ruling Issuing Staff Proposal* (“Ruling”) filed in Rulemaking (R.) 23-02-016 on November 7, 2023, Pacific Bell Telephone Company d/b/a AT&T California (U 1001 C), AT&T Mobility Wireless Operations Holdings, Inc. (U 3021 C), New Cingular Wireless PCS, LLC (U 3060 C) d/b/a AT&T Mobility, and Santa Barbara Cellular Systems, Ltd. (U 3015 C) (collectively, “AT&T”) hereby their submit opening comments on the Broadband Equity, Access, and Deployment (“BEAD”) Initial Proposal Volume I<sup>1</sup> and Volume II.<sup>2</sup>

## **I. INITIAL PROPOSAL VOLUME I**

AT&T generally agrees with the Commission’s approach to adopt the guidance and requirements outlined in the Commission’s Initial Proposal Volume I (“Volume I”) and recommends the changes described below.

### **A. Challenge Submission and Rebuttal Phases**

The Commission is proposing a “30 calendar day”<sup>3</sup> challenge submission window and a “15 calendar day”<sup>4</sup> rebuttal window. AT&T recommends that the Commission align with NTIA’s guidance and “keep[ ] both the challenge submission window and the rebuttal window open for at least 30 calendar days.” This will allow all interested parties sufficient time to thoroughly review submissions, and any prepare necessary responses.<sup>5</sup>

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<sup>1</sup> *Administrative Law Judge’s Ruling Issuing Staff Proposal* (“Ruling”), Rulemaking (R.) 23-02-016, Attachment A – Initial Proposal Volume I, (Nov. 7, 2023).

<sup>2</sup> *Id.* Attachment B – Initial Proposal Volume II.

<sup>3</sup> Volume I at 13.

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

<sup>5</sup> Department of Commerce, *National Telecommunications and Information Administration Policy Notice*, Section 7.7 – Timing Requirements (last modified Nov. 1, 2023), [https://www.ntia.gov/sites/default/files/2023-11/bead\\_challenge\\_process\\_policy\\_notice.pdf](https://www.ntia.gov/sites/default/files/2023-11/bead_challenge_process_policy_notice.pdf).

## **B. Speed Test Requirements**

The Commission proposes to “accept speed tests as evidence for substantiating challenges and rebuttals.”<sup>6</sup> AT&T recommends that the Commission clarify that speed tests will not be required for locations served by end-to-end fiber,<sup>7</sup> but only for locations served by non-fiber technologies. Verifications for 100/20 Mbps speeds are unnecessary in the context of homes served by fiber because end-to-end fiber consistently delivers speeds to end user premises that not only consistently meet, but also far exceed 100/20 Mbps speeds. Speeds delivered over end-to-end fiber are unaffected by issues such as the number of customers using the service simultaneously or an end user’s distance from facilities.<sup>8</sup> In contrast, the speeds delivered to customer locations by non-fiber technologies can vary, depending on environmental conditions, resource capacity limitations, distance of transmission lines, and other location-specific conditions.

Accordingly, challenges based on speed tests are only necessary and appropriate for technologies other than end-to-end fiber. Speed tests challenges are unnecessary for locations served by fiber because the result of those end-to-end fiber are certain to result in a finding that the locations are receiving at least 100/20 Mbps service and therefore, are ineligible for BEAD funding. Challengers would expend unnecessary time and resources to collect speed test information for locations served by fiber without any benefit to consumers, and the Commission will expend unnecessary time and resources to address those challenges. For this reason, AT&T recommends the Commission clarify that speed tests should only target non-fiber technologies

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<sup>6</sup> Volume I at 20.

<sup>7</sup> The terms fiber to the premise (“FTTP”), fiber to the home (“FTTH”), end-to-end fiber, and “fiber” are used interchangeably in these comments.

<sup>8</sup> AT&T Fiber, for example, currently offers speeds of up to 5 Gbps download and 5 Gbps upload (“5 Gig symmetrical”). See <https://fiber.att.com/>.

that report speeds at or near 100/20 Mbps, but which may not perform at those speeds under normal usage.

## **II. INITIAL PROPOSAL VOLUME II**

### **A. Project Areas**

The Commission can best promote broad participation in the BEAD program by allowing network providers as much flexibility as possible to design the project areas included in their applications. Providers are in the best position to design their project areas to use existing infrastructure most cost-effectively and, minimize the need for new permits and rights of way needed, which will speed deployment to deliver robust broadband to more Californians and do it more quickly and efficiently than if providers cannot design their project areas.<sup>9</sup> The recommendations below are designed to enhance provider flexibility in designing projects, which will also benefit Californians by ensuring the most efficient use of the finite BEAD funding.

#### **1. Minimum Project Area Unit**

The Commission offers two potential approaches on how project areas could be defined.<sup>10</sup> Option 1 allows applicants to “draw their own project areas using the minimum geographic unit of a Census Block Group (CBG)” and “[a]pplicants may create a proposed Project Area by selecting as many contiguous CBGs for deployment as they choose.”<sup>11</sup> Under Option 2, “the boundaries of Tribal lands and school districts should serve as the boundaries for

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<sup>9</sup> NTIA recognized the importance of leveraging existing assets in attaining speed to deployment and reducing BEAD program outlays, thus requiring each state to specify in its Initial Proposals the steps that the state will take to promote the use of existing infrastructure and cost-effective access to poles, conduits, easements, and rights of way. BEAD NOFO, § IV.B.5.b, ¶ 14; § IV.B.9.b, ¶ 11.a. The Commission also recognizes the benefits of allowing applicants to define their own project areas with its finding that applicants “are frequently best suited to determine the most economically viable grouping of locations into a single geographic unit for application.” (Initial Proposal Volume II at 37.).

<sup>10</sup> Volume II at 35-40.

<sup>11</sup> Volume II at 37.

the Project Areas and applicants would be required to provide a proposal for all eligible locations within the political boundaries of their selected Project Area.”<sup>12</sup> The Commission should not pre-select project areas based on large geographic units like CBGs, Tribal lands, or school districts, that do not reflect existing network infrastructure resources. Requiring providers to deploy to all locations in such a large state-defined project area will effectively disqualify some applicants or force them to extend beyond what they can manage from a financial, operational, or human resources perspective.

AT&T suggests that project area units be as geographically small as possible – in fact, NTIA’s guidance recognizes individual locations are an option – and in no case larger than a census block. Census Blocks are relatively small common geographic units.<sup>13</sup> Allowing applicants to combine Census Blocks into project areas thus enables applicants to design efficient deployments that maximize use of existing infrastructure, permits, and rights-of-way. A requirement to use larger minimum geographic units like CBGs (which on average, consist of approximately 33 Census Blocks),<sup>14</sup> Tribal lands, or school districts could force applicants to build far beyond their current infrastructure and thereby eliminate synergies and increase costs.<sup>15</sup> This would result in higher costs per location and could lead some providers to avoid applying for project areas all together. In contrast, enabling applicants to propose project areas comprised of smaller units, like Census Blocks, will maximize efficiencies, reduce costs, and enable greater

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<sup>12</sup> Volume II at 38.

<sup>13</sup>U.S. Census Bureau, What are census blocks?, (last visited Nov. 20, 2023) <https://www.census.gov/newsroom/blogs/random-samplings/2011/07/what-are-census-blocks.html>

<sup>14</sup>U.S. Census Bureau, Tallies, Nov. 20, 2023) [https://www.census.gov/geographies/reference-files/time-series/geo/tallies.html#tract\\_bg\\_block](https://www.census.gov/geographies/reference-files/time-series/geo/tallies.html#tract_bg_block).

<sup>15</sup> U.S. Census Bureau, What are census blocks?, (last visited Nov. 20, 2023) <https://www.census.gov/newsroom/blogs/random-samplings/2011/07/what-are-census-blocks.html>. In remote areas, Census Blocks can encompass hundreds of square miles.

participation by a variety of applicants. The use of Census Blocks will also 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 thus recommends that the Commission not mandate project areas based upon CBGs, Tribal lands, or school districts, whose boundaries bear no relationship to real world network infrastructure deployments. Requiring deployment to 100 percent of the eligible locations in such large areas may limit participation in the BEAD program. Additionally, requiring that applicants serve every eligible location in such a large area could necessitate that applicants deploy beyond their existing resources which would likely lead to a higher average amount of requested BEAD funding per location. If the Commission is nonetheless inclined to use larger minimum project area units, CBGs are preferable to geographic areas such as school districts, because CBG boundaries are more likely to reflect natural population boundaries, such as highways, and therefore, to enable more efficient network deployments.

AT&T supports the Commission's proposal to allow applicants to propose to serve fewer than 100% of the unserved and underserved locations in each Project Area. This will enable applicants to identify and remove outlier locations that are so costly to serve with fiber that these locations put the rest of the project at risk of losing out on end-to-end fiber.<sup>16</sup> Furthermore, as proposed, the Commission should offer BEAD funding for these most-costly locations in a non-fiber round or should address them on a case-by-case basis.

Lastly, if the Commission does not receive the proposals expected in using larger geographic units, such as CBGs as its minimum Project Area building block in the initial funding round, it should consider shifting to a smaller unit, like Census Blocks or locations, in

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<sup>16</sup> See Initial Proposal Volume II at 38-39.

subsequent rounds. A second round of proposals using a smaller minimum geographic Project Area Unit could both increase provider participation and help to extend BEAD funding further by encouraging private sector dollars and therefore, help meet the State's BEAD goals.

## **2. De-Conflicting Overlapping Project Areas**

Whether the Commission opts to use locations, Census Blocks, or CBGs as the minimum Project Area building block, the Commission needs to establish a mechanism to de-conflict Project Area applications that overlap, as the Commission has recognized.<sup>17</sup> The Commission has proposed to undertake a negotiation process with applicants to arrive at an outcome that addresses as many eligible locations as possible.<sup>18</sup>

Rather than utilize negotiations to de-conflict overlapping Project Area applications, the Commission should use a more transparent and objective process to de-conflict overlapping applications. For example, the Commission 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. Attachment A contains a suggested transparent and objective process to de-conflict overlapping applications. While some negotiation may happen as part of the overlap de-conflicting process, the purpose of NTIA's scoring rubric is to ensure a fair and transparent competitive process. The suggested process in Attachment A thus utilizes the scoring rubric, in combination with the number of locations to be served, to resolve overlapping applications. If overlapping applications cannot be resolved via transparent assessment of scores, the Commission could also consider running a second or third application round to allow providers to make a best and final offer in a competitively neutral way.<sup>19</sup>

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<sup>17</sup> See Volume II, n.27 at p. 21.

<sup>18</sup> See Volume II at 37-38.

<sup>19</sup> See Attachment A.



### 3. Extremely High Cost Per Location Threshold (“EHCPLT”)

As the Commission has recognized, NTIA has identified end-to-end fiber optic network deployments as “Priority Broadband Projects” and directed the states to maximize the number of unserved and underserved locations that receive end-to-end fiber deployments in implementing their BEAD programs.<sup>20</sup> The Commission has appropriately committed to setting the EHCPLT as high as feasible to allow for greater fiber coverage and maximize the use of the best available technology while ensuring the program can meet the prioritization and scoring requirements. This is consistent with NTIA’s requirement that states set the EHCPLT as high as possible to help ensure that end-to-end fiber projects are deployed wherever feasible.<sup>21</sup>

With respect to the timing for establishing the EHCPLT, whether the Commission selects Option 1<sup>22</sup> or Option 2,<sup>23</sup> the Commission should set the EHCPLT at a level that prioritizes end-to-end fiber while ensuring that every unserved and underserved location in California will get broadband service at speeds of at least 100/20 Mbps. In other words, the Commission should assume the use of non-end-to-end fiber reliable broadband service technologies only for a relatively small number of locations in more sparsely populated areas that would be too costly

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<sup>20</sup> The Infrastructure Investment & Jobs Act of 2021, Publ. L. 117-58, 135 Stat. 429 (Nov. 15, 2021) (“IIJA”), which established the BEAD program defines “unserved locations” as broadband serviceable locations that have no access to broadband service, or only at speeds less than 25 Mbps download and 3 Mbps upload (“25/3 Mbps”) and defines “underserved locations” as broadband serviceable locations that have service at speeds above 25/3 Mbps but at less than 100 Mbps download and 20 Mbps upload (“100/20 Mbps”). IIJA § 60102(a)(1)(A), (C), codified at 47 U.S.C. § 1702(a)(1)(A), (C). This document refers to unserved and underserved locations collectively as “eligible locations.”

<sup>21</sup> Initial Proposal Volume II at 51; NOFO, § IV.B.5.b ¶ 8.

<sup>22</sup> Option 1 – to establish the EHCPLT based on the BEAD applications it receives, as states like Louisiana have proposed to do.

<sup>23</sup> Option 2 – to establish the EHCPLT prior to the BEAD application window.

for fiber deployments.<sup>24</sup> The Fiber Broadband Association (“FBA”) and Cartesian BEAD Threshold Financial Model, which recommends an EHCPLT for each state, may provide useful analysis and EHCPLT benchmark.<sup>25</sup> While AT&T has not independently validated the FBA/Cartesian model data and analysis, it appears to be robust and its EHCT recommendations seem reasonable.

## **B. Affordability**

### **1. Low-Cost Broadband Service Option**

The Commission proposes to adopt the low-cost broadband service option outlined in the BEAD Notice of Funding Opportunity (“NOFO”) with additional requirements. The Commission would 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 ... is established”<sup>26</sup> and “a Low-Cost Broadband Service Option that results in no cost to ACP-eligible customers.”<sup>27</sup> The Commission would also require subgrantees to make the Low-Cost Broadband Service Option available to households that qualify for ACP and those with income equal to or below 200 percent of the Federal Poverty Guidelines.

AT&T does not oppose the adoption of the \$30 low-cost option outlined in the BEAD NOFO. However, AT&T 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. The Infrastructure Investment & Jobs Act (“IIJA”) does

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<sup>24</sup> This also could mean that the Commission should consider, if necessary, establishing an additional threshold above the EHCPLT, for other technologies like satellite broadband, in light of available the State’s BEAD allocation and those technologies’ lower relative costs.

<sup>25</sup> See <https://fiberbroadband.org/resources/bead-high-cost-threshold-model/>

<sup>26</sup> Initial Proposal Volume II at 194.

<sup>27</sup> *Id.* at 193.

not permit broadband service rate regulation,<sup>28</sup> nor does the IIA otherwise provide an independent grant of authority to states to regulate broadband prices. Indeed, 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.<sup>29</sup>

AT&T also opposes the Commission’s attempt to require a “no cost” option, without any regard to the availability of ACP or a successor program, because such a requirement fails to recognize that subgrantees need flexibility for future price changes. In implementing NTIA’s guidance, the Commission should confirm that: (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.

The Commission should be careful to avoid inflexibly locking in prices without accommodating changes in costs and broader economic conditions. In recently released Frequently Asked Questions (“FAQ”) guidance, NTIA has made clear that states are permitted to allow for reasonable cost adjustments over time.<sup>30</sup> These adjustments could be tied to any

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<sup>28</sup> IIA § 60102(h)(5)(D) (codified at 47 U.S.C. § 1702(h)(5)(D)).

<sup>29</sup> See *Charter Advanced Servs. v. Lange*, 903 F.3d 715, 719 (8th Cir. 2018) (“[A]ny state regulation of an information service conflicts with the federal policy of nonregulation,’ so 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).

<sup>30</sup> U.S. Department of Commerce, Frequently Asked Questions and Answers Version 5.0 BEAD Program, available at [https://broadbandusa.ntia.gov/sites/default/files/2023-11/Broadband\\_Equity\\_Access\\_Deployment\\_Program\\_Frequently\\_Asked\\_Questions\\_Version\\_5.0.pdf](https://broadbandusa.ntia.gov/sites/default/files/2023-11/Broadband_Equity_Access_Deployment_Program_Frequently_Asked_Questions_Version_5.0.pdf)

number of reasonable metrics including consumer price index (“CPI”), the Urban Rate Survey, or others as preferred by the states.<sup>31</sup> Price locks for extended periods are unprecedented and would clearly be a form of unnecessary and intrusive rate regulation, as well as disincentivize investment and enhancements to the services provided.

Regarding the requirement that subgrantees 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, the Commission should specify that households in BEAD-funded area who participate in ACP or who meet any ACP eligibility criteria qualify for the Low-Cost Broadband Service Option. Today, 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.<sup>32</sup>

### **C. Middle Class Affordability and Affordability Scoring**

The Middle-Class Affordability Plan and Affordability scoring are separate issues requiring different approaches. Both issues are discussed below.

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<sup>31</sup> *Id.*

<sup>32</sup> Notably, some providers today have targeted offers that, when coupled with the current ACP benefit, enable participating consumers to obtain high-speed internet service at no monthly cost. For example, AT&T’s Access from AT&T offer enables eligible consumers to obtain FTTP-provisioned internet service, where AT&T Fiber is available, at symmetrical speeds of up to 100 Mbps with no monthly data caps, no annual contracts, free installation, and free in-home Wi-Fi, all at *no cost* when coupled with the ACP benefit. See <https://www.att.com/internet/access/>.

(a) Middle Class Affordability

NTIA has made clear that the Middle-Class Affordability Plan is a strategy or strategies adopted and implemented by the state to meet the program’s goal of ensuring that every resident, including middle-class residents, have access to reliable and affordable high-speed internet offerings. NTIA has specifically noted that this is not a mandated service offering.<sup>33</sup> NTIA has thus contrasted the Middle-Class Affordability Plan – which does not require a subgrantee offer – with the IJJA’s Low-Cost Broadband Service Option BEAD obligation, which does require a subgrantee to have a specific offer.<sup>34</sup>

AT&T recommends that the Commission adopt strategies that maximizes the most participation in the BEAD program. Robust competition for BEAD funds will help to ensure that all consumers in BEAD-funded areas gain access to high-quality and high-speed internet service at affordable prices while also helping to ensure that BEAD funding is distributed to as many people who need it. To this end, a BEAD subgrantee should be found to satisfy the State’s Middle-Class Affordability targets if it offers multiple high-speed internet service tiers at different price points in BEAD-funded areas, enabling middle-class consumers to select the internet service tier and price point that best meets their needs. The best strategy to ensure that all consumers (including middle-class consumers) have access to affordable rate options for high-speed broadband is to provide various options.

The proposal to assign a scoring weight to applicants and their proposed pricing plans to implement the Middle-Class Affordability requirement is contrary to NTIA’s express guidance

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<sup>33</sup>NTIA, *Tricky Topics to Watch Out for in the Initial Proposal*, (Sept. 2023) at 22 (available at [https://broadbandusa.ntia.doc.gov/sites/default/files/2023-09/BEAD\\_Initial\\_Proposal\\_-\\_Tricky\\_Topics.pdf](https://broadbandusa.ntia.doc.gov/sites/default/files/2023-09/BEAD_Initial_Proposal_-_Tricky_Topics.pdf)).

<sup>34</sup> *Id.*

that a state's Middle Class Affordability strategy focus on the state's strategies, and not any subgrantee offer. By doing so, the Commission would effectively engage in a form of rate regulation by rewarding applicants that set their prices at or below the target price mandated by the State. As previously discussed above, the IJA does not permit broadband service rate regulation,<sup>35</sup> and state law preempts a state agency from regulating broadband prices and, more generally under current federal law, states are preempted from regulating broadband prices.<sup>36</sup>

(b) Affordability Scoring

The BEAD NOFO requires that in scoring applications for end-to-end fiber Priority Broadband Projects, the state must score and rank an applications' affordability, among other things, based on the total price for symmetrical gigabit service with unlimited monthly usage (the "Gigabit Tier") in the project area. Affordability for non-FTTP Last-Mile Broadband Deployment Projects must be scored based on the total price to the customer for 100/20 Mbps service with unlimited monthly usage ("100/20 Mbps Tier").

In light of the IJA's prohibition against rate regulation, the Commission should not score affordability relative to arbitrarily chosen prices of \$50 per month and \$30 per month. Rather, the Commission should score and rank Priority Broadband Project applicants' prices for the gigabit tier service and other Last-Mile Broadband Deployment Project applicants' 100/20 Mbps Tier service, as applicable, compared to the FCC's benchmark urban rate for that service tier then in effect. In particular, the Commission should provide:

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<sup>35</sup> IJA § 60102(h)(5)(D) (codified at 47 U.S.C. § 1702(h)(5)(D)).

<sup>36</sup> See *Charter Advanced Servs. v. Lange*, 903 F.3d 715, 719 (8th Cir. 2018) ("[A]ny state regulation of an information service conflicts with the federal policy of nonregulation,' so 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).

- Full Affordability points for an application proposing a rate below the FCC's benchmark urban rate;
- Partial points for an application proposing a rate at the FCC's benchmark urban rate; and
- No points for an application proposing a rate that is above the FCC's benchmark urban rate.

The Commission should use this scoring approach because the FCC's urban rate benchmark provides an objective, fact-based, competitive price reference, and an administratively simple way to ensure that lower prices receive more weight, as opposed to the \$50 and \$30 monthly prices the Commission proposes to use with no justification, much less a persuasive or objective rationale.<sup>37</sup>

The purpose of the FCC's urban benchmark rates is to ensure that prices in rural areas are not significantly higher than in urban areas.<sup>38</sup> The FCC's benchmark rates also reflect up-to-date pricing data because the FCC adjusts them each year based on an annual survey of the fixed broadband service prices offered to consumers in urban areas nationwide.<sup>39</sup> The urban rate benchmarks thus reflect competitive prices in competitive urban areas. Consequently, the FCC's urban rate benchmark is a more appropriate price reference than the arbitrary \$50 per month reference price proposed, which lacks factual basis.

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<sup>37</sup> NTIA warned states to avoid arbitrary decisions, which could undermine confidence in the subgrantee selection process. *See* NOFO at 35 ("In establishing a fair, open, equitable, and competitive selection process, each Eligible Entity must ensure that adequate safeguards are in place to protect the integrity of the competition, including safeguards against collusion, bias, conflicts of interest, arbitrary decisions, and other factors that could undermine confidence in the process.").

<sup>38</sup> FCC WCB Order, *Urban Rate Survey Form & Content*, DA 13-598, FN43 (April 13, 2013).

<sup>39</sup> FCC, United States 2023 Broadband Benchmark Calculator available at <https://us-fcc.box.com/v/URSUSBenchmarkCalculator>. Additional information regarding the urban rate survey and broadband benchmarks are available at <https://www.fcc.gov/economics-analytics/industry-analysis-division/urban-rate-survey-data-resources>.

Using the applicable FCC urban benchmark rates to score and rank the relative affordability of applicants' Gigabit Tier prices (or 100/20 Mbps Tier prices, as applicable) will ensure that applications proposing lower prices – in fact, prices that are lower in BEAD-funded areas than the urban rate benchmark – will score higher than applications proposing prices that are on par with or above the urban rate benchmark. This scoring methodology will thus help to ensure that consumers in BEAD-supported areas have access to gigabit tier service (or 100/20 Mbps service) at prices that are reasonably comparable to prices charged for similar services in urban areas and are, therefore, affordable.

#### **D. Scoring**

The purpose of the prioritization and scoring process is to set clear incentives for how applicants should design end-to-end fiber Priority Broadband Projects. The Commission's BEAD application scoring rubric should provide sufficient detail on specifically what an application must contain to earn full, partial, or no points in each scoring category. This will enable applicants to develop project proposals that are uniquely tailored to meet the State's needs and expectations. This process is critical to the overall success of the program. AT&T recommends the proposed scoring rubric be adjusted as described below.

##### **1. Minimal BEAD Program Outlay**

The Commission proposes to award up to 15 points in the Minimal BEAD Program Outlay category, equating to just 15% of the total possible points. The Commission states that scoring will be based on the grant amount requested and the amount of matching funds the applicant proposes to commit. The Commission also proposes to award 10 points for meeting the 25% match requirement and 15 points for a 50% match amount.<sup>40</sup> AT&T recommends that

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<sup>40</sup> Initial Proposal Volume II at 32.



the Commission reconsider the match percentages that would be required to earn full, partial, or no points. Given California’s large geography and diverse physical characteristics, some areas may be so costly to serve that even a 25% match may not be financially feasible. NTIA has recognized that waivers of the 25% matching funds requirement may be in the public interest and enables states to seek waivers of the match requirement.<sup>41</sup>

Additionally, in finalizing its scoring rubric, AT&T recommends that the Commission (1) redistribute at least 10 Affordability points to the Minimal BEAD Program Outlay scoring criteria, to strike more balance among the 3 Primary Scoring Criteria; and (2) use three Minimal BEAD Program Outlay subcategories to avoid disadvantaging higher cost areas and to prioritize applications with larger scale.

## **2. Higher-Cost Scoring Subcategory**

First, the Commission should establish a relative cost outlay subcategory to help ensure that higher-cost areas are not disadvantaged. This is recommended because 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 costly, to serve. This scoring approach not only disadvantages high-cost areas that need proportionately more funding per location to incentivize deployment but may incentivize some applicants to make financial “commitments” that would overextend their financial capabilities.

For example, the Commission could award a portion of the Minimal BEAD Program Outlay points based on the percentage of totally unserved locations in the proposed project. More points would be awarded to applications that have a higher percentage of totally unserved locations, which are often higher cost.

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<sup>41</sup> See NOFO, § III.B.5 at 22.

Alternatively, based on all the applications received, the Commission could 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 them from the highest Cost per Eligible Location cost to the lowest Cost per Eligible Location. The Commission would award two sets of points: First, award decreasing amounts of points for the lowest to highest Cost Per Eligible Location. The remaining points could be awarded based on the percentage of “high cost” Eligible Locations a project includes, awarding more points to projects that have a higher percentage of high-cost locations. The Commission would need to identify the higher cost Eligible Locations on its BEAD map before the BEAD competitive funding process begins.

### **3. Project Size Scoring Subcategory**

Second, the Commission should consider establishing 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. This subcategory would recognize that larger scale projects have cost efficiencies compared to smaller scale projects, result in efficiencies in permitting processes due to optimizing the number of permits and approvals needed and minimizing community disruptions.

Ohio, for example, has proposed in its draft Initial Proposal Volume 2 to award up to 10% of the total points available based on the number of locations that an application proposes to serve.<sup>42</sup> Following this proposal, if the Commission rebalances the Primary Criteria points as

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<sup>42</sup> Ohio thus proposes to award:

- 10 points for applications that have 500-999 eligible locations;
- 20 points for applications that have 1,000-1,499 eligible locations;
- 30 points for applications that have 1,500-1,999 eligible locations;
- 40 points for applications that have 2,000-2,499 eligible locations;

recommended and directs 30 points to the Minimal BEAD Program Outlay scoring category, the Commission could award up to 10 points based on the percentage of matching funds the applicant proposes; up to 10 points for the application’s proportion of high-cost locations; and up to 10 points based on the total number of eligible locations the application proposes to serve.

Using these scoring subcategories in combination with cost per location metrics better balances the scoring equation with the realities of network design and costs. Awarding a subset of Minimal BEAD Program Outlay points based on the number of eligible locations will achieve better results at a lower cost. The goal of bringing broadband to all unserved and underserved locations will only be met if the State encourages and rewards projects willing and capable of deploying to large numbers of locations, enabling efficient and cost-effective deployments, and stretching BEAD dollars to as many locations as possible.

#### **4. Speed to Deployment**

All subgrantees have four years from the date they receive their subgrant from a state to complete deployment.<sup>43</sup> The Commission should not assign significant points to this element for the following reasons.

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- 50 points for applications that have 2,500-2,999 eligible locations;
  - 60 points for applications that have 3,000-3,499 eligible locations;
  - 70 points for applications that have 3,500-3,999 eligible locations;
  - 80 points for applications that have 4,000-4,499 eligible locations;
  - 90 points for applications that have 4,500-4,999 eligible locations; and
  - 100 points for applications that have 5000 or more eligible locations.

(Department of Development, *State of Ohio Initial Proposal, Volume II BEAD Program* (Oct. 2023) (available at [https://broadband.ohio.gov/static/202310-DRAFT\\_Ohio-BEAD-Initial-Proposal-Volume-II\\_vShare.pdf](https://broadband.ohio.gov/static/202310-DRAFT_Ohio-BEAD-Initial-Proposal-Volume-II_vShare.pdf))).

<sup>43</sup> 47 U.S.C. § 1702(h)(4)(C). “Speed to deployment” should clearly be defined to commence on the date that the grant agreement is signed, the date that any NEPA (National Environmental Policy Act) review is complete, or upon grant of required permits, whichever is later.

First, the quality of deployment and the qualifications of applicants are more important than how quickly a project is deployed. Deployment timelines are dependent on many variables outside of the control of applicants such as environmental reviews, permitting, labor supply, weather, and supply chain issues.

Second, large projects covering more locations are inherently disadvantaged by speed to deployment metrics because they will always take longer to complete than smaller projects that cover fewer locations. However, deploying to more locations (*i.e.*, larger projects) may be the best way for the State to use its BEAD funds efficiently and to get service to the most people as expeditiously and economically as possible.

For these reasons, the Commission should adopt an approach similar to that taken by states like Montana, Nevada, and New York<sup>44</sup> and only award minimal points for speed to deployment. Alternatively, at a minimum, these points should be weighted to take the size of the project into account. In addition, applicants' speed to deployment commitments should also be enforceable and include penalties for non-performance to serve as disincentives against unrealistic speed to deployment "commitments."

## **5. Applicant Prequalification Requirements**

In the NOFO, NTIA has largely identified the issues states should consider in evaluating prospective subgrantees' minimum qualifications. However, NTIA has not provided sufficient guidance regarding the specific qualifications applicants should have, nor the documentation that applicants must submit to demonstrate that they are qualified. AT&T recommends the following approach to address these issues.

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<sup>44</sup> In their draft Initial Proposals Volume 2 ("IPV2") issued for public comment Montana has proposed a maximum of 4 out of 100 points for speed to deployment and Nevada and New York have proposed a maximum of 1 point for speed to deployment.

The Commission should establish clear standards for what it considers “capable” within the required qualification categories so that assessments can be made fairly and efficiently. After awarding some projects, the Commission could consider adjusting these standards if it determines that allowing additional participants into the program will help the state to meet its 100% deployment goals.

## **6. Experience With the Technology Proposed**

The best measure of a provider’s operational, managerial, and technical capability is its prior experience deploying and providing broadband service, with the technology it proposes to use in its BEAD application. Experience providing voice or electric transmission service does not indicate that an entity can design and accurately estimate costs for an FTTP project.

The minimum qualifications NTIA has identified do not sufficiently differentiate between proven providers and start-ups with little to no experience in deploying the broadband service the applicant proposes to deploy. For example, nothing in the NOFO requires that a provider seeking to deploy and offer FTTP-enabled broadband service to have any track record whatsoever of deploying and offering end-to-end fiber-based internet service. In fact, an electric transmission or distribution service provider is not required to have any experience offering broadband service at all. NTIA’s minimum applicant qualifications are modeled on the requirements the FCC established for Universal Service auctions, which intentionally set a low bar to ensure enough participation to create desired auction dynamics. A grant program such as BEAD allows a more considered approach. Therefore, the Commission should require that applicants have experience with the technology they propose to deploy, which is the best predictor that they will deliver on their BEAD commitments.

## 7. Risk-Based Documentation Requirements

The BEAD NOFO offers examples of documentation states should consider requiring, but it does not require every document for every applicant. States should consider their own time and resources when determining what to require from subgrantees and the level of review that is needed. Adopting a thoughtful, risk-based approach could help the Commission to make efficient decisions about which providers are qualified.

For example, experienced providers, especially publicly-traded entities with a proven track record of deploying and offering end-to-end fiber-enabled broadband service to thousands of customers, present a significantly lower risk of default than newly-established companies who have little financial and operational experience deploying and offering broadband service.<sup>45</sup> Time and resources are better spent exploring more in-depth information provided by newer entrants to ensure that they can meet the grant requirements and comply with the legal and regulatory obligations.<sup>46</sup>

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<sup>45</sup> For example, the Sarbanes-Oxley Act of 2002, Pub. Law 107-204 codified at 15 U.S.C. § 7201 et seq., obligates covered entities to maintain corporate auditing and other financial record keeping and reporting practices in place and the law includes robust enforcement and oversight provisions that ensure adequate internal controls and procedures are followed. Moreover, given how market forces generally reward entities that deliver on commitments and punish those that fail to deliver, it is reasonable to associate a longer track record of delivering results with a lower level of potential risk of default.

<sup>46</sup> Jonathan Chaplin, Lead Analyst, New Street Research, recently offered similar advice to the states in a panel discussion regarding the BEAD program. He stated that “[s]tates should] [g]ive [funding] to companies that have scale, a demonstrated track record, know what they’re doing. ... these are companies that can’t afford not to fulfill the mandate that they commit themselves to, because of the operations they have across the rest of the country. (American Enterprise Institute Panel Discussion, *Will Broadband Be Affordable? Assessing Regulations for Broadband Subsidies* (Oct. 2, 2023) (available at [https://www.aei.org/events/will-broadband-be-affordable-assessing-regulations-for-broadband-subsidies/?mkt\\_tok=NDc1LVBCUS05NzEAAAGOlbuHv-avL4OsJfmU3RR9myez2oO7NwLESqquHrj0rIJu0Vu6Y72uv05Hhm6JfmmY5s8\\_lhKwc2Kj3Gple3ZsP9CLUbqQx0c6UeBSadovsQnP4yCe](https://www.aei.org/events/will-broadband-be-affordable-assessing-regulations-for-broadband-subsidies/?mkt_tok=NDc1LVBCUS05NzEAAAGOlbuHv-avL4OsJfmU3RR9myez2oO7NwLESqquHrj0rIJu0Vu6Y72uv05Hhm6JfmmY5s8_lhKwc2Kj3Gple3ZsP9CLUbqQx0c6UeBSadovsQnP4yCe))).

Providers of all sizes and capabilities will be needed to meet the BEAD goals. However, all applicants are not the same and recognizing these differences in application requirements can help the Commission to streamline its grant review processes. The recommended documentary requirements contained in Attachment B propose a way to differentiate the evidence of qualifications and financial capability an applicant must submit, commensurate with the risk of delay or default the applicant presents. The recommended approach would enable the Commission to identify the documentation each applicant quickly and easily would need to submit to demonstrate it is qualified.

#### **E. Letter of Credit**

As the Commission addressed, the BEAD Notice of Funding Opportunity requires the State to establish a model Letter of Credit patterned after the letter of credit the Federal Communications Commission (“FCC”) required for grantees of the Rural Digital Opportunity Fund (“RDOF”). NTIA specified that each BEAD subgrantee would be required to submit an irrevocable standby letter of credit in a value of at least 25% of the BEAD grant award.<sup>47</sup> However, NTIA issued a “programmatic waiver” with alternatives to the Letter of Credit requirement in November that was published with insufficient time for the Commission to address it in the Initial Proposal Volume II.<sup>48</sup>

While AT&T 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. The BEAD funding would be diverted to financial institutions in the form of bank charges and collateral to guarantee the 25% credit

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<sup>47</sup> See BEAD NOFO, § IV.D.2.a.ii.

<sup>48</sup> See BroadbandUSA, *BEAD Letter of Credit Waiver* (available at <https://broadbandusa.ntia.gov/funding-programs/policies-waivers/BEAD-Letter-of-Credit-Waiver>).

amount. For the reasons set forth below, the Commission should still consider seeking a waiver from NTIA to adopt the approach proposed by the Commonwealth of Virginia<sup>49</sup> which would 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. AT&T proposes model language in Attachment C.

This type of waiver is appropriate for several reasons. In a deployment program like BEAD, funding is distributed based on reimbursing grant recipients for funds expended. A state's primary concern, therefore, should be to ensure that the applicant has the financial capability to begin and sustain the project prior to being reimbursed. The BEAD program thus presents a fundamentally different financial risk profile compared to broadband deployment projects funded by the RDOF program administered by the FCC. Under that program, funding recipients began to receive regular monthly payments immediately upon authorization of funding, irrespective of the funds they expended or their deployment progress and were not obligated to report deployment progress until the third year.

A requirement that BEAD funded subgrantees provide assurances of creditworthiness in the form of Letter of Credit 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. This requirement would thereby unnecessarily increase the cost of BEAD deployments, as well as divert meaningful portions of limited capital funds to financial institutions in the form of fees and charges to maintain the Letters of Credit or one of the alternatives. In contrast, by seeking a waiver from NTIA<sup>50</sup> to allow the State to apply a 2-Step "financial health" decision would enable

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<sup>49</sup> See Virginia Final Initial Proposal Volume 2 at 19-21.

<sup>50</sup> NTIA may issue updated guidance regarding the letter of requirement that might obviate the need to seek a waiver from NTIA.



the Commission to objectively and cost-effectively customize security requirements based on each individual provider's financial health criteria while also providing security and assurances that the provider will meet its obligations. The model language describing the 2-Step "financial health" decision creditworthiness is provided in Attachment C and mirrors the framework the Commonwealth of Virginia proposed in its Initial Proposal, Volume 2.

#### **F. Application of California Prevailing Wage Laws**

As drafted, subgrantees would be required "to certify compliance with Davis-Bacon prevailing wages, as well as compliance with relevant aspects of California Labor Code § 1770 et seq., ..." <sup>51</sup> The Commission should clarify the applicability and requirements associated with the California prevailing wage laws and the inapplicability of the federal Davis-Bacon prevailing wage law in the Initial Proposal Volume II. As the U.S. Department of Labor made clear, "the broadband assistance programs under [BEAD] do not generally require the payment of Davis-Bacon prevailing wages." <sup>52</sup> This is because the BEAD provisions of the IJA are not a Davis-Bacon and Related Act. <sup>53</sup> Thus, contrary to the language in the Initial Proposal Volume II, there is no situation under which a state can require subgrantees to certify compliance with the federal Davis-Bacon requirements. While states may require subgrantees to report information on employee counts, job titles, and wage information, the reporting obligation does not impose an obligation to pay employees a particular wage. The reporting requirement is

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<sup>51</sup> Initial Proposal Volume II at 118.

<sup>52</sup> See U.S. Department of Labor Wage and Hour Division, Fact Sheet #66A: Bipartisan Infrastructure Law (available at <https://www.dol.gov/agencies/whd/fact-sheets/66a#:~:text=The%20BIL%2C%20which%20President%20Biden,state%20and%20local%20infrastructure%20construction.>)

<sup>53</sup> See U.S. Department of Labor Wage and Hour Division, Government Contracts Compliance Assistance, List of Current Davis-Bacon and Related Acts (available at [https://www.dol.gov/agencies/whd/government-contracts/.](https://www.dol.gov/agencies/whd/government-contracts/))

informational only, and not an authorization from Congress to require compliance with the federal Davis-Bacon law.

By contrast, the IJA does not limit the ability of states to apply their own prevailing wage laws. Since California has well-established prevailing wage laws, the Commission should clarify whether and how these laws will apply to subgrantees prior to submission of applications. As a unionized company represented by the Communications Workers of America (“CWA”), AT&T believes in the value of using an experienced unionized workforce whenever possible and is familiar with complying with labor-related laws and requirements. Not all companies who apply to participate in the BEAD program will have this same background, but it is critical that all applicants have a full understanding of whether and how the California prevailing wage laws apply to BEAD projects. The cost of labor is a large part of any broadband deployment project, and all applicants should factor in the costs of paying their workforce at compliant wages. Therefore, to ensure a fair and accurate bidding environment and to guard against future defaults due to a shortage of funds, the application of the California prevailing wage laws should be clearly addressed in the Initial Volume II.

### **III. CONCLUSION**

AT&T recognizes the importance and complexity of the work the Commission is undertaking to implement the BEAD Program. AT&T appreciates the opportunity to offer comments and looks forward to continued opportunities to work collaboratively with the Commission to implement this critically important program and help bridge the digital divide.

(Signature page to follow)

Date: November 27, 2023

Respectfully submitted,

\_\_\_\_\_/s/  
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# ATTACHMENT A

## De-conflicting Overlapping Project Areas

### Section 1. Definitions

- A. “**Project**” means an undertaking by an eligible grant recipient to construct and deploy infrastructure for the provision of broadband service to broadband serviceable locations. A project may consist of a single eligible CB or a grouping of Eligible CBs.
- B. “**Underserved location**” means an Underserved location as defined in the Infrastructure Investment & Jobs Act of 2021, 47 U.S.C. § 1702(a)(1)(C), that has access to broadband service at speeds faster than 25/3 Mbps but less than 100 Mbps download and 20 Mbps upload; and a latency sufficient to support real-time, interactive applications.
- C. “**Unserved location**” means an Unserved location as defined in the Infrastructure Investment & Jobs Act of 2021, § 1702(a)(1)(A), that has no access to broadband service or with service at speeds of less than 25 Mbps download and 3 Mbps upload; and a latency sufficient to support real-time, interactive applications.
- D. “**Eligible location**” means an Unserved location or Underserved location as defined in this chapter.
- E. “**Eligible CB**” means a Census Block identified by the Commission that contains Eligible location(s).

*Note: “Eligible CBG” should be substituted for “Eligible CBG” throughout this de-confliction framework if the Commission selects CBGs as the minimum Project Area building block.*

### Section 2. De-conflicting overlapping BEAD proposals

#### A. Round 1.

1. Each applicant may identify any Eligible CB(s) included in each of its proposed Project area(s) that are “separable,” meaning that the applicant is willing to be awarded BEAD funds for a smaller collection of Eligible CBs than it applied for, if the separable Eligible CBs are overlapped by another application and are not awarded to applicant. Designating Eligible CBs as separable is optional.

***Illustrative example***

*Application A covers a total of 100 Eligible CBs, Eligible CBs #1-100. The applicant identifies Eligible CBs #1-25 as separable but Eligible CBs #26-100 as not separable.*

2. If 2 or more applications propose end-to-end fiber Priority Broadband Projects requesting BEAD funding in amounts below the Extremely High-Cost Per Location Threshold for overlapping Eligible CBs, the Office shall score and rank those applications by score, award funding, and de-conflict applications as follows:

- a. The Office shall award funding to the application that earns a “decisively higher score” of at least X% more points than the next highest scoring application. If no application earns a decisively higher score, the Commission shall award funding to the application that covers the most Eligible locations.
  - b. The Commission shall make additional awards using same award priorities identified in the previous paragraph (1) and using the “separable” Eligible CBs applicants have identified to de-conflict overlapping applications and still award funding covering as many Eligible locations as possible.
3. After Round 1 awards have been made, before commencing Round 2, the Commission shall publicly identify all of the Eligible CBs awarded funding in Round 1 and the remaining Eligible CBs that may be awarded funding in Round 2.
  4. There shall be a minimum of [X] days between the publication of the Round 2 Eligible CBs and the commencement of Round 2.

**Illustrative example**

*Application A covers a total of 100 Eligible CBs (Eligible CBs #1-100) that have a total of 500 Eligible locations. Application B also covers a total of 100 Eligible CBs (Eligible CBs #50-149) that have a total of 1000 Eligible locations. Application A and Application B overlap with respect to Eligible CBs #50-100 that have a total of 100 Eligible locations.*

*Funding Round 1:*

- *If Application A receives a “decisively higher score” (at least X% more points than Application B), Application A will receive funding for all of the 100 Eligible CBs (Eligible CBs #1-100) it applied for. Application B may still receive funding for any of the Eligible CBs #101-149 it identified as “separable,” but will not receive an award in Round 1 for any of those Eligible CBs it did not identify as separable (nor will Application B receive an award for Eligible CBs #50-100).*
- *If neither application receives a “decisively higher score,” Application B will receive funding for all 100 Eligible CBs it applied for, Eligible CBs #50-149, because its application serves more Eligible locations than Application A. Application A may still receive funding for any of the Eligible CBs #1-49 it identified “separable,” but will not receive an award if it did not identify any of those Eligible CBs as separable (nor will Application A receive an award for Eligible CBs #50-100).*
- *Before commencing Round 2, the Commission shall publicly identify all of the Eligible CBs awarded funding in Round 1 to identify the remaining Eligible CBs that may be awarded funding in Round 2.*

**B. Round 2.**

- a. Applicants may modify applications not selected in Round 1 by revising their BEAD funding requests to eliminate Eligible CB(s) awarded funding in Round 1 and/or add new Eligible CB(s). Applicants may also modify their BEAD funding requests.
- b. Applicants will be asked to identify any Eligible CB(s) included in their proposed Round 2 Project areas that are “separable,” meaning that the applicant is willing to be awarded BEAD funds for a smaller collection of Eligible CB(s), if the separable Eligible CB(s) are overlapped by another application. Designating Eligible CB(s) as separable is optional.
- c. After receiving Round 2 submissions, the Commission shall first score and rank all of the end-to-end fiber Priority Broadband Projects, award funding, and de-conflict applications as described in Subsection A.2 above using the “separable” Eligible CBs to de-conflict overlapping applications. The objective shall be to award funding for as many Eligible Locations as possible.
- d. When there are no further end-to-end fiber Priority Broadband projects seeking BEAD funding per location in amounts below the Extremely High-Cost Threshold, applications for non-end-to-end fiber Reliable Broadband Service projects may also be considered together with any end-to-end fiber Priority Broadband projects requesting BEAD funding per location above the Extremely High-Cost threshold.

**C. Round 3 and Subsequent Rounds (if applicable)**

If the number of Eligible locations that remain unawarded after Round 2 is small, Round 3 may consist of a case-by-case negotiation process conducted by the Office. If there are enough Eligible locations remaining to justify additional open rounds, they shall be conducted using the same award and de-confliction process in Subsections A.2 and B.

# ATTACHMENT B

## Applicant Prequalification Requirements

### A. Prequalify Applicants *Before* Competition for BEAD Funding Begins

1. All BEAD applicants' qualifications should be fully evaluated and found to be satisfactory *before* the competitive process to award BEAD funding begins.
2. An applicant who does not meet the State's minimum qualifications should not be permitted to participate in the BEAD competitive funding process.

### B. Operational, Managerial, and Technical Capability

#### 1. Require Experience with the Technology Proposed

- a. Each applicant should be required to have experience deploying and providing broadband service *with the technology the applicant proposes to deploy in its BEAD application(s)*.
- b. Specifically, an applicant seeking BEAD funding for fiber to the premises (FTTP) Priority Broadband Projects must have experience deploying and offering FTTP-enabled broadband service to end-user customers.
- c. Applicants who lack experience deploying and offering broadband service using the technology they propose in their BEAD application should not be permitted to participate in the competitive process to award BEAD funding.

#### 2. Risk-Based Documentation Requirements

- a. To streamline the prequalification process, a multi-level risk-based approach that seeks more information from companies with less experience will be used.
- b. For applicants seeking BEAD funding for FTTP Priority Broadband Projects:

Applicants that have <b>10+ years</b> of experience deploying FTTP networks <i>and</i> <b>10,000 or more active FTTP broadband customers</b>	No managerial resumes No professional engineer (PE) certifications No other information required
Applicants that have <b>5 or more but less than 10 years</b> of experience deploying FTTP networks <i>and more than 1,000 active fiber broadband customers</i>	<b>Not required:</b> Managerial resumes PE certifications required for proposed network design

	<b>Required:</b> Proof of FCC Form 477/Broadband Data Collection (BDC) (national broadband map) submission
Applicants that have <b>2 or more but less than 5 years</b> of experience deploying FTTP networks <b>and/or fewer than 1,000 active fiber broadband customers</b>	<b>Required:</b> Managerial resumes PE certifications for proposed network design Proof of FCC Form 477/BDC submissions
Applicants that have <b>no experience deploying FTTP networks</b>	<b>Not qualified for FTTP Priority Broadband Projects</b>

- c. An applicant’s current customer and/or employee count information may also be used to balance the number or size of the projects an applicant may be awarded. A company capable of managing a 1,000-customer operation may not be able to scale to serve 10,000 customer locations despite receiving BEAD grant funding.

D. Financial Capability

Except in the case of applicants that have 10+ years of experience deploying FTTP networks and 10,000 or more active FTTP broadband customers, all applicants should be 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. 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.
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 should be evaluated, not just in the individual funded area.
4. Specific Financial Capability Documentation Requirements

As part of the prequalification process, every applicant should be required to submit the following financial Information 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% of the parent company revenues or (ii) seek to provide service to locations representing more than 25% of their current locations passed.

*\*\*Note: These are the same financial documents that should be required to establish subgrantee Letter of Credit requirements (Attachment C).*

2. Each applicant must commit to furnish to the State a Letter of Credit, Binding Guarantee, or Performance Bond if the applicant is awarded BEAD funds as a condition of the BEAD grant and as required under the accompanying Creditworthiness & Letter of Credit requirements.

## ATTACHMENT C

### Creditworthiness & Letter of Credit (“LoC”) Requirements<sup>54</sup>

Each prospective subgrantee shall be required to submit the financial documentation in Subsection 2 of this section and, if awarded BEAD funds, shall be required to satisfy the Letter of Credit (LOC) requirements identified in Subsection 3.

1. **Step 1. Financial Information Requirements.** The following financial documentation shall be submitted at the parent, affiliate, or subsidiary level. All applicants must submit Items A through C of this subsection. All applicants that are subsidiaries must also submit Item D.
  - A. Audited Financial Statements. All applicants must submit two years of audited financial statements. Subsidiaries may provide 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% of the parent company revenues or (ii) seek to provide service to locations representing more than 25% of their current locations passed.

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<sup>54</sup> In the absence of updated guidance from NTIA, these Letter of Credit requirements would require a waiver from NTIA. The Commonwealth of Virginia has already requested a waiver to enable it to use the Letter of Credit evaluation framework and requirements recommended.

**2. Step 2. Assessment of Creditworthiness – Letter of Credit Requirements**

<p>Level 1: No Letter of Credit required</p>	<p>Applicant must meet a, b, and c: Most recent audit is clean with no material findings. Assets in the State are greater than the value of the BEAD grant requested. The bank reference letter demonstrates the applicant has funds under its line of credit or credit facility sufficient to cover 50% of BEAD project cost.</p>
<p>Level 2: No Letter of Credit required; must provide Item E, Binding Guarantee</p>	<p>If Applicant cannot meet one of a, b, or c, but can provide – d. Line of credit or credit facility at least equal to BEAD grant amount</p>
<p>Level 3: Letter of Credit for 10% of BEAD grant amount required; retired with deployment</p>	<p>If applicant cannot meet one of a, b, or c and cannot provide d.</p>
<p>Level 4: Letter of Credit for 25% of grant amount required; retired with deployment</p>	<p>If applicant cannot meet two or more of a, b, or c, and cannot provide d.</p>

- A. Applicants may also elect to secure performance bonds in lieu of the 2 options for demonstration of creditworthiness outlined above. Performance bonds must equal 100% of the total BEAD funding requested.