

**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 No. 23-02-016  
(Filed February 23, 2023)

**OPENING COMMENTS OF COMMUNITY LEGAL SERVICES  
ON BROADBAND EQUITY, ACCESS, AND DEPLOYMENT  
(BEAD) DRAFT INITIAL PROPOSAL VOLUMES I AND II**

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**I. INTRODUCTION**

Pursuant to the November 7, 2023 *Administrative Law Judge’s Ruling Issuing Staff Proposal*, Community Legal Services (“CommLegal”) respectfully submits the following opening comments on the Draft Initial Proposal Volumes I (“Vol. I”)<sup>1</sup> and II (“Vol. II”).<sup>2</sup>

**II. DISCUSSION**

**A. VOLUME I**

**1. Section 4 – Community Anchor Institutions (Volume I, Requirement 6)**

The Broadband Equity, Access, and Deployment (“BEAD”) Initial Proposal, Volume I (“Vol. I”) acknowledges the definition of “community anchor institution” (“CAI”) as defined in the Infrastructure Investment and Jobs Act (“IIJA”).<sup>3</sup> In applying the statutory definition, Vol. I deems as eligible for BEAD funding all health clinics, health centers, and hospitals “that have a

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<sup>1</sup> California Public Utilities Commission, Draft of *Initial Proposal Volume I* (“Vol. I”), November 2023, accessed at <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M520/K752/520752666.PDF>.

<sup>2</sup> California Public Utilities Commission, Draft of *Initial Proposal Volume II* (“Vol. II”), November 2023, accessed at <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M520/K763/520763574.PDF>.

<sup>3</sup> Vol. I at 5.

Centers for Medicare and Medicaid Services (CMS) identifier certification number (CCN).”<sup>4</sup> The resulting list of eligible CAIs<sup>5</sup> includes some of the wealthiest hospitals in California, which are owned or run by some of the wealthiest companies in America, including Kaiser, Sutter, Cedars-Sinai Health System, and the University of Southern California.

***a. The Statutory Definition of Eligible CAIs Includes Facilitating Greater Use of Broadband by Vulnerable Populations***

The IIJA, 47 USC 1702 section 60102(a)(2)(E), defines CAIs as follows:

COMMUNITY ANCHOR INSTITUTION.—The term “community anchor institution” means an entity such as a school, library, health clinic, health center, hospital or other medical provider, public safety entity, institution of higher education, public housing organization, or community support organization that facilitates greater use of broadband service by vulnerable populations, including low-income individuals, unemployed individuals, and aged individuals.

The IIJA does not indiscriminately make all hospitals eligible for BEAD projects, but instead requires that each location also “facilitates greater use of broadband service by vulnerable populations” such as low-income and unemployed persons. Although hospitals provide valuable and necessary services for communities, they are not typically considered “public spaces” in the same way that libraries or recreation centers are and, as such, are not ideal locations to welcome low-income community members to utilize broadband connections. Hospitals do not (and should not) maintain large public gathering spaces for people to congregate and conduct research online, as the space would divert resources away from the hospital’s more important function in providing medical care, and the crowds would hinder access and would increase exposure to potential sources of infection. Therefore, not all hospitals should be considered eligible CAIs.

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<sup>4</sup> Vol. I at 5.

<sup>5</sup> *Id.*, Appendix 4.

Health clinics that are located in disadvantaged communities, that serve patients without insurance, and that do not require appointments would most closely conform to the IJA definition of a “community anchor institution.” Such locations are more accessible to low-income members of the public than private, insurance-based hospitals are. The generally smaller size of clinics means that they are normally nestled among stores and residences that can also share their wi-fi networks, as opposed to hospitals that are isolated on large private campuses. Being situated within communities allows clinics and smaller hospitals to better facilitate greater use of broadband services by vulnerable populations, consistent with the statutory requirement for BEAD CAIs.

***b. Lack of Data on Broadband Needs of Defined CAIs***

In Vol. I, Commission Staff reviewed data from the California Department of Public Health (“CA Dept of Public Health”) and concluded that any healthcare provider located in a census block that does not have 1 Gbps symmetrical broadband service is presumed to be unserved.<sup>6</sup>

Vol. I does not specify what information the CA Dept of Public Health provided for Commission staff to review for each healthcare location. CA Dept of Public Health may have provided data that specifically indicates which hospitals actually do not have gigabit service or that gigabit service is not available in certain locations, or perhaps there is simply a lack of information on the broadband service at hospitals. Reviewing the list of healthcare locations in Appendix 4 reveals inconsistencies that raise concerns regarding a lack of accurate information. For example, there are nine healthcare CAIs located in Mariposa, CA, all within the zip code 95338. Yet six locations are listed as having “800” speed available, while three have only “25.”

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<sup>6</sup> Vol. I at 6.

This discrepancy is all the more puzzling given that two of the “25” speed locations appear to be at nearly the same address as three of the “800” speed locations.<sup>7</sup> It seems highly improbable that locations in the same zip code and same block could have such disparate broadband service availability.

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
1	CAI	Entity name	FA	CA	EP	LA	Street address	City	State	Zip code	Longitude	Latitude	Explanation	Broadband Need	Broadband Availability
4154	H	CAMARENA HEALTH MARIPOSA MOBILE UNIT					5082 OLD HWY N	MARIPOSA	CA	95338	-119.96523	37.48982		1000	800
4186	H	COMMUNITY HEALTH CENTERS OF AMERICA					5320 STATE HIGHWAY 49 N	MARIPOSA	CA	95338	-119.98306	37.49964		1000	800
4238	H	JOHN C. FREMONT HEALTHCARE DISTRICT					5189 HOSPITAL RD	MARIPOSA	CA	95338	-119.97767	37.50039		1000	800
4239	H	JOHN C. FREMONT HEALTHCARE DISTRICT - RHC II					5186 HOSPITAL RD	MARIPOSA	CA	95338	-119.97643	37.50005		1000	25
4240	H	JOHN C. FREMONT HEALTHCARE DISTRICT D/P SNF					5189 HOSPITAL RD	MARIPOSA	CA	95338	-119.97767	37.50039		1000	800
4241	H	JOHN C. FREMONT MEDICAL CLINIC					5189 HOSPITAL RD	MARIPOSA	CA	95338	-119.97767	37.50039		1000	800
4242	H	MACT MEDICAL, MARIPOSA					5192 HOSPITAL RD	MARIPOSA	CA	95338	-119.97675	37.5008		1000	25
4243	H	MARIPOSA COUNTY PUBLIC HEALTH DEPARTMENT					4988 11TH STREET	MARIPOSA	CA	95338	-119.96897	37.48979		1000	800
4275	H	SVS MARIPOSA ADULT DAY PROGRAM					5070 BULLION STREET	MARIPOSA	CA	95338	-119.96663	37.48774		1000	25

The inconsistency comes up again with healthcare CAIs in Lone Pine, CA, where three locations are listed for the same entity in the same zip code and on the same block, but only one has a speed availability of “750” and the rest have no availability rating.

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
1	CAI	Entity name	FA	CA	EP	LA	Street address	City	State	Zip code	Longitude	Latitude	Explanation	Broadband Need	Broadband Availability
3286	H	SOUTHERN INYO HOSPITAL					501 E LOCUST	LONE PINE	CA	93545	-118.05793	36.60901		1000	
3290	H	SOUTHERN INYO HOSPITAL D/P SNF					501 E. LOCUST ST	LONE PINE	CA	93545	-118.05793	36.60901		1000	
3291	H	SOUTHERN INYO HOSPITAL DISTRICT CLINIC					510 E. LOCUST ST	LONE PINE	CA	93545	-118.05858	36.6083		1000	750

While all the locations discussed above indicate broadband availability below the required gigabit-level of 1000, the issue is not moot, as it indicates a lack of accurate information. Another good indication of this lack is that many of the healthcare CAIs in major urban centers show no broadband availability at all, which is clearly not correct. None of the six locations in San Francisco or 33 locations in Los Angeles have any speed availability rating at all. In fact, of the 737 locations listed in Appendix 4, 417 have no broadband availability rating at all, while only 38 have an affirmative rating of “0.”

The abundance of locations with no rating indicates that the presumption in Vol. I that the majority of healthcare CAI locations are underserved may not be based on any affirmative

<sup>7</sup> “5186 Hospital Road” and “5192 Hospital Road” have only “25” speed available, while “5189 Hospital Road” has “800” speed available.

information of their available broadband speed. Categorizing all healthcare locations that lack data as presumptively underserved results in an overly inclusive eligibility and need list, which will result in diverting available funds to many locations that do not actually need BEAD support, as well as excessive administrative burden and delays from reviewing many legitimate challenges.

### *c. Recommendation*

The Appendix 4 list of healthcare CAIs should be refined to eliminate locations that are the least situated to facilitate greater use of broadband services by vulnerable populations and the least likely to need BEAD funds. A metric such as net patient revenue (“NPR”) can be useful in identifying the largest and wealthiest hospitals that do not align with the IJA definition and purpose of the BEAD program and that are able to invest in broadband infrastructure to meet their own needs. NPR is an aggregate of all the money that a hospital generates from patient services and indicates a healthcare organization’s financial strength.<sup>8</sup> The California Department of Health Care Access and Information (“HCAI”) publishes annual spreadsheets with hospital facilities-level data.<sup>9</sup> In the 2022 CY Hospital Annual Selected File,<sup>10</sup> column CX provides NPR data for California hospitals. CommLegal recommends that the Commission staff review such information and remove from Appendix 4 hospitals with annual NPR above a certain limit, perhaps \$1 billion. Among the hospitals identified by the HCAI as having over \$1 billion in NPR and which are also included in Appendix 4 are the following:

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<sup>8</sup> <https://www.definitivehc.com/resources/glossary/net-patient-revenue#>; <https://hcai.ca.gov/visualizations/net-patient-revenue-discharges-and-outpatient-visits-by-payer-and-facility/#why-publish-net-patient-revenues-discharges-and-outpatient-visits>.

<sup>9</sup> [https://data.chhs.ca.gov/dataset/hospital-annual-financial-data-selected-data-pivot-tables/resource/28df017b-7693-4d83-b105-69eeca4a12e0?view\\_id=59f37a88-1886-45a1-b74a-79effcd8a852](https://data.chhs.ca.gov/dataset/hospital-annual-financial-data-selected-data-pivot-tables/resource/28df017b-7693-4d83-b105-69eeca4a12e0?view_id=59f37a88-1886-45a1-b74a-79effcd8a852).

<sup>10</sup> <https://data.chhs.ca.gov/dataset/ea0c8ca9-023e-46a3-b95b-b9d4ab8ec195/resource/28df017b-7693-4d83-b105-69eeca4a12e0/download/hadr-22.xlsx>.

<u>Facility Name</u>	<u>Net Patient Revenue</u>
UCSF MEDICAL CENTER	- \$5.021 Billion
CEDARS-SINAI MEDICAL CENTER	- \$3.751 Billion
UC SAN DIEGO MEDICAL CENTER	- \$3.123 Billion
RONALD REAGAN UCLA MEDICAL CENTER	- \$2.305 Billion
LAC/USC MEDICAL CENTER	- \$1.627 Billion
KECK HOSPITAL OF USC	- \$1.395 Billion
LOMA LINDA UNIVERSITY MEDICAL CENTER	- \$1.389 Billion
SUTTER MEDICAL CENTER – SACRAMENTO	- \$1.359 Billion
LAC/HARBOR - UCLA MEDICAL CENTER	- \$1.302 Billion
KAISER FOUNDATION HOSPITAL - SANTA CLARA	- \$1.233 Billion

Many organizations have numerous affiliated hospitals separately listed in Appendix 4 that have large NPRs, but which individually are under the \$1 billion annual threshold, including Kaiser, Sutter, and private and public universities. Because of the pool of resources available to these affiliated hospitals through their parent organizations, it may be reasonable to remove them from the eligibility list as well.

In considering additional screening criteria, such as NPR, to refine the list of eligible CAIs, the Commission Staff should be careful not to remove lower-resourced health clinics and smaller hospitals that are truly independent from larger organizations. Such neighborhood healthcare facilities are often located in low-income communities and face the same barriers to affordable high-speed broadband as residents of those communities. The location of such health facilities allows them to share broadband connections with the neighboring community, and their smaller budgets and revenues evidence a greater need for BEAD funds, making them ideal targets for BEAD projects.

## **2. Section 5 - Challenge Process (Volume I, Requirement 7)**

### ***a. DSL and LFW Modifications***

The BEAD Initial Proposal, Vol. I includes a proposed challenge process for development of the map under which BEAD grants will be evaluated and awarded by the



California Public Utility Commission.<sup>11</sup> Vol. I includes proposed modifications to the National Broadband Map (“NBM”), which provides a basis for the challenge process, such as treating NBM locations with “served” level broadband provided by DSL as “underserved” and treating NBM locations with “underserved” level broadband provided by DSL as “unserved.”<sup>12</sup> As Vol. I explains, lowering the status of locations with DSL-provided broadband “will facilitate the phase-out of legacy copper facilities and ensure the delivery of ‘future-proof’ broadband service.”<sup>13</sup> Similarly, Vol. I proposes to modify the status of locations with “underserved” levels of broadband provided by Licensed Fixed Wireless (“LFW”) at or below 30/5 Mbps speeds to “unserved” status. LFW speeds vary significantly based on environmental and network conditions, so there is a “decreasing [] likelihood that service delivered to consumers will meet the claimed thresholds, especially in future years as network utilization increases.”<sup>14</sup>

CommLegal supports these proposed modifications. BEAD eligibility criteria should be forward-looking to ensure that projects deploy sufficient broadband service to meet today’s standards, while also allowing upgrades in areas where future investment is clearly needed. DSL especially, but LFW as well, is not a future-proof technology and cannot efficiently scale up. These technologies tend to only remain in use where ISPs are reluctant to develop their infrastructure – often in lower-income markets where higher-speed, higher-cost service plans may not sell well. The lack of broadband investment in these “digital redlining” areas contributes to disparate access to economic opportunities and services, which further perpetuates the financial hardships of residents. In order to accelerate the equitable access of broadband

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<sup>11</sup> Vol. I at 8.

<sup>12</sup> *Id.*

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

<sup>14</sup> *Id.* at 10.

deployment, Vol. I appropriately includes modifications that will allow BEAD projects to target these border-line locations.

## ***b. Challenge Types***

### **i. Availability**

Vol. I describes the “Availability” challenge type as “The broadband service identified is not offered at the location, including a unit of a multiple dwelling unit (MDU).”<sup>15</sup> The proposal lists examples of relevant supporting evidence that demonstrates what services are technically and physically available at the location. However, the “Availability” challenge does not include any criteria for whether the required broadband service is *economically* available, as in whether it is affordable. Economic availability is as much a real barrier as technical or physical availability because if a household cannot afford the service, the end result is the same as if the service were not offered at all. Therefore, challengers should be able to bring an “Availability” challenge by demonstrating that there is no affordable 100/20 Mbps service for residences or affordable 1 Gbps symmetrical service for Community Anchor Institutions.

Major ISPs offer “affordable” internet plans at around \$30 per month for 100 Mbps download speed so that with the Affordable Connectivity Program (“ACP”) subsidy, the net cost is essentially free.<sup>16</sup> Commission staff should consider setting the threshold for affordable 100/20 Mbps service at \$30/month. Major ISPs also offer 1 Gbps symmetrical service for \$80/month.<sup>17</sup> Commission staff should consider setting the threshold for affordable 1 Gbps symmetrical

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<sup>15</sup> Vol. I at 15.

<sup>16</sup> Xfinity Internet Essentials Plus - \$29.95/month for 100/10 Mbps

<https://www.xfinity.com/support/articles/comcast-broadband-opportunity-program>;

AT&T - 100 Mbps (upload not specified) for \$30/month <https://www.att.com/affordable-connectivity-program/>;

See also <https://www.cpuc.ca.gov/industries-and-topics/internet-and-phone/california-low-cost-internet-plans>

<sup>17</sup> AT&T Internet 1000 service - \$80/mo <https://www.att.com/local/fiber/california/san-francisco>; Xfinity Gigabit - \$80/month <https://www.highspeedinternet.com/providers/comcast/internet>.

service at \$80/month. Acceptable evidence of a lack of affordable plans should include screenshots of the provider’s webpage showing that prices in the challenger’s area are above the affordable threshold or copies of customer bills for the requisite service speed showing costs exceeding the threshold.

Including a consideration of economic availability in determining eligibility for BEAD projects will support the deployment of affordable internet where low-income households cannot currently access it.

Vol. I at 15:

The broadband service identified is not offered at the location, including a unit of a multiple dwelling unit (MDU). Or the broadband service identified is not offered at an affordable price (i.e., \$30/month for 100/20 Mbps or \$80/month for 1 Gbps symmetrical service).

## **ii. Speed – Hardware Requirements**

Vol. I describes the “Speed” challenge type as “The actual speed of the service tier falls below the unserved or underserved thresholds.”<sup>18</sup> Challenges must include three speed test measurements taken on different days. Among the acceptable forms of speed tests, Vol. I includes those “performed on a laptop or desktop computer within immediate proximity of the residential gateway.”<sup>19</sup>

While speed tests are very useful in evaluating the service being provided at a location, the recorded results are subject to a number of factors other than just service quality. The capabilities of the networking hardware involved, which can include the modem (for cable/DSL), router, gateway (combined modem/router), and network interface controller/card (“NIC”) on the computer, will all factor into the speed ultimately measured by the computer. Variations in the

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<sup>18</sup> Vol. I at 16.

<sup>19</sup> *Id.* at 21.

standards and protocols built into such hardware can significantly impact measured internet speed.

For example, cable internet service providers like Comcast/Xfinity, Charter, and Cox use cable modems with the DOCSIS (Data Over Cable Service Interface Specifications) standard. Older DOCSIS standards like 2.0 only support up to a theoretical maximum download of 40 Mbit/s.<sup>20</sup> These are generally no longer in use, but if such a modem were being used, it would result in very limited speeds. More modern cable modems with DOCSIS 3.0 can support a wide range of theoretical max download speeds from 170 Mbit/s up to 1.4 Gbit/s, depending on the number of channels they have.<sup>21</sup> As these speeds are only theoretical, real-world speeds are typically between 50 Mbit/s to 800 Mbit/s.

Additionally, wi-fi standards (denoted by Wi-Fi # or 802.11-- ) for routers and NICs have tremendous differences in capability. Wi-Fi 6 (802.11ax) supports a wide range of theoretical max download speeds between 574 and 9608 Mbit/s, versus Wi-Fi 5 (802.11ac) that supports 433 to 6933 Mbit/s, and Wi-Fi 4 (802.11n) that supports 72 to 600 Mbit/s.<sup>22</sup> Aside from speed capacity, Wi-Fi 5, Wave 2 introduced Multi-User, Multiple Input Multiple Output (MU-MIMO) technology.<sup>23</sup> Prior wi-fi technology was able to switch between many devices very quickly, simulating multiple devices being connected at once, but it was not able to actually serve more than one device at a time. MU-MIMO is able to send multiple data streams to multiple devices simultaneously, “increasing the total throughput and capacity of the WLAN [Wireless Local

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<sup>20</sup> <https://en.wikipedia.org/wiki/DOCSIS>.

<sup>21</sup> <https://www.howtogeek.com/889272/what-are-cable-modem-channels-and-how-many-do-i-need/>;  
<https://us.hitrontech.com/learn/cable-modems-explained-upstream-and-downstream-channels-the-benefits/>.

<sup>22</sup> [https://en.wikipedia.org/wiki/IEEE\\_802.11](https://en.wikipedia.org/wiki/IEEE_802.11).

<sup>23</sup> Qualcomm Atheros, Inc., *802.11ac MU-MIMO: Bridging the MIMO Gap in Wi-Fi*, (January 2015) at 4 (available at <https://www.qualcomm.com/media/documents/files/802-11ac-mu-mimo-bridging-the-mimo-gap-in-wi-fi.pdf>).

Area Network or Wi-Fi] system.”<sup>24</sup> This means that the number of wi-fi devices in use will heavily impact speed tests on routers and gateways using older wi-fi standards.

Although it is important to consider the specifications of all hardware components when evaluating speed tests, it is also essential to avoid placing an undue burden on customers to prove that they are not receiving appropriate speeds. Customers should not be required to be IT experts, and typically those who are currently underserved with broadband service would have had little reason or opportunity to become familiar with the nuances of networking technology.

Therefore, in order to balance accurate speed testing with appropriate reporting requirements, CommLegal recommends that speed tests be performed on a computer that is hardwired with an ethernet cable directly to the modem. Using a direct ethernet connection avoids the complexities of evaluating router and wi-fi protocols, and even long-outdated ethernet hardware that may still be in use is likely capable of 100 Mbit/s speeds.<sup>25</sup> Only if a challenger affirms that they are unable to directly connect their computer to the modem with an ethernet cable should they be allowed to submit tests conducted over wi-fi, with the computer in the immediate proximity of the router or gateway. Challengers should also state the wi-fi protocol of their router and the wi-fi card on their computer, to ensure their hardware is capable of the required speeds. If challengers are not able to determine the wi-fi protocol of their devices, they should at least provide the make and model of their router/gateway and computer so that staff can look up the standard wi-fi protocol of those devices. Finally, challengers should also be required to affirm that no other devices were utilizing the network at the time the test was

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<sup>24</sup> Qualcomm Atheros, Inc., *802.11ac MU-MIMO: Bridging the MIMO Gap in Wi-Fi*, (January 2015) at 6 (available at <https://www.qualcomm.com/media/documents/files/802-11ac-mu-mimo-bridging-the-mimo-gap-in-wi-fi.pdf>).

<sup>25</sup> “Fast Ethernet” 100Base-TX (802.3u) has been in use since 1995 and supports 100 Mbit/s speeds. [https://en.wikipedia.org/wiki/Fast\\_Ethernet](https://en.wikipedia.org/wiki/Fast_Ethernet).

conducted, as simultaneous downloads can impact speed results dramatically.<sup>26</sup> Requiring this basic information will increase the accuracy of challenges and reduce the administrative burden of evaluating improper tests.

### **iii. Speed – Internet Protocol Address Requirement**

Vol. I proposes to require challengers to submit, along with speed test measurements, “The provider-assigned internet protocol (IP) address, either version 4 or version 6, identifying the residential gateway conducting the test.”<sup>27</sup> It is not clear how this information is relevant to evaluating speed test results, and it may be difficult for many challengers to understand how to ascertain it. At the same time, ISPs may have this information in their system for customers already so that they can determine it based on the name and address of the challenger. CommLegal recommends not requiring IP address information from challengers.

### **iv. Speed – Test Results**

Vol. I proposes that, of the three required speed tests submitted by a challenger, only the median recorded result is used to trigger a speed-based challenge, for either the required download or upload speed.<sup>28</sup> As an example, the proposal states that a challenge with speed test results of 105/18, 102/26, and 98/17 Mbps would qualify because the media upload speed of 18 Mbps is below the 20 Mbps requirement.

A convenient challenge process that does not overly burden customers is essential to allow accurate identification of areas that are not receiving appropriate broadband service. This will help ensure that BEAD funds are directed toward the intended areas that need support.

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<sup>26</sup> “Smart devices” that utilize a network connection for remote access and use only a minimal amount of bandwidth should not need to be disconnected during the speed test.

<sup>27</sup> Vol. I at 21.

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

However, the speed test requirement already allows challengers to self-select from among the tests that they chose to run at any time of the day, under conditions that they only need to state are appropriate. Given how accommodating the testing conditions are, it would not be unreasonable to require that challengers at least provide speed test results that consistently demonstrate a problem. If a challenger cannot obtain three results on any days and any times that they chose that show either insufficient download or upload speeds, it is likely that they generally are receiving the required speeds. Therefore, CommLegal recommends that the group of three speed test results all be required to show below the required speed, either for download or for upload.

#### **v. Speed – Recommended Changes to Text**

Vol. I at 21:

4. A speed test performed on a laptop or desktop computer ~~within immediate proximity of the residential gateway,~~ using speedtest.net or other Ookla-powered front ends or M-Lab’s speed test services. The laptop or desktop computer must be directly connected to the modem or residential gateway with an ethernet cable. If the challengers affirm they are unable to directly connect their computer with an ethernet cable, the speed test may be performed on a laptop or desktop computer within immediate proximity of the router or residential gateway.

Each speed test measurement must include:

- The time and date the speed test was conducted
- ~~The provider assigned internet protocol (IP) address, either version 4 or version 6, identifying the residential gateway conducting the test~~
- If the speed test was conducted over wi-fi, indicate the wi-fi protocol in use by (1) the router or residential gateway and (2) the laptop or desktop computer (i.e. 802.11ac or 802.11n). Alternatively, if the challengers affirm they are unable to verify the wi-fi protocols, they must provide the make and model of (1) the router or residential gateway and (2) the laptop or desktop computer.
- A statement indicating that no other laptop, desktop, tablet, phone, or video/audio streaming devices were utilizing the network at the time the tests were conducted. “Smart devices” that utilize a network connection for remote access and use only a minimal about of bandwidth do not need to be disconnected during the speed test.

Each location must conduct three speed tests on three different days; the days do not have to be adjacent. ~~The median of the three tests (i.e., the second highest (or lowest) speed) is used~~ All three tests must show below the required speed to trigger a speed-based (S) challenge, for either upload or download. For example, if a location claims a broadband speed of 100 Mbps/25 Mbps and the three speed tests result in download speed measurements of 105, 102 and 98 Mbps, and three upload speed measurements of 18, ~~26~~ 19 and 17 Mbps, the speed tests qualify the location for a challenge, since the three measured upload speeds s marks the location as underserved.

#### vi. Speed – Clarification

Vol. I states that “Since speed tests can only be used to change the status of locations from ‘served’ to ‘underserved’, only speed tests of subscribers that subscribe to tiers at 100/20 Mbps and above are considered.”<sup>29</sup> However, Vol. I gives an example of a provider rebutting a “unserved” speed test challenge, by showing that 80% of locations have at least 20/2.4 Mbps, meeting the 80% requirement for the 25/3 Mbps “unserved” threshold.<sup>30</sup>

It is unclear why speed tests would only be admissible to change the status of a location from “served” to “underserved” by demonstrating below 100/20 Mbps speed, but not from “underserved” to “unserved” by demonstrating below 25/3 Mbps speed. This is also inconsistent with the example showing how to rebut a speed test challenge of the “underserved” to “unserved” speed requirement. Perhaps the initial language only meant to indicate that if a speed test is being used to change the “served” to “underserved,” those challengers would need to be subscribed to sufficient service tier. CommLegal suggests the following revision to the text:

Vol. I at 21:

Subscribers submitting a speed test must indicate the speed tier they are subscribing to. ~~Since~~ For speed tests ~~can only be~~ being used to change the status of locations from “served” to “underserved”, only speed tests of subscribers that subscribe to tiers at 100/20 Mbps and above are considered. If the household subscribes to a speed tier of 100/20

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<sup>29</sup> Vol. I at 21.

<sup>30</sup> *Id.* at 21-22.



Mbps or higher and the speed test yields a speed below 100/20 Mbps, this service offering will not count towards the location being considered served. However, even if a particular service offering is not meeting the speed threshold, the eligibility status of the location may not change. For example, if a location is served by 100 Mbps licensed fixed wireless and 500 Mbps fiber, conducting a speed test on the fixed wireless network that shows an effective speed of 70 Mbps does not change the status of the location from served to underserved.

## **B. VOLUME II**

### **1. Section 5 - Deployment Subgrantee Selection (Volume II, Requirement 8)**

#### *a. Section 5.3.2 – Scoring Criteria*

In Vol. II, Commission Staff proposes to make available a total of 100 points both for Priority Broadband Projects, which will deploy end-to-end fiber, and for Other Last-Mile Broadband Deployment Projects.<sup>31</sup> As Vol. II notes, the three primary criteria, affordability, labor standards, and minimal BEAD outlay, must together account for 75 percent of the available points,<sup>32</sup> while secondary criteria and additional prioritization factors will account for the rest of the available 25 percent.<sup>33</sup>

#### **i. Primary Criteria**

Regarding the primary criteria, CommLegal supports Vol. II's distribution of the points available, i.e., 40 points for affordability, 20 points for labor standards, and 15 points for minimal BEAD outlay.<sup>34</sup> As we stated in opening comments on the OIR, we strongly support affordability being one of the primary criteria because public broadband funding programs should prioritize projects that will provide affordable broadband to low-income, rural, and hard-

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<sup>31</sup> Vol. II at 33.

<sup>32</sup> *Id.* at 31 (citing BEAD NOFO, Section IV.B.6.b, page 43), 33.

<sup>33</sup> *Id.* at 33.

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

to-reach areas, where broadband providers have less financial incentive to deploy broadband.<sup>35</sup>

In order for the public to benefit from the BEAD-funded construction of broadband infrastructure, residents must be able to afford the service plans offered.<sup>36</sup> As indicated by the point distribution scheme, this is the most important factor in selecting between competing applications, and CommLegal agrees. In opening comments on the OIR, CommLegal also supported (1) fair labor practices being a primary criterion because this will help ensure both that subgrantees carry out the funded activities in a lawful manner and that a stable supply of skilled workers is available<sup>37</sup> and (2) minimal BEAD program outlay being a primary criterion because (a) fewer BEAD funds expended per location helps expand the reach of the limited BEAD funding and (b) subgrantees, that are financially able, will have some “skin in the game,” which makes them more likely to spend the funds prudently.<sup>38</sup>

Regarding the primary criterion of Minimal BEAD Program Outlay, Vol. II proposes to award up to 15 points in the following manner:

Applicants will be 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.<sup>39</sup>

The BEAD NOFO describes the requirements for this criterion as follows:

***Minimal BEAD Program Outlay.*** 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

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<sup>35</sup> April 17, 2023 *Opening Comments of Community Legal Services on the Order Instituting Rulemaking Proceeding to Consider Rules to Implement the Broadband Equity, Access, and Deployment Program* (“CommLegal Opening Comments on the OIR”) at 5.

<sup>36</sup> CommLegal Opening Comments on the OIR at 5.

<sup>37</sup> *Id.* at 6 (citing BEAD NOFO at 56).

<sup>38</sup> *Id.* at 4-5.

<sup>39</sup> Vol. II at 32.

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.<sup>40</sup>

The proposed scoring method does not meet the BEAD NOFO requirements. Although Vol. II purports to base the score on both the grant amount requested and the amount of matching funds provided, the grant amount is not actually factored into the proposed scoring method. Indiana's draft proposal offers a good model for California to follow for this criterion:

Scoring: The [Indiana Broadband Office] will calculate the BEAD program outlay per broadband serviceable location for each project area. The most cost-efficient application for each project area will receive a full 50 points under this section. All other applications will receive a percentage of the total points available based on their relative distance from the most cost-efficient proposal.<sup>41</sup>

CommLegal suggests that the Commission offer a total of 15 points for this criterion, as proposed in Vol. II, but that the points be awarded as follows:

The Commission will calculate the BEAD program outlay per broadband serviceable location for each project area. The most cost-efficient application for each project area will receive 10 points. All other applications will receive a percentage of the 10 points available based on their relative distance from the most cost-efficient proposal. In addition, Applicants will receive 3 points for meeting the 25 percent match requirement, 4 points for a 26%-49% match, and 5 points for a 50% or greater match.<sup>42</sup>

This division of points offered will ensure that the BEAD NOFO requirements are met as to this criterion and will also reward Applicants that are able to contribute a higher percentage of matching funds.

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<sup>40</sup> BEAD NOFO at 43, 44-45 (*emphasis added*).

<sup>41</sup> Draft of Indiana Initial Proposal Vol. II at § 2.4.2 (accessed at <https://www.in.gov/indianabroadband/grants/bead/>).

<sup>42</sup> The suggested changes to Vol. II are set out in Attachment A to these comments.

## ii. Secondary Criteria

In selecting among Other Last-Mile Broadband Deployment Projects only, the Commission is required to give some weight to “the speeds, latency, and other technical capabilities of the technologies proposed.”<sup>43</sup> To fulfill this requirement, Vol. II proposes the following:

For Other Last-Mile Broadband Deployment Projects only, applicants will be awarded a total of 4 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, 1 point will be deducted from the 4-point maximum.<sup>44</sup>

The BEAD NOFO describes the requirements for this criterion as follows:

***Speed of Network and Other Technical Capabilities.*** Eligible Entities must weigh the *speeds, latency, and other technical capabilities* of the technologies proposed by prospective subgrantees seeking to deploy projects that are not Priority Broadband Projects. Applications proposing to use technologies that exhibit *greater ease of scalability* with lower future investment (as defined by the Eligible Entity) and *whose capital assets have longer useable lives* should be *afforded additional weight* over those proposing technologies with higher costs to upgrade and shorter capital asset cycles.<sup>45</sup>

Since the proposed scoring scheme for this criterion only weighs downstream speed, it does not meet the BEAD NOFO requirements. New Jersey’s draft proposal offers a good model for California to follow for this criterion:

Non-fiber applications will be awarded up to 5 points based on certified speed and latency performance commitments, as well as on length of useful life of the proposed infrastructure and future scalability (as described in the table below)

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<sup>43</sup> BEAD NOFO at 45.

<sup>44</sup> Vol. II at 32.

<sup>45</sup> BEAD NOFO at 45 (*emphasis added*).

<b>Minimum downstream / upstream speed (Mbps)</b>	<b>Maximum latency (milliseconds)</b>	<b>Points awarded</b>
1000/250	100	4
400/100	100	3
200/50	100	2
100/20	100	1

Non-fiber applicants will also be awarded 1 additional point if they certify a useful network life of 10+ years.<sup>46</sup>

CommLegal suggests that the Commission offer a total of 4 points for this criterion, as proposed in Vol. II, but that the points be awarded as follows:

Non-fiber applications will be awarded up to 4 points based on certified speed and latency performance commitments, as well as on length of useful life of the proposed infrastructure and future scalability (as described in the table below)

Minimum downstream / upstream speed (Mbps)	Maximum latency (milliseconds)	Points awarded
1000/250	100	3
400/100	100	2
200/50	100	1
100/20	100	.5

Non-fiber applicants will also be awarded 1 additional point if they certify a useful network life of 10+ years.<sup>47</sup>

This division of points offered will ensure that the BEAD NOFO requirements are met as to this criterion while keeping the point scheme the same as suggested in Vol. II.

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<sup>46</sup> Draft of New Jersey Initial Proposal Vol. II at 24-25 (accessed at <https://www.nj.gov/connect/documents/bead/Initial%20Proposal%20Volume%202.pdf>).

<sup>47</sup> The suggested changes to Vol. II are set out in Attachment A to these comments.

### iii. Additional Prioritization Factors

The scoring criteria section (§ 5.3.2) of Vol. II suggests only two additional prioritization factors, equity and resilience, for both Priority and Other Last-Mile Projects.<sup>48</sup> This does not harmonize with language provided earlier in the same section (§ 5) of Vol. II. Regarding principles of the deployment subgrantee selection process, section 5.1.1 of Vol. II states,

Openness is crucial to ensure the best outcomes for unserved and underserved communities and will involve a range of strategies:

. . . .

2. *Scoring criteria that reward open access* and open competition on the funded network[.]<sup>49</sup>

This language is consistent with the “NTIA *encourag[ing]* 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.”<sup>50</sup> CommLegal continues<sup>51</sup> to support open access being an additional prioritization factor for both Priority and Other Last-Mile Projects because publicly subsidized infrastructure should be used for public benefits. More choices for consumers as to options and prices and the potential ability for consumers to change providers are among the public benefits to having open access last-mile infrastructure. CommLegal recommends that the Commission add open access as an additional prioritization factor for both Priority and Other Last-Mile Projects by making the following changes to page 32 of Vol. II:<sup>52</sup>

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<sup>48</sup> Vol. II at 32, 33.

<sup>49</sup> *Id.* at 17 (*emphasis added*).

<sup>50</sup> BEAD NOFO at 46 (*emphasis added*).

<sup>51</sup> CommLegal Opening Comments on the OIR at 8.

<sup>52</sup> These suggested changes, plus suggested changes to the Scoring Rubric chart on page 33 of Vol. II, are also set out in Attachment A to these comments.

**Equity: ~~10~~ 8 points**

As an additional prioritization factor for both Priority Broadband Projects and Other Last-Mile Broadband Deployment Projects, applicants will receive up to ~~10~~ 8 points for the number of locations they propose to serve that are located in a disadvantaged<sup>53</sup> or low-income community.<sup>54</sup> ~~One~~ Eight-tenths (.8) of a point will be awarded per 10 percent (rounded down) of the locations in a proposed project that are located in a disadvantaged or low-income community, for a total of ~~10~~ 8 points.

**Resilience: ~~10~~ 8 points**

As an additional prioritization factor for both Priority Broadband Projects and Other Last-Mile Broadband Deployment Projects, applicants will receive up to ~~10~~ 8 points for the number of locations located in a Tier 2 or Tier 3 High-Fire Threat District. ~~One~~ Eight-tenths (.8) of a point will be awarded per 10 percent (rounded down) of locations in a Tier 2 or Tier 3 High-Fire Threat District, for a total of ~~10~~ 8 points.

**Open Access: 4 points**

As an additional prioritization factor for both Priority Broadband Projects and Other Last-Mile Broadband Deployment Projects, applicants will receive 4 points for projects that will offer open access wholesale last-mile broadband service for the life of the subsidized network(s), on fair, equal, and neutral terms to all potential retail providers.

Adding points that promote open access will harmonize the language in Vol. II, be consistent with NTIA’s vision for the BEAD Program, and help ensure that public funds are used for public benefits.

**2. Clarifications and Typographical and Other Suggested Corrections**

In addition to the proposed edits explained above, CommLegal suggests clarifications and typographical and other corrections to the following pages of Vol. II: 6, 10, 11, 13, 14, 15, 16,

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<sup>53</sup> [Provide definition of “disadvantaged.”]

<sup>54</sup> [Provide definition of “low-income community.”]

18, 20, 21, 22, 23, 24, 32, 33, 37, 40, 41, 42, 62, 112, 190, 200, 203, and 204. These suggested edits are set out in Attachment A to these comments.

### **III. CONCLUSION**

CommLegal appreciates the opportunity to provide comments in this proceeding and looks forward to continued participation in the development of rules for the BEAD program in California.

November 27, 2023

Respectfully Submitted,

/s/ Brycie Loepf

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COMMUNITY LEGAL SERVICES