

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

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

Rulemaking 23-02-016
(Filed February 23, 2023)

**OPENING COMMENTS OF RURAL COUNTY REPRESENTATIVES OF
CALIFORNIA TO ADMINISTRATIVE LAW JUDGE'S RULING ISSUING STAFF
PROPOSAL**

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Dated: November 27, 2023

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I. Introduction

In accordance with Rule 6.2 of the California Public Utilities Commission (“CPUC” or “Commission”) Rules of Practice and Procedure (“Rules”), the Rural County Representatives of California (“RCRC”) submits opening comments to the *Administrative Law Judge’s Ruling Issuing Staff Proposal*, issued on November 7, 2023. RCRC was granted party by ALJ Thomas J. Glegola via an email ruling on August 31, 2023. RCRC is an association of forty rural California counties, and its Board of Directors is comprised of one elected supervisor from each of those member counties.

II. Discussion

A. Volume 1 (Requirements 3, 5-7), “Challenge Process”

1. Unserved and Underserved Locations

RCRC supports the Initial Proposal’s modifications to the National Broadband Map making locations served by DSL either “unserved” or “underserved” based on the speed of reported service.¹ RCRC would also support the CPUC being more rigorous in the application of this modification, and

¹ Page 8.

suggests the Commission consider making all locations served with DSL, regardless of speed of service, treated as “unserved.” AT&T has proposed to relinquish DSL service to all but 1,482 customers through an Application² currently pending with the CPUC, leaving more than 580,000 locations, in mostly rural areas of the state, potentially without internet service. All DSL infrastructure is antiquated and replacing with future proof technology should be a prioritized.

Additionally, RCRC supports the proposed speed test modifications³ that address the fluctuating speeds of wireless technology and will leverage existing data and accounts for more precise measurements of specific locations.

2. Community Anchor Institutions

To create consistency with the Digital Equity Act and California’s Five-Year Action Plan, references to “vulnerable populations” in the context of “community anchor institutions,” (CAIs), as well as throughout Volumes 1 and 2, should instead be referenced as “covered populations.” Furthermore, Appendix 4 should be modified to add county and city government centers to the list of CAIs. (Such facilities feat neatly under the "community support organization" category.⁴)

Moreover, CAIs should include county information in identifying those locations. This would enable smaller counties—some of which have no incorporated cities—to better determine whether it accurately captures qualifying institutions. Errors were found in Alpine County, for example, where a library and Sheriff substation in Bear Valley were omitted, but certain CAIs in or near Markleeville and Woodfords were duplicated. Given the sheer volume of information across Appendices 1-5, RCRC cannot accurately determine the veracity and completeness of each location contained in Appendix 2 (Unserved Locations), Appendix 3 (Underserved Locations), and Appendix 4 (Community Anchor Institutions) for our 40 member counties. While we understand this data informed the staff proposal and is a useful reference, RCRC cautions the CPUC from over relying on this data as an exhaustive list, and instead ensure that a facility that meets the Initial Proposal’s definition of a CAI be eligible for its connectivity needs.

3. Challenge Process

² A. 23-03-003.

³ Page 9.

⁴ Page 6.

RCRC appreciates the Commission's desire to engage with stakeholders, such as local and tribal governments, during the challenge process. However, limiting permissible challengers solely to nonprofit organizations, local government entities, tribal nations, and service providers unfairly disenfranchises businesses and individuals from putting forward credible objections, and places untenable burdens on nonprofits and local and tribal governments to serve as clearinghouses for individual objections.⁵

We strongly encourage the CPUC to proactively engage with stakeholders prior to negotiating with applicants and determining outcomes. This is especially important not only due to staffing constraints and limited resources of local public entities, but also due to the explicit absence for Internet Service Providers (ISPs) to collaborate with municipalities during the development of the application. For these reasons, RCRC supports the Initial Proposal's grounds for permissible challenges. More specifically, RCRC strongly supports the "planned service" challenge type that requires confirmation from the local government that all needed local permits are pending or have been issued.⁶ Additionally, the Initial Proposal's "area and MDU" provisions reversing the burden of proof for certain challenges is an appropriate solution that will have meaningful outcomes.

B. Volume 2 (Requirements 1, 2, 4, 8-19), "Subgrantee Selection Process"

1. Scoring Methodology

As an initial matter, RCRC strongly supports the federal framework that prioritizes end-to-end fiber infrastructure. The Commission should be commended for how it approaches the Extremely High Cost Per Location Threshold before funding alternative technologies, as well as scoring criteria that rewards open access, and for explicit considerations of affordability.

However, the requirement for entities to have provided a voice, broadband, and/or electric transmission or distribution service for at least two consecutive years⁷ should be removed from the scoping methodology. While this provision is likely intended to avoid nascent applicants from defaulting on their obligations, as evidenced by the FCC's Notice of Apparent Liability for the Phase 1 Rural Digital Opportunity Fund (RDOF) Auction, it will have severe negative impacts on public, tribal and non-profit applicants, the vast majority of whom are new entrants – and indeed may effectively prevent those entities from accessing BEAD funding.

⁵ Pages 12-21.

⁶ Page 18.

⁷ See Section 5.3 *Operational capability*, page 27.

2. *Project Area Design*

RCRC supports the Initial Proposal’s project area design pathway that allows applicants to designate project areas, using the minimum geographic unit of Census Block Group.⁸ This allows the applicant to take into consideration factors necessary to create a successful project, e.g., eligible locations for funding, estimated take-rate, and other financial factors that ensure the long-term operation of the network is sustainable. Also, as correctly referenced in the Initial Proposal, this project design structure acknowledges that local and tribal governments “are frequently best suited to determine the most economically viable grouping of locations into a single geographic unit for application.”⁹

The alternative of creating project areas based on established boundaries of tribal lands and school districts applies a misguided framework to broadband network design, preventing applicants from considering necessary business and network design factors accounted for in the “applicant design” framework alternative (discussed above).

Additionally, RCRC supports allowing the CPUC to negotiate with applicants for less than 100 percent location coverage within a project area, with the caveats that there should be some minimum percentage of coverage (e.g., 80%) – especially if the applicant designed the project area. Further, the CPUC is strongly urged to consult with and involve the applicable local government in the negotiation process.¹⁰ Allowing this flexibility will help make more viable projects in areas with lower populations and higher construction costs.

3. *Extremely High Cost Per Location Threshold (EHCPLT)*

The challenges of closing the digital divide in a rural and remote setting versus unserved and underserved urbanized, disadvantaged communities vary greatly. For this reason, the Extremely High Cost Per Location Threshold (EHCPLT) should account for the suitability of the proposed solution to ultimately serve an array of customers with the highest quality, future-proof infrastructure. To do so, the EHCPLT should be established once applications are received. This flexibility is needed to determine how best to maximize the limited resources available without placing artificial limits. Additionally, local governments should be closely involved in the negotiation phase of the process to ensure that the proposed project

⁸ Page 21.

⁹ Page 37.

¹⁰ Page 21-22

locations are those that are the most appropriate for the community, especially if multiple projects are proposed for one area.¹¹

4. Letter of Credit

RCRC supports revising the Letter of Credit provisions¹² to allow the maximum flexibility permitted under the recent NTIA waiver.¹³ In particular, since the CPUC has elsewhere indicated that BEAD funding will be provided on a reimbursement basis¹⁴, the CPUC should reduce the letter of credit requirement to 10% of the subaward, as allowed by NTIA. This is more consistent with the Federal Funding Account in which the Local and Tribal governments are exempt from the requirement to obtain a letter of credit, provided they can demonstrate administrative capability and expertise in financial administration; demonstrate relationships with financial advisors; in-house or contracted expertise in evaluating broadband infrastructure project feasibility; and demonstrate relationships with, and support from, experienced public or nonprofit broadband system operators.¹⁵

RCRC also supports involving BEAD applicants in the process of developing the “model letter of credit” – since awardees’ counsel will be required to issue a legal opinion regarding the effect of the letter, which they will not be able to do if the letter is improperly drafted.¹⁶

5. Qualifications

While we do not deny the criticality for subgrantees to demonstrate the necessary capabilities to utilize BEAD funds, the CPUC’s Initial Proposal should account for the inherent differences between incumbent service providers and public, non-profit, and tribal subgrantees when demonstrating the technical, managerial, and financial quantifications. Local governments, for instance, should be able to demonstrate its capabilities through its expertise with in-house or contracted expertise. Requiring direct employees of an organization to have a minimum of five years’ experience within the communications industry of broadband network design, construction, maintenance, and operations may disenfranchise many municipal and/or tribal and non-profit subgrantees.¹⁷

¹¹ Page 42-44.

¹² Page 45-46.

¹³ BEAD Letter of Credit Waiver, November 1, 2023, (<https://broadbandusa.ntia.gov/funding-programs/policies-waivers/BEAD-Letter-of-Credit-Waiver>).

¹⁴ Page 204.

¹⁵ D.22-04-055, Appendix A, Page A-18.

¹⁶ Page 45-46.

¹⁷ Pages 27, and 48-49.

Furthermore, the requirement for certification of a project application by an *independent* professional engineer should be removed. Similarly, the proposed requirement that participants "provide a legal opinion by an attorney licensed in California" attesting to certain matters, as set forth on Page 53 of Volume 2 (see also p. 28), is inappropriate, and should be replaced with a sworn certification by the participant's management addressing these items. The items in question (concerning the organization's awareness, qualifications and resources, and existing activities, etc.) are almost entirely matters of fact, not legal opinion, for which the attorney will be entirely reliant upon management – and any competent legal opinion will contain that qualification. If the goal is to bind the participant and hold them accountable for these representations, an attorney's "opinion" reciting these facts second-hand will not well achieve this. Moreover, the requested "opinion" would require disclosure of attorney-client confidences by the attorney that many lawyers may regard as potentially unethical. Smaller applicants, in particular tribes and nonprofits, who lack in-house counsel may be unable to find an attorney willing to provide such an "opinion." By contrast, a certification by organization management to each of these points, under penalty of perjury, would much more effectively hold the participant accountable, and would require no one to violate the ethical rules applicable to their profession.

Lastly, RCRC opposes the requirement to provide three years of financial statements.¹⁸ Initially, there appears to be a conflict between these financial statement provisions and those included on Page 46 ("prior fiscal year"), the latter of which is consistent with the BEAD Notice of Funding Opportunity (NOFO). The CPUC should limit this requirement to just the prior fiscal year, to avoid excluding new entrants – particularly newly formed public and tribal entities.

RCRC further proposes alternative means of satisfying the financial statement requirement for public and tribal entities, similar to those included in other grant programs administered by the CPUC (e.g. the Loan Loss Reserve and Federal Funding Account programs). Municipalities have other methods for demonstrating fiscal stability and are themselves credit worthy entities. A local government going into bankruptcy is extremely rare, but large and small businesses fail regularly. Two of the most notable utilities to file bankruptcy recently include Frontier Communications (filed for Chapter 11 bankruptcy protection in 2020) and Pacific Gas and Electric (emerged from Chapter 11 bankruptcy in 2020). If a public or tribal entity applicant has been in existence for less than three years, financial statements for as long as applicant has been in existence, e.g. one or two years, should be acceptable. For newly formed

¹⁸ Pages 27, 222.

organizations, financial statements from the parent or sponsoring organization should also be submitted, including the relationship between those organizations.¹⁹

6. Affordability

RCRC wholeheartedly agrees with the CPUC to incorporate considerations of affordability into the BEAD program design and applauds the creation of the middle-class affordability plan. This holistic approach stands to reach—and benefit—a wide array of households who grapple with our high-cost state.

7. Reducing Costs

RCRC supports numerous cost-saving rules set forth in the Initial Proposal. Specifically, RCRC supports the creation of fast-track screening for environmental compliance and CPUC’s assistance for awardees to navigate the environmental and historic preservation review process.²⁰ RCRC also supports the proposal to provide “letter of information” to in-state community banks and credit unions to facilitate letters of credit and connect local and community banks with service areas overlapping eligible locations to local grant participants.”²¹

C. Comments on the October 26, 2023 Workshop

RCRC appreciates the inclusion of local government expertise at the October 26, 2023, workshop. RCRC fully concurs with the Commission’s observations that unless BEAD dollars are coordinated effectively, BEAD funding alone will not be sufficient to deploy broadband infrastructure to unserved and underserved locations.

III. Conclusion

RCRC seeks to ensure that public funding for broadband infrastructure is allocated in a manner that provides high-quality connectivity to all households in the state, prioritizing high-cost areas that require subsidization for deployment due to historic, pervasive underinvestment. For these reasons, it is imperative that BEAD closely integrate, to the extent possible per the federal NOFO, with analogous funding sources to deploy affordable, open-access, broadband infrastructure such as the Federal Funding

¹⁹ D.22-04-055, Appendix A, Page A-20.

²⁰ Page 142.

²¹ Page 142-143.

Account, Loan Loss Reserve Fund, and the California Advanced Services Fund Infrastructure Grant Account. We appreciate your consideration of our comments and the recommendations contained herein.

Respectfully submitted,

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