

## BEAD Initial Proposal Volume I, Public Comment

### Comments on Requirement 3 “Existing Broadband Funding”

BCAP commends PBDA for adopting the NTIA Model Challenge Process’s method for identifying and removing locations subject to existing enforceable commitments. Doing so will be critical to PBDA’s compliance with the requirement to not include as eligible BEAD locations any location that is already subject to an enforceable federal, state, or local commitment to deploy qualifying broadband as of the date that the challenge process is concluded. See BEAD NOFO at 36.

However, BCAP strongly cautions against the unnecessary step of using “Ookla and other publicly available speed test data” to validate upload and download speeds of existing enforceable commitments. As a threshold matter, conducting speed tests to validate existing enforceable commitments is impractical given that the vast majority of these networks are still under construction. Second, to the extent a network subject to an enforceable commitment has been constructed, its speeds will almost certainly have already been validated as part of its compliance with the existing grant agreement, so there is no need for PBDA to add an additional administrative process for duplicating this effort for BEAD purposes.

Third, and as described in more detail below, subscriber-conducted speed tests like Ookla are, in general, not designed in a manner that accurately measures the network performance delivered by the provider. In addition to suffering from methodological flaws, like the possibility of self-selection bias and/or improperly performed testing, speed and other third-party service-level data typically reflect highly variable differences in available throughput, which may vary based on factors beyond the control of the service provider. These factors include the level of service subscribed to by the customer; the number, age, and quality of devices (modems, routers, extenders, computers and laptops, smartphones, etc.) used to access the service; the amount of bandwidth used by such devices; and the wiring inside a customer’s home. See *generally* Commc’ns Marketplace Rep., 36 FCC Rcd. 2945, 3102 ¶ 280 n.796 (2020) (“Crowd-sourced data, however, often are not collected pursuant to statistical sampling techniques, and may require adjustments to construct a representative sample from the raw data. For instance, crowd-sourced mobile data come from a self-selected group of users, and there often is little control for most tests regarding such parameters as when people implement the test, whether the test is performed indoors or outdoors, the geographic location of the tester, and the vintage of the consumer’s device.”); *id.* ¶ 283 n. 810 (noting that the FCC is not reporting the results for certain tribal areas “because we have concerns with the reliability of the Ookla data for these areas.”).

In sum, PBDA is on a path for fully complying with Initial Proposal Requirement 3 without the unnecessary and burdensome addition of further speed tests, and such tests should be deleted from the Draft Proposal.

## Comments on Requirement 5 "Unserved and Underserved Locations"

BCAP respectfully urges PBDA to exercise its discretion to exclude optional speed test challenges from its challenge process. Acknowledging that speed test evidence often inaccurately measures network performance delivered, NTIA's guidance *explicitly* clarifies that accepting speed tests is optional. NTIA, *BEAD Model Challenge Process* 8, 18-20 (June 28, 2023), [https://www.ntia.gov/sites/default/files/publications/bead\\_model\\_challenge\\_process.zip](https://www.ntia.gov/sites/default/files/publications/bead_model_challenge_process.zip) ("NTIA Model Challenge Process"). Due to the inherent difficulty in ensuring that a speed test contains accurate, verifiable information, the FCC only uses speed test data as a *supplemental* source of information, not as the sole basis for a challenge to a provider's reporting of a location as served. For this reason, pursuant to NTIA's guidance, the use of speed tests requires the State to impose significant requirements in an attempt to ensure the sufficiency of a challenge. *Id.* at 18-20. Then, because speed test challenges cannot be submitted by an individual subscriber, they must be gathered and submitted by a different entity, such as a local government or nonprofit organization. See *id.* at 19. If speed test data that is gathered and submitted meets the above-mentioned requirements, a responding provider will then offer a countervailing speed test. After that, PBDA would have to evaluate all this evidence to make a final determination of the challenge. To be clear: these parameters are necessary to ensure the reliability of speed-test evidence; however, they illustrate the incredible complexity of allowing and fairly evaluating speed test challenges, and it would be overly complex and burdensome – for providers, subscribers, and PBDA reviewers – to ensure all of these requirements are met.

Fundamentally, accepting speed tests is also unnecessary to determine actual speeds offered to subscribers in the State, particularly for cable and fiber providers, because the FCC has already recently confirmed that "actual speeds experienced by the subscribers of most ISPs are close to or exceed the advertised speeds." FCC, *Twelfth Measuring Broadband America Fixed Broadband Report: A Report on Consumer Fixed Broadband Performance in the United States* 13 (Jan. 6, 2023), available at <https://data.fcc.gov/download/measuring-broadband-america/2022/2022-Fixed-Measuring-Broadband-America-Report.pdf>.

The report notes that cable and fiber technologies are distinguishable from other deployed Broadband technologies insofar as they provide "a high consistency of speed" for all subscribers. Moreover, unlike wireless or satellite technologies, they are not subject to variances associated with propagation characteristics or other factors. Thus, there should be no need to revisit the FCC's deployment data relative to "cable" or "fiber to the premises" technologies, and accepting challenges to the service status of locations receiving those technologies, without extraordinary justification, would impose substantial burdens on providers with no corresponding benefit to the accuracy of deployment data.

Thus, the FCC has already independently validated the fact that BCAP members, and other cable and fiber providers, consistently offer consumers actual speeds that meet or

even exceed advertised speeds. PBDA should therefore not permit the use of speed tests within its challenge process because such tests are unnecessary, at least for cable and fiber providers.

If PBDA does not eliminate consumer speed tests as a basis for a challenge, it should reproduce the actual text of the methodological requirements in the response to Text Box 1.4.6 to allow stakeholders to verify the details of the proposed challenge process. In addition, PBDA should permit providers to rely on speed test results from the FCC's Measuring Broadband America Reports as a source to rebut consumer speed test challenges. Clearly, though, the best approach is for PBDA to simply exclude the *optional* speed-test challenges.

### **Comments on Requirement 6 "Community Anchor Institutions"**

PBDA should clarify in the text of the Initial Proposal the full definition of CAI that the State will apply. The NTIA's Challenge Process Policy Notice requires that each State describe how it "applied the statutory definition of the term 'community anchor institution' and identified Eligible CAIs (i.e., 'a community anchor institution that lacks access to Gigabit-level broadband service')." See NTIA, *BEAD Challenge Process Policy Notice* 8-9 (June 28, 2023) ("NTIA Challenge Process Policy Notice"), [https://ntia.gov/sites/default/files/publications/bead\\_challenge\\_process\\_policy\\_notice\\_final.pdf](https://ntia.gov/sites/default/files/publications/bead_challenge_process_policy_notice_final.pdf). However, the Draft Proposal states only that the "initial evaluation of CAIs was based on the NTIA CAI definition," but it also cites PA Act 96 of 2021 for its definition of CAI. In doing so the State appears to be conflating the definitions of "community anchor institution" and of "Eligible CAI." See Initial Proposal at 3 (defining a CAI as "an entity that facilitates greater use of internet service by vulnerable populations ... and those that lack access to gigabit-level broadband service"). For accuracy, PBDA should simply adopt the federal statutory definition of CAI, and then clarify that "eligible CAIs" for BEAD Program purposes are limited to those currently lacking access to symmetrical gigabit connections.

PBDA should also explain the "Pennsylvania-specific considerations" that impacted its CAI determinations. BCAP has no objection to using "Tier One" and "Tier Two" classifications to "prioritize funding preference for [CAIs] of the greatest need." However, BCAP asks that PBDA clarify the definition of "community service organizations" in Tier One and specifically, include non-profit, community centers such as Boys and Girls Club, which directly interacts with and work to empower vulnerable youth populations.

### **Comments on Requirement 7 "Challenge Process"**

BCAP strongly supports PBDA's decision to decline to adopt the *optional* area and multiple dwelling unit ("MDU") challenge modules, which will avoid a burdensome and

ineffective mechanism for accurately identifying unserved and underserved locations and allow more time to focus on more reliable challenges.

BCAP urges PBDA to implement the full 120-day challenge process timeline suggested by NTIA, instead of the currently allotted 90 days for challenge submissions, rebuttals, and final determinations. This abbreviated 90-day timeframe will create two significant risks to BEAD program success. First, it will unreasonably overload PBDA and stakeholders with what will likely be a tremendous volume of challenge and rebuttal evidence to adjudicate. Second, and in turn, this unnecessary rush will substantially increase the risk that Pennsylvania's ultimate list of BEAD-eligible locations will be inaccurate, leaving some Pennsylvania households still without service while enabling BEAD funds to be used for unlawful and wasteful overbuilding.

To ensure that the challenge process is meaningful and effective, PBDA should: (1) establish a 30-day period before the initiation of the challenge submission window to allow providers to submit evidence of existing enforceable federal, state, and local broadband deployment commitments; (2) adopt, at a minimum, a 120-day challenge process period that consists of a 45-day challenge window, a 45-day rebuttal period, and a 30-day final determination phase; and (3) require local governments and nonprofits to conduct a pre-screening process to remove frivolous and/or incomplete challenges submitted by individuals.

*First*, PBDA should establish a 30-day period before the challenge process begins for providers to submit evidence of existing enforceable federal, state, and local broadband deployment commitments. Doing so will ensure that the State is not missing any existing commitments that are not yet identified on the latest maps or are otherwise unknown to the State and will serve as an additional failsafe to ensure that PBDA satisfies the requirement to not include any location that is already subject to an enforceable federal, state, or local commitment as of the date that the challenge process is concluded. See BEAD NOFO at 36.

*Second*, Pennsylvania should ensure that its challenge process provides sufficient time for challenge submissions and rebuttals. NTIA explicitly authorizes the State to “choose longer periods when determining the specific timeframes for the various components of the challenge process” particularly “*longer submission and rebuttal windows*, if possible.” NTIA Challenge Process Policy Notice at 20-21. Based on BCAP members’ experience with other broadband grant programs, providing 45-day periods each for challenge submissions and rebuttals is realistic and necessary, given that providers will need to comprehensively review and respond to the serviceability designations for every location in Pennsylvania. The Draft Proposal’s proposed 30-day timeframe is simply too brief and is considerably shorter than many existing state and federal broadband deployment programs. See, e.g., FCC, *How Providers Should Respond to Fixed Availability Challenges* (May 30, 2023) (affording providers 60 days to dispute a challenge in the FCC’s Broadband Data Collection process).

*Third*, PBDA should require that the submitting local government or nonprofit (i) screen challenges from the public to remove incomplete or frivolous challenges and (ii) confirm

that any such challenges are from residents of that locality or, in the case of a nonprofit, from members of the nonprofit or others with an established connection to the nonprofit. See NTIA Challenge Process Policy Notice at 16

## Comments on Volume I Public Comment

BCAP urges PBDA to exercise its explicit authority under NTIA’s guidance to treat locations that the National Broadband Map shows to have available qualifying broadband service (*i.e.*, a location that is “served”) delivered via DSL as “underserved” and, therefore, eligible for BEAD funding. (See NTIA BEAD Model Challenge Process at 8). The FCC has already determined that “DSL speeds lag far behind” the speed of other technologies. For example, in the *Twelfth Measuring Broadband America Report*, FCC data revealed that the weighted mean advertised download speed for DSL technology was just 24 Mbps, which “lagged considerably behind” the weighted advertised download speed of fiber technology at 510 Mbps. (See FCC, *Twelfth Measuring Broadband America Fixed Broadband Report*, at 11-13 (Jan. 6, 2023), <https://www.fcc.gov/reports-research/reports/measuring-broadband-america/measuring-fixed-broadband-twelfth-report> (“FCC MBA Report”)). The FCC also concluded that “DSL broadband ISPs . . . continue to advertise ‘up-to’ speeds that, on average, exceed the actual speeds experienced by their subscribers.” (*Id.* at 13).

PBDA’s proposed modification to NTIA’s BEAD Model Challenge Process is particularly necessary to ensure that the BEAD Program delivers Pennsylvania residents access to reliable broadband service. As NTIA has concluded, this modification will “better reflect the locations eligible for BEAD funding because it will facilitate the phase-out of legacy copper facilities and ensure the delivery of ‘future-proof’ broadband service.” (NTIA BEAD Model Challenge Process at 8). Indeed, NTIA’s recently updated Model Challenge Process further strengthens the justification for this modification, including a conclusion that *a state’s decision to treat all DSL locations as eligible for BEAD funding, “cannot be challenged or rebutted by the provider.”* (*Id.* (emphasis added)). Finally, adopting this modification would ensure that the PBDA aligns with the great majority of states that have released draft BEAD challenge processes and proposed to adopt this targeted modification. (For example, the State of Georgia’s recently released guidance not only includes the DSL modification, but it also adopts the conclusion that the designation *cannot* be challenged by a provider. See State of Georgia, Georgia Technology Authority, *BEAD Challenge Process* (Sept. 19, 2023), (<https://gta.georgia.gov/news/2023-09-19/georgia-bead-volume-1-initial-proposal-available-public-comment-through-october-18>)).

BCAP appreciates the opportunity to comment on the Draft Proposal and work with PBDA to help achieve the goal of bringing universal broadband connectivity to Pennsylvania. This funding is a once-in-a-generation opportunity. BCAP members look forward to partnering with the State to serve every Pennsylvanian with high-speed broadband. Pennsylvania’s broadband communications industry has the proven track

record of success, technical expertise, and experience to connect every community to digital opportunity, and remains committed to getting the job done. BCAP commends the State for a strong Draft Proposal, including the thoughtful and practical decision to decline to adopt optional area and MDU challenge modules. BCAP intends for the suggestions contained herein to help PBDA promote a “transparent, evidence-based, fair, and expeditious challenge process” and avoid the risk that BEAD funding is misdirected from Pennsylvanians who need broadband most. BEAD NOFO at 34.

## **Additional Comments on Volume I**

BCAP commends the PBDA for faithfully adopting NTIA’s guidance on examples of acceptable evidence for BEAD challenges and rebuttals in full. However, to promote the most accurate and expedient resolution of challenges, BCAP respectfully recommends several modest tweaks to the evidentiary standards regarding availability, planned service, and enforceable commitment challenges. These modest changes and clarifications will provide meaningful support to key stakeholders, allowing PBDA to set the State’s BEAD implementation on a path to success from day one.

Availability. BCAP cautions PBDA from considering evidence that is potentially too stale or superficial to credibly demonstrate that broadband service is unavailable at a particular location. For example, “[a] letter or email dated within the last 365 days that a provider failed to schedule a service installation or offer an installation date within 10 business days of a request” is too dated to sustain such a challenge. Draft Proposal at 8. Given the significant deployment projects underway, broadband service could have been established at that location in the last six months. Indeed, ISPs are required to provide updates to the FCC’s BDC Map every six months. Accordingly, for challenges to a location’s initial served status, the State should consider only those challenges supported by evidence from within the last six months. Similarly, PBDA should regard evidence that a provider failed to schedule a service installation or offer an installation date within 10 business days of a request to be insufficient, given the many legitimate reasons that could have prevented providers from doing so at the time the request was made.

ISPs rebutting availability challenges also should be permitted to submit other evidence, including:

- ISP’ diagrams or maps of their service areas indicating serviceability at the specific location;
- An attestation that the location identified is offered service at the specified minimum speeds and/or has the capability to reliably receive the relevant minimum speeds and latency within 10 business days of a request; or
- Evidence of a mailing to the area offering service at the requisite speeds. See NTIA Challenge Process Policy Notice at 17.

Moreover, PBDA should permit evidence confirming that the provider has provided service to a BSL at any time in the past (not limited to the previous 12 months), barring more recent evidence to the contrary. Once service is provided, the ability of an HFC network to serve a given location typically does not change year-over-year. Not only is the network where the network has always been, but an HFC network also does not have capacity constraints like other technologies such as fixed wireless.

Enforceable Commitment Challenges. PBDA also should accept as sufficient evidence a provider's (i) attestation regarding what service and maximum speeds would be provided by future broadband deployment in the grant area, and (ii) documentation evidencing the grant, service area, and build-to speeds required under the grant.

Planned Service Challenges. Providers rebutting planned service challenges should be able to provide evidence of a construction contract, franchise agreement, rights-of-way license, or pole attachment license for a planned build *without* evidence that all necessary permits have been applied for or obtained. Requiring permitting evidence would be overly burdensome for providers, who likely will be responding to challenges in multiple States simultaneously.

All Challenge Types. If additional detail is needed to evaluate a challenge, PBDA should ask challengers and/or providers for such information as part of a targeted follow-up process. In adjudicating a challenge, PBDA should consider all available evidence and data in making a determination as to whether a location is served, underserved, or unserved and issue a written explanation for its decision.