



May 5, 2023

Submitted via Email to BEAD@NTIA.gov

Hon. Alan Davidson
Assistant Secretary of Commerce for Communications and Information
Administrator
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Ave, NW
Washington, DC 20230

Re: Comments of the Schools, Health & Libraries Broadband (SHLB) Coalition in Response to NTIA’s Proposed BEAD Challenge Process Guidance

Dear Administrator Davidson:

The Schools, Health & Libraries Broadband Coalition (SHLB)¹ appreciates this opportunity to comment on NTIA’s proposed BEAD Challenge Process Guidance (Proposed Guidance).² We welcome NTIA’s efforts to provide additional guidance and a model framework to States, Territories, and Tribal entities (Eligible Entities) as they identify locations eligible for BEAD funding and implement a fair and transparent challenge process. While the Proposed Guidance is commendable, there are several areas that require clarification, revision, or additional language to ensure that eligible community anchor institutions (CAIs) are 1) properly identified; 2) considered for inclusion in BEAD-funded deployment projects, despite being potentially designated as a non-broadband serviceable location in the Fabric and on the National Broadband Map; and 3) subject to a challenge framework that recognizes their unique needs.

¹ SHLB is a nonprofit public interest organization with the mission of promoting open, affordable, high-quality broadband for community anchor institutions and their communities. Its membership is comprised of a broad base of organizations including representatives of schools, libraries, health care providers and networks, state broadband offices, private sector companies, state and national research and education networks, and consumer advocates. See <http://shlb.org/about/coalition-members> for a complete list of SHLB coalition members.

² NTIA, U.S. Dept. of Commerce, *Proposed BEAD Challenge Process Guidance*, Policy Notice (rel. Apr. 25, 2023) https://www.internetforall.gov/sites/default/files/2023-04/BEAD_Challenge_Process_Policy_Notice_-_Public_Comment_Draft_04.24.2023_0.pdf; see also *BEAD Model Challenge Process* (rel. Apr. 25, 2023) available at <https://www.internetforall.gov/bead-challenge-process-policy> (Proposed Guidance).

Background

On November 18, 2022, the Federal Communications Commission (FCC) released the “pre-production” draft of its [National Broadband Map](#) (Map). Unfortunately, the Map is missing locations entirely and does not treat small libraries and other CAIs well. Some CAI locations may be missing completely, and most are “grayed out” on the Map and treated as not being “broadband serviceable locations” (BSLs) in the underlying fabric (Fabric). The FCC made the mistaken assumption that all CAIs purchase custom-tailored internet access (similar to an enterprise) and not “broadband internet access service” (BIAS) not based on any factual analysis. SHLB pointed out in several filings with the FCC that many small and rural libraries and other CAIs *do* purchase BIAS, similar to the service offerings provided to a place of residence or small business. Unfortunately, the FCC Broadband Data Task Force ignored SHLB’s filings and set the default that CAIs are not BSLs, resulting in a Map that does not provide information about the broadband available to those locations.

This result does not appear to comply with the Congressional legislation or even the FCC’s own policies. Specifically:

- The Broadband DATA Act (enacted on March 23, 2020) directed the FCC to “create a common dataset of *all locations* in the United States where fixed broadband internet access service (BIAS) can be installed (emphasis added).”³ By failing to provide broadband information for CAIs that purchase BIAS, the Map does not include “all locations.”
- In January 2021, the FCC released a Third Report and Order defining BIAS as “mass market service.” The Order also says, “to the extent such acquisitions of broadband capacity [by anchor institutions] fall into the category of ‘mass market,’ then providers must report such data.”⁴ By designating CAIs as non BSLs, however, the Map does not require providers to report broadband data to these locations. CAI locations designated as non BSLs are instead grayed out on the Map. The Map is thus inconsistent with the FCC’s own policy adopted in the Third Report and Order.
- The Infrastructure Investment and Jobs Act (IIJA) (enacted on November 15, 2021), specifies that CAIs that do not have access to gigabit-level broadband service are

³ The Broadband Deployment Accuracy and Technological Availability Act, Pub. L. No. 116-130, 134 Stat. 230 § 802(b)(1)(A)(i) (2020).

⁴ *Establishing the Digital Opportunity Data Collection, Modernizing the FCC Form 477 Data Program*, Third Report and Order, WC Docket No. 19-195, WC Docket No. 11-10, 11 Fn.79 (rel. Jan. 19, 2021) <https://www.fcc.gov/document/fcc-takes-next-step-collect-more-precise-broadband-mapping-data>.

“eligible” for broadband funding (“Eligible CAIs”).⁵ Unfortunately, for the reasons stated above, the Map does not provide information about all CAIs’ access to broadband, let alone those locations that are “eligible” because they lack access to gigabit-level service. The Map thus does not facilitate implementation of Congress’ intentions in the IIJA.

SHLB met with the FCC staff on several occasions to express our concern about this mistreatment of CAIs.⁶ We also contracted with Dr. Colin Rhinesmith, with the New York Metropolitan Library Council, who issued a paper documenting that the majority of libraries are treated as “not broadband serviceable locations”.⁷ To our dismay, the FCC indicated that they are “locked in” and will not make any changes to their mapping methodology, even though the legislation requires the FCC to update the Map every six months.

Comments to NTIA’s Proposed Guidance

Fortunately, this Proposed Guidance proceeding offers an opportunity for NTIA and Eligible Entities to address and correct the above-mentioned shortcomings of the FCC’s Map. NTIA can allow Eligible Entities to implement the IIJA legislation without delaying the award of BEAD funding. The language in the Proposed Guidance, however, is somewhat confusing and could be clarified and revised with certain (often minor) adjustments. Through the specific suggestions outlined below, our goal is that NTIA allow Eligible Entities to engage in their own mapping efforts to identify those CAIs that do not have access to gigabit-level broadband service as part of the inventory that they must prepare for inclusion in their Initial Proposal, and set forth a challenge process that confirms eligible and non-eligible CAIs based on evidence that recognizes their specific needs. While our comments suggest revisions specifically to the language in the BEAD Challenge Process Guidance document, we also ask that NTIA incorporate our suggestions into the BEAD Model Challenge Process if and where applicable. We additionally ask that any suggestions made in reference to a specific section of the Proposed

⁵ The Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 1183, § 60102(a)(1)(E) (2021).

⁶ See SHLB Ex Parte Filing, *Establishing the Digital Opportunity Data Collection, Modernizing the FCC Form 477 Data Program*, WC Docket No. 19-195, WC Docket No. 11-10 (Feb. 7, 2023) <https://www.fcc.gov/ecfs/document/10208481625101/1>; see also SHLB Ex Parte Filing, *Establishing the Digital Opportunity Data Collection*, WC Docket No. 19-195 (Mar. 22, 2023) <https://www.fcc.gov/ecfs/document/103220349726424/1>.

⁷ See Colin Rhinesmith, Ph.D., *Missing Pieces: How the FCC’s Broadband Map Misrepresents Public Libraries*, https://www.shlb.org/uploads/Policy/National%20BB%20Plan/Rhinesmith_2023_Missing_Pieces%20-%20Jan%2028%202023.pdf.

Guidance be applied to other sections and corresponding files/attachments if and where applicable.

1. Clarifications, Revisions and Additions to Section 5

First, section 5 in the Proposed Guidance generally states that Eligible Entities must use the FCC's Map "as the starting point" for identifying "the full universe of BEAD-eligible locations."⁸ Subsection 5.2 sets forth the specific criteria that Eligible Entities must use when identifying Eligible CAIs within their jurisdiction. Although subsection 5.2 does not specifically state that Eligible Entities are required to use the Map as a starting point to identify Eligible CAIs, SHLB is concerned that the beginning language in section 5 encourages Eligible Entities to rely only on the Map to create its Eligible CAI list as required under this subsection.

Accordingly, we ask NTIA to include language clarifying that Eligible Entities may and should use their own data and mapping efforts in addition to the Map to identify Eligible CAI locations (those that lack access to Gigabit-level broadband service) even if they are missing or classified as non-BSLs in the Fabric and/or on the Map. Allowing Eligible Entities to use their own data to supplement the Map is consistent with the BEAD NOFO requirement that Eligible Entities must create their own inventory and assessment of Eligible CAIs, as identified in subsection 5.2 of the Proposed Guidance. Additionally, we ask that NTIA include clarifying language in subsection 5.2 stating that a CAI's potential designation as a non-BSL in the Fabric and/or on the Map does not preclude an Eligible Entity from including that CAI location in its list of Eligible CAIs (as long as it meets the definition of an Eligible CAI as provided in the IJA legislation and BEAD NOFO).

Second, the Proposed Guidance requires Eligible Entities to describe "the basis" for determining whether a CAI facilitates greater use of broadband service by vulnerable populations. SHLB does not disagree with requiring this information, but asks NTIA to provide additional guidance to help Eligible Entities understand what information they will need to produce to provide this "basis." More specifically, what reasoning or evidence will NTIA require? Is this "basis" developed by the Eligible Entity's sole determination, or are they required to consider information received through stakeholder engagement? If an Eligible Entity determines that certain institutions satisfy its definition of a CAI in a particular area, but it does not want to universally include that *category* of institutions in its definition, can it do so? For example, if an Eligible Entity determines that a church facilitates greater use of broadband in an area or multiple areas within its jurisdiction, but it does not want to designate all houses of

⁸ Proposed Guidance at 9 stating, "[t]he goal of the BEAD challenge process is to ensure Eligible Entities identify the *full universe of locations* that are eligible for BEAD funding. In support of this goal, this section outlines the requirements for Eligible Entities to use the National Broadband Map *as a starting point* to identify the list of BEAD-eligible locations within their jurisdiction, prior to conducting a challenge process." (emphasis added).

worship as an eligible CAI category, can it do so? If yes, does it need to provide the “basis” it used to make this determination?

Third, given that the Map does not identify the broadband availability to all CAIs, SHLB is concerned about the narrow timeline in which Eligible Entities must determine the threshold broadband speeds to each and every CAI within their jurisdictions to populate their Eligible CAI inventory pursuant to subsection 5.2.⁹ Accordingly, SHLB asks that NTIA add language allowing an Eligible Entity to include in its inventory list (submitted with its Initial Proposal) those CAIs where the threshold broadband speed to that location is unavailable or unknown. The Eligible Entity should be allowed to develop additional broadband availability data after submitting its Initial Proposal to determine whether these locations meet the statutory definition of an Eligible CAI. The Eligible Entity would be responsible for updating the Eligible CAI inventory originally submitted with its Initial Proposal to indicate final eligibility determinations. Such an allowance would be consistent with the requirements for an Eligible Entity’s five-year action plan, whereby an Eligible Entity must identify “CAIs without gigabit service, *and/or any plans to make these determinations where service availability is unclear.*”¹⁰

2. *Timing Considerations for Using the National Broadband Map*

The Proposed Guidance states that when an Eligible Entity identifies each unserved and underserved location within its jurisdiction, it must use the most recently published Map *as of the date of submission of the Initial Proposal*.¹¹ Our understanding is that the Map will be updated every six months, as required by the Broadband Data Act. Since the initial pre-production draft of the Map was released in mid-November 2022, we expect future Map versions will be issued in May and November of 2023. By the time an Eligible Entity conducts its challenge process, however, the version of the Map published as of the date it submits its Initial Proposal could be outdated.¹² Accordingly, we believe that an Eligible Entity should be able to use the most recent version of the Map that is published at the time it conducts its challenge process. This will give broadband providers and challengers the incentive to continue to update the Map after NTIA makes its allocation announcements at the end of June 2023.

⁹ An Eligible Entity could also presumably wait to gather speed availability data until after it has defined all of the categories of anchor institutions within its jurisdiction, which is also required under subsection 5.2.

¹⁰ BEAD NOFO at 27 (emphasis added).

¹¹ Proposed Guidance at 9 (emphasis added).

¹² Although Eligible Entities will likely have until the end of December 2023 to submit their Initial Proposals, they are not precluded from submitting them prior to that date.

3. *Clarifications, Revisions and Additions to Section 6*

Section 6 of the Proposed Guidance states that an Eligible Entity may modify the Map's location information based on additional data.¹³ It further states, however, that an Eligible Entity may not change the identification of "broadband serviceable locations."¹⁴ If a CAI is (improperly) designated as a non-BSL on the Map, but the Eligible Entity acquires more detailed data to show that the CAI purchases "mass market" service and lacks access to gigabit-level broadband service, it is not clear from the Proposed Guidance whether the Eligible Entity is allowed to treat such CAI as "eligible" for funding. Furthermore, the Proposed Guidance states that an Eligible Entity may change the designation of a location as "served", "unserved" or "underserved." Since these terms refer to residences, the Proposed Guidance is silent on whether a CAI is "eligible" or not. Similar to our request above, we first ask NTIA to resolve these ambiguities by declaring that an Eligible Entity may identify a CAI as BEAD-eligible based on its own mapping efforts and analysis of the broadband availability data to a CAI location, regardless of whether that location is designated as a non-BSL in the Fabric and/or on the Map. Second, we ask NTIA to allow Eligible Entities to change the identification of BSLs and add missing locations and BSLs based on its own mapping efforts. Many CAI locations may be missing entirely or misrepresented as non-BSLs in the Fabric and on the Map. If an Eligible Entity's mapping efforts identify missing CAIs and those satisfying the BSL designation, they should be able to reflect this data.

4. *Clarifications, Revisions and Additions to Section 7*

The Proposed Guidance sets forth design requirements for various aspects of the challenge process that SHLB requests NTIA to revise. First, subsection 7.2, Table 2 describes the classes of challenges that are allowable and unallowable. Here, the Proposed Guidance precludes challenges with respect to the classification and addition of BSLs on the Fabric. Specifically, Table 2 provides that "NTIA will not permit challenges to the classification of a BSL on the Fabric (e.g., altering the BSL's "Building Type" classification on the Fabric to reflect a BSL's subscription to mass-market broadband service)" and that "NTIA will not permit new BSLs to be added to or removed from the Fabric."¹⁵ As stated previously, the representation of CAI broadband availability data on the Map has been directly (and negatively) affected by the FCC's

¹³ Proposed Guidance at 10 stating, "an Eligible Entity may, upon approval of the Assistant Secretary, modify the set of locations it proposes to make eligible for BEAD funding to reflect data not present in the National Broadband Map as described in Section 6.1."

¹⁴ *Id.* at 11 stating, "[p]roposals may not (a) add or remove locations from the set of broadband serviceable locations the Commission has identified on the National Broadband Map (see Section 5), or (b) change the definitions of "unserved" and "underserved" from those set forth in the Infrastructure Act."

¹⁵ *Id.* at 15.

presumption that CAIs are not BSLs. As such, the ability to re-classify and add BSLs to the Fabric directly responds to this CAI misrepresentation (i.e. the *only way* to include CAIs on the Map is to alter their “Building Type” in the Fabric to classify them as a BSL). While SHLB continues to ask the NTIA to clarify that Eligible Entities may identify Eligible CAI locations even if they are classified as non-BSLs in the Fabric and/or on the Map, we additionally ask NTIA to remove the non-allowable challenge types in Table 2 that preclude challengers from reclassifying non-BSLs to BSLs and adding BSLs to the Fabric. We instead suggest that NTIA allow Eligible Entities to collect this type of BSL-related data, including missing locations generally, missing BSLs, and alterations of a non-BSL to a BSL, during their challenge process to enable them to add more locations to their service territories that they identify for funding. This will serve not only as a way to continue to improve the Map,¹⁶ but to help Eligible Entities identify the universe of unserved, underserved, and CAI locations that are eligible for BEAD-funded opportunities.

Second, subsection 7.3 states that Eligible Entities may only allow challenges from units of local and tribal government, nonprofit organizations, and broadband service providers.¹⁷ While we recognize that NTIA is following the language of the IJJA legislation, we ask NTIA to expand the scope of allowable challengers to include units of local and tribal government, nonprofit organizations, broadband service providers, and *all other interested parties*. We believe that all parties interested in submitting challenge information to an Eligible Entity should have the equal and fair opportunity to do so.

5. *Clarifications, Revisions and Additions to Table 3: Examples of Acceptable Evidence for BEAD Challenges and Rebuttals*

The Proposed Guidance sets forth examples of permissible evidence for making and rebutting BEAD challenges.¹⁸ However, Table 3 does not provide examples of acceptable evidence to challenge the broadband availability at an Eligible CAI. While we understand that an Eligible CAI must satisfy the statutory requirement of lacking access to gigabit-level broadband service, we ask NTIA to clarify and add examples of the types of evidence a challenger must set forth to prove that a CAI included in the Eligible Entity's inventory *does not* satisfy this requirement or that a CAI that is missing from the inventory *does* satisfy this requirement (and should thus be included). We also ask NTIA to clarify and add examples of permissible rebuttals to such broadband availability data submitted for CAIs during the challenge process.

¹⁶ For example, the Eligible Entity could gather this information to ultimately submit a bulk Fabric challenge.

¹⁷ *Id.* at 16; *see also* Infrastructure Act Section 60102(h)(2)(A); BEAD NOFO at 34-35, Section IV.B.6.


¹⁸ *See Id.* at 17.

6. *Clarifications, Revisions and Additions to Table 4: Guidance on Data Formats for CAIs*

The Proposed Guidance sets forth the CAI inventory data requirements that Eligible Entities must submit in their Initial Proposal.¹⁹ One such data requirement includes supplying the entity number that USAC assigns for each school or library that participates in the E-rate program. Because not all schools and libraries participate in E-rate, and because many other CAIs are not eligible to participate in E-rate, we ask NTIA to revise Row 3 of Table 4 (and elsewhere if and where applicable) to state that an Eligible Entity can leave this data field empty for CAIs that are neither type S nor L and for CAIs that are type S or L but that do not participate in the E-rate program.

Accordingly, SHLB respectfully requests NTIA to consider these comments in clarifying, revising, and adding to the language of the Proposed BEAD Challenge Process Guidance and BEAD Model Challenge Process where applicable.

Respectfully submitted,



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¹⁹ *See Id.* at 23.