

## Pacific Broadband and Digital Equity

### **Comment to National Telecommunications and Information Agency on the BEAD Challenge Process: Community Anchor Institution Access and Affordability**

This Comment represents the position of Pacific Broadband and Digital Equity, a non-profit organization based in Hawaii and serving governments and institutions of the Pacific region. This Comment should not be construed as representing an opinion of any territorial jurisdiction or government. The Comment is a response to the National Telecommunications and Information Agency (NTIA) BEAD State Challenge Process Guidance Draft released to the public on April 25, 2023.

Summarizing this Comment, we communicate that:

- 1) Affordability must be a factor in considering whether a community anchor institution “lacks access” to gigabit-level broadband service;**
- 2) Lack of affordability makes gigabit-level broadband access impossible for many community anchor institutions in the Pacific territories;**
- 3) NTIA should allow Eligible Entities to formally set definitions for Community Anchor Institution Gigabit Access—potentially including affordability criteria—and should accept those local definitions as being effective with respect to BEAD; and,**
- 4) NTIA should modify its BEAD Challenge Process Guidance and overall policy in order to incorporate Eligible Entity definitions of Community Anchor Institution Gigabit Access.**

For the purposes of this document we assume that the reader is familiar with the definitions of Community Anchor Institutions and gigabit-level broadband service. We also assume that the reader is familiar with NTIA and its Broadband Equity, Access, and Deployment (BEAD) program. We assume that the reader is aware that NTIA refers to states’ and territories’ government organizations working with Broadband as “Eligible Entities.” We will frequently refer to the BEAD Notice of Funding Opportunity, or NOFO for short.

**Affordability must be a factor in considering whether a community anchor institution “lacks access” to gigabit-level broadband service.**

To discuss access, we first quote the statute for the Grants for Broadband Deployment section of Title 47:

- (a) Definitions

(1) Areas, locations, and institutions lacking broadband access

In this section:

(A)

[...]

(E) Eligible community anchor institution

The term "eligible community anchor institution" means a community anchor institution that lacks access to gigabit-level broadband service.<sup>1</sup>

Unfortunately, the definition of “access” for community anchor institutions fails to escape the recursion of its own section. The neighboring definitions for Served and Unserved access for residences is far more detailed and involves the massive regulatory complex of the Broadband Maps—all of which is explicitly exclusive of community anchor institutions.

NTIA’s Notice of Funding Opportunity mentions Eligible Community Anchor Institutions<sup>2</sup> several times, including providing a mechanism for concerned organizations (presumably Network Service Providers) to “challenge” the eligibility of those institutions. However, on the topic of defining eligibility, the NOFO simply mirrors the statute: “The term “eligible community anchor institution” means a community anchor institution that lacks access to Gigabit-level broadband service.”<sup>3</sup> Indeed, the concept of “Lacking access” is not defined anywhere in the document, although we note in particular that the strong spirit displayed in the document’s Background section: “NTIA underscores its strong preference that Eligible Entities also ensure deployment of gigabit connections to community anchor institutions such as libraries and community centers that lack such connectivity.”<sup>4</sup>

Since we are concerned in this Comment with gigabit service that would be too expensive for institutions to reasonably afford, we might consider the connection between “access” and “affordability.” It turns out that there are many examples of the concept of “access” appearing in the regulatory world throughout government, including that of telecommunications and broadband. We note, for example, the use of the term access in the “Ensuring Phone and Internet Access Through Lifeline and Affordable Connectivity Program Act of 2022,” which passed in the U.S. House in 2022; or, also for example, the Federal Communication Commission’s (FCC) published description of its E-Rate service “ensur[ing] that schools and libraries have affordable access to the high-speed broadband they need - in the most effective, efficient way possible.”<sup>5</sup>

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<sup>1</sup> U.S.C. 47 § 1702

<sup>2</sup> The capitalization scheme for this construct varies as used in the NOFO and other NTIA documents. We use the capitals here as they make sense.

<sup>3</sup> Broadband Equity Access and Deployment Notice of Funding Opportunity, (BEAD NOFO) National Telecommunications and Information Agency. Accessed online May 3 2023 from <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf> Page 12.

<sup>4</sup> BEAD NOFO. Page 7.

<sup>5</sup> <https://www.fcc.gov/general/universal-service-program-schools-and-libraries-e-rate>

It would be possible to find many more examples where the concept of public access to a service is tied to the public's availability to afford that service. However, there is a much more practical approach we can use to determine whether there must be *some* price for gigabit-level broadband service so great that it would qualify an institution as "lacking access" to the service.

To demonstrate this, let us imagine the opposite case, where there is *no* level of cost too great. Now let us imagine a hypothetical institution in any place in America. Can it get gigabit internet service? The answer is absolutely yes. Some combination of construction, time, and capital expenditure will get gigabit internet service to our imaginary building no matter where we have imaginarily built it. While the cost might be very low or very high, no cost is too great, and we can be confident that some level of investment will light up our phantasmagorical library or community college. In fact, this certainty is a core quality of the American capitalist system.

Our hypothetical demonstrates that if there is no cost limit on service that would qualify a community anchor institution as lacking access to gigabit service, then there can be no institutions lacking access at all. The intent of the Bipartisan Infrastructure Law could not have been to *disqualify* all the institutions from eligible status, and so it follows that there *must be an affordability component* for qualifying Eligible Community Anchor Institutions.

### **Lack of affordability makes gigabit-level broadband access impossible for many community anchor institutions in the Pacific territories**

We are unaware of *any* gigabit-level broadband service being delivered to community anchor institutions anywhere in American Samoa or the Commonwealth of the Northern Mariana Islands (CNMI); Guam has very few such non-military gigabit service installations of its own. The reason for this: pricing for gigabit access is so high that it would likely astonish many uninitiated observers.

In fact, just such a phenomenon was recently observed through one of the territories' CAIs. American Samoa Community College recently was a recipient of an NTIA Connecting Minority Communities grant, which included two years of proposed internet access for the college. During the curing process, grant reviewers balked at the line item for the internet service contract: \$648,000 for twenty-four months of service. The grant-closing work came to a halt over this figure. After several rounds of communication, it became clear that grant reviewers did not challenge the price so much as they *did not understand* what they were looking at; a \$27,000 per-month internet bill. Only after sending vendor quotations to the reviewer was the process continued and the grant able to be closed. It should be noted that \$27,000 per-month was the lowest quote out of two supplied for the project.

The high cost of internet to institutions is well-known throughout the Pacific Territories. One public Health Care institution pays \$17,000/month for 200Mbps upload/100Mbps download service to its primary location. Government offices are frequently quoted 100/100 service at \$5,000 per month and up, with those quotations often containing no special services or monitoring outside of basic installation and a named sales representative. Sadly, many public libraries throughout the region struggle to afford service exceeding 25/2 levels. When comparing pricing with the national average, libraries in the Pacific territories would typically have to pay more per month than the national average of *annual* library internet spending to achieve even “Served residential” status at 100 Mbps.<sup>6</sup> Surely these libraries could not be reasonably considered as having access to gigabit service. This condition seems completely contrary to the intent of the legislation.

While the local costs for internet service would be difficult for many community anchor institutions in America to bear, they are simply off the table for most institutions of the Pacific territories. Like the communities they serve, CAIs in the region are generally poor, with irregular funding streams and limited financial predictive power. Since they generally serve small populations, the relative low-income of the region is compounded in many cases by unfavorable step economics hampering per-constituent efficiency of already cash-constrained institutions.

**NTIA should allow Eligible Entities to formally set definitions for Community Anchor Institution Gigabit Access—potentially including affordability criteria—and should accept those local definitions as being effective with respect to BEAD.**

One of the primary challenges with respect to setting an affordable access threshold for Pacific territory CAIs is the lack of *any* mass market gigabit broadband in the area. In fact, the fastest mass market package available in the territories of Guam, American Samoa, and CNMI is Guam’s top-tier package at 150 Mbps. No generally available internet service advertised in the region approaches gigabit speeds.

While some areas in other parts of the United States lack gigabit mass market service, we believe that all Eligible Entities in the United States, outside these three Pacific territories, have mass market gigabit service available *somewhere* within their boundaries. While enterprise service to CAIs is not necessarily identical to mass market internet service, it is reasonable to assume the availability of a price tag for gigabit access somewhere nearby would inherently have a clear effect on pricing for gigabit internet service to institutions within any given Eligible Entity.

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<sup>6</sup> “The cost of internet service for American libraries can vary widely depending on several factors, such as the location of the library, the size of the library, the type of internet service provider, and the specific internet plan chosen. However, according to the American Library Association’s (ALA) “Digital Inclusion Survey 2020”, the average cost for internet access for public libraries in the United States was \$4,550 per year. The survey also found that 93% of public libraries offer Wi-Fi access to their patrons and 67% offer Wi-Fi outside of their buildings.” retrieved by the author via ChatGPT 4.0 on May 5, 2023.

Thus, while it might seem possible to gather up a national affordability price guideline for CAI gigabit service—through data measurements and some kind of multipliers, perhaps—it would be extremely difficult to fit such a threshold to the Pacific territories.<sup>7</sup> This is not to say that the Pacific territories should not do their own analysis; they should, and in fact to our knowledge such data gathering is already underway in at least two of the territories to identify what the common price points and service levels are today. It is very likely that within the region there will be stark variances from territory to territory.

As a result, we believe that the situation clearly calls for local control over the concept of access for CAIs. We encourage that NTIA should work with Eligible Entities who establish their own guidelines for defining conditions that would reasonably constitute “lack of access to gigabit-level broadband service.” We call the resulting condition “Community Anchor Institution Gigabit Access.”<sup>8</sup> NTIA would ideally review, collaborate on, and accept the Eligible Entity’s guidelines for Community Anchor Institution Gigabit Access, although we would opine that the localities will have the best understanding of their local conditions. We insist that affordability must be applicable in some way to these guidelines.

We believe that such an approach could be applied nationwide. Since many Eligible Entities will be defining “affordable internet” prices—albeit for residential service—for purposes of Digital Equity programming, we suggest that an excellent vehicle for defining CAI gigabit affordability would be that same Executive Order or other legislative or regulatory vehicle. We would also encourage the Eligible Entities themselves to leverage the same code or statute to tailor the definition of “community anchor institution” to more specifically suit their own community needs as appropriate, using a manner that satisfies the NTIA BEAD NOFO.<sup>9</sup>

**NTIA should modify its BEAD Challenge Process Guidance and overall policy in order to incorporate Eligible Entity definitions of Community Anchor Institution Gigabit Access.**

NTIA recently released a draft of its BEAD Challenge Process Guidance<sup>10</sup> in order to solicit comments from the public. Taking into account the reasoning from the sections above, NTIA should update this process so that Community Anchor Institution Access as defined by Eligible Entities can be taken into account in determining which CAIs are eligible for project funding.

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<sup>7</sup> We believe that the same effect could be found in areas of the State of Alaska.

<sup>8</sup> We do not call the resulting condition Community Anchor Institution *Eligibility*, since 1) NTIA should make such a final determination, and 2) the status of Community Anchor Institution Gigabit Access is a quality that can be used in contexts outside of the BEAD NOFO.

<sup>9</sup> BEAD NOFO. Page 11.

<sup>10</sup> Proposed BEAD Challenge Process Guidance, Draft, Pre-decisional. Emailed to author April 22, 2023.

The following list of proposed modifications to the Guidance illustrate how these modifications might be implemented. The list is not exhaustive; rather, it is intended to crystalize how the incorporation of Eligible Entity definitions of Community Anchor Institution Access might work in practice. In the examples, gray highlighted text is copy quoted from the draft Guidance, and additions are underlined. Page numbers are also from the draft.

*Page 8:*

c. Describe how the Eligible Entity applied the statutory definition of the term “community anchor institution,” defined Community Anchor Institution Gigabit Access in its jurisdiction, identified all Eligible CAIs in its jurisdiction, identified all Eligible CAIs in applicable Tribal Lands, and assessed the needs of Eligible CAIs....

*Page 9:*

b. A description of how the Eligible Entity assessed the needs of Eligible CAIs<sup>11</sup>, how the Eligible Entity assessed the Community Anchor Institution Gigabit Access status for CAIs, and of what types of CAIs the Eligible Entity intends to receive service under the BEAD Program;

*Page 15:*

(Table Row: Allowable, CAI Eligibility Determination)

Challenge Type Gigabit Access (G): NTIA will permit challenges to the classification of a CAI as eligible for BEAD funds (i.e., challenges that a CAI does not receive at least 1 Gigabit broadband speeds or is assessed to be lacking Community Anchor Institution Gigabit Access as defined by the Eligible Entity).

*Page 21, 10.2 Community Anchor Institutions*

The Eligible Entity is responsible for defining the criteria that make an institution or building an Eligible<sup>12</sup> CAI as defined in 47 U.S.C. § 1702(a)(2)(E). 39 The definitions given are thus illustrative and are not meant to enumerate all categories of institutions or require that all institutions that may match the colloquial definition of the term are included. The Eligible Entity is responsible for defining the criteria that designate Community Anchor Institution Gigabit Status for in a manner consistent with 47 U.S.C. § 1702(a)(1)(E).

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<sup>11</sup> This is an inaccuracy from the draft text. The Eligible Entity is assessing the needs of all CAIs and determining which are Eligible.

<sup>12</sup> Again, we believe this is a simple inaccuracy, and that the text is intended to refer to the classification of community anchor institutions themselves. We would remove the word “Eligible” immediately preceding the footnote reference. The cited statute should confirm this.

*Page 31, Table 7, Guidance on Data Formats for CAI Challenges*

(Note: We anticipate that tables 7 and 8 are preliminary and will be reworked in future drafts. The following example is purely illustrative of the intent of Community Anchor Institution Gigabit Access.)

Challenge Type | challenge\_type enumerated | string {1}, C, R, or G | G | Must be C, R, or G

*Page 31, Table 8, Guidance on Data Formats for Submitted Challenges*

[add rows:]

G | 1 | Community Anchor Institution Gigabit Access is TRUE according to criteria established by the Eligible Entity. Please include explanation.

G | 0 | Community Anchor Institution Gigabit Access is FALSE according to criteria established by the Eligible Entity. Please include explanation.

*Page 32, A. Relevant Instructions from Infrastructure Investment and Jobs Act*

After submitting an initial proposal under subsection (e)(3) and before allocating grant funds received under this section for the deployment of broadband networks, an eligible entity shall ensure a transparent, evidence-based, and expeditious challenge process under which a unit of local government, nonprofit organization, or other broadband service provider can challenge a determination made by the eligible entity in the initial proposal as to whether a particular location or community anchor institution within the jurisdiction of the eligible entity is eligible for the grant funds, including whether a particular location is unserved or underserved or a particular community anchor institution lacks Gigabit Access.

*Page 32. Relevant Instructions from Infrastructure Investment and Jobs Act*

ELIGIBLE COMMUNITY ANCHOR INSTITUTION. —The term “eligible community anchor institution” means a community anchor institution that lacks access to gigabit-level broadband service. The Eligible Entity-defined condition of “Community Anchor Institution Gigabit Access” provides an assessment of this access and can be True, False, or Undetermined.

**Comment Contact**

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