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by **Stephen Duerst** in **BEAD Initial Plan, Volume 1 Public Comment Form** id. 43876562

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Are you responding on behalf of an organization? **Yes**

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**The Kansas Office of Broadband Development (KOBD) is in the process of developing its BEAD Initial Proposal as required by the NTIA. This initial plan is divided into Volume 1 and Volume 2. Volume 1 includes initial identification of unserved and underserved locations, definition of community anchor institutions, proposed pre-challenge process location modifications, and the model challenge process. Please use this link to review the entire Initial Proposal Volume 1 document, and feedback on Volume 1 will be captured in the text boxes below. The comment portal will be open from August 1, 2023 through August 30, 2023. KOBD will then review all feedback and submit the Initial Proposal to the NTIA. To access a full copy of Volume 1 of the BEAD Initial Proposal along with accompanying documents, please use the links below:**

**<https://www.kansascommerce.gov/officeofbroadbanddevelopment/broadband-equity-access-and-deployment/>**

I am responding to comments related to the following Volume 1 requirements

**Requirement 7: Detailed BEAD challenge process**

Comments relating to Requirement 7:

**Page 7 (Challenge Process—DSL Modification): The Kansas Cable Telecommunications Association (hereafter referred to as KCTA) appreciates**

KOBD's well-reasoned decision to exercise its explicit authority under NTIA's guidance to treat locations that were determined to be "served" exclusively by DSL technology as "underserved," and therefore eligible for BEAD funding. KCTA urges KOBD to maintain this modification in its final challenge process guidance, which is necessary to ensure that the BEAD Program delivers Kansas residents access to reliable broadband service. Indeed, the FCC has concluded that "DSL broadband ISPs ... continue to advertise 'up-to' speeds that, on average, exceed the actual speeds experienced by their subscribers," and specifically determined that "DSL speeds lag far behind" the speed of other technologies. For example, in the FCC's 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. (FCC, Twelfth Measuring Broadband America Fixed Broadband Report, at 11-13 (Jan. 6, 2023) ("FCC MBA Report")). As a result, the majority of states that have released draft BEAD challenge processes have proposed to adopt this targeted modification, which NTIA has concluded 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). Therefore, KCTA strongly supports KOBD's proposed decision regarding DSL technology and urges it to include this modification in its final guidance.

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Page 7 (Challenge Process—Licensed Fixed Wireless Modification): NTIA's guidance explicitly allows KOBD to propose modifications to its set of locations that are eligible for BEAD funding, and KOBD should exercise that discretion to treat locations that have available qualifying broadband service (i.e., a location that is "served") delivered exclusively via fixed wireless as "underserved" and presumptively eligible for BEAD funding. As KOBD notes, NTIA has already determined that fixed wireless service using entirely unlicensed spectrum is not considered a reliable broadband service and requires locations served exclusively by unlicensed fixed wireless to be treated as "unserved" for the purposes of the BEAD Program and eligible for funding. In markets served exclusively by licensed fixed wireless service that were determined to be "served" and initially ineligible for BEAD funding, recent estimates suggest that these fixed wireless providers typically only have sufficient excess capacity to actually serve 10-15 percent of the homes and businesses in that market. (See Jonathan Chaplin, *The Impact of Fixed Wireless on BEAD*, New Street Research at 2-5 (July 22, 2023) (stating that licensed fixed wireless service providers "have said that they can't economically add capacity to their mobile network for [licensed fixed wireless ("FW")] alone – they invest in capacity for mobile users, and where this results in pockets of excess capacity not needed by mobile users, they will sell FW subscriptions. The process of determining how many FW subscribers a carrier can support in a given cell site is complex (and the analysis must be done on a sector-by-sector basis): the carrier determines how much capacity they can deliver in the sector based primarily on how much spectrum they have; they determine how much capacity their mobile customers will likely consume; they then divide the residual capacity by what they assume a FW customer will consume, taking into consideration consumption patterns over the course of the day. When they reach their subscription limit, they stop selling subscriptions in the sector.")). Thus, this targeted modification to make all locations served exclusively by fixed wireless service eligible for BEAD funding will ensure that as many Kansans as feasible will benefit from fiber projects, as required by the BEAD Program.

The BEAD Program will require the KOBD to fund end-to-end fiber projects

wherever feasible because “[o]nly end-to-end fiber will ‘ensure that the network built by the project can easily scale speeds over time to ... meet the evolving connectivity needs of households and businesses.’” (BEAD NOFO at 42 (citing the Infrastructure Investment and Jobs Act of 2021, Division F, Title I, Section 60102(a)(1)(I), Public Law 117-58, 135 Stat. 1184 (November 15, 2021)). Indeed, multiple states have proposed to treat all locations served exclusively by both licensed and unlicensed fixed wireless service as eligible for BEAD funding because they do “not believe that terrestrial fixed wireless technologies can reliably deliver the speed and latency requirements for a location to be considered ‘served’ under the IJA (i.e., not less than 100 Mbps download and 20 Mbps upload and latency less than or equal to 100 milliseconds)” and because “the median cellular internet speeds in the United States are approximately 80 Mbps download and 10 Mbps upload, which do not meet the definition of served. Additionally, cellular networks, by design, have a significant drop-off of data rates the farther a user is from the source (e.g., tower).” (See, e.g., Ohio’s, Wyoming’s, Delaware’s, and Vermont’s draft Volume I Guidance). Therefore, consistent with KOBD’s decision to treat locations “served” via DSL as “underserved,” KOBD should propose this modification to “ensure the delivery of ‘future-proof’ broadband service.”

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**Page 10 (Challenge Process):** While addressing locations subject to enforceable commitments, KOBD mentions projects funded by Treasury. However, there is no mention of projects funded by the FCC’s RDOF program. KCTA recommends that RDOF and other enforceable federal commitments must be explicitly taken into account when identifying the areas eligible for BEAD funding. This requires consulting the FCC’s Broadband Deployment Locations Map established by IJA § 60105, as set forth in the NTIA model challenge process.

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**Page 11 (Challenge Process):** The state has developed a “up to 120 day” challenge process following publication of the eligible areas, and KCTA applauds this decision. As a threshold matter, KCTA urges KOBD to adopt the overall timeframe of 120 days, which is the minimum amount of time necessary to complete the challenge process. In addition, KCTA is highly concerned that KOBD leaves only a “minimum of 14 and a maximum of 30 BUSINESS days” for rebuttals to be submitted. Although KOBD appreciates the need to expeditiously complete the challenge process, it can best do so, as discussed further below, by excluding the optional modules that would add unnecessary complexity and confusion to the challenge process. In any event, KOBD should provide a minimum of 45 days to respond to a challenge that may come in on a rolling basis, rather than a static 30-day rebuttal period. Allowing such a “rolling “ 45-day response time appropriately allows KOBD to spread out its review of challenges and is particularly necessary for providers that will likely be responding to challenges in multiple states simultaneously.

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**Page 12 (Evidence & Review Approach (Challenge Process; Table 2: Challenge Types and Examples)):** In the Initial Proposal Volume 1 draft, KOBD uses the Table 2: Challenge Types and Examples from NTIA’s Proposed BEAD Challenge Process/Model Guide. NTIA has since released a FINAL version of its Challenge Process, following public comment, and made important revisions to this Table, including footnotes that are not captured in KOBD’s Volume 1 draft. KOBD should revise Table 2 in their draft to reflect the FINAL version of the NTIA BEAD Challenge Process released on June 28, 2023. (Specifically, revisions that need to be made in the KOBD draft to reflect the final version of the NTIA Challenge Process in Table 2 include the sections for Availability, Speed (+footnote), Latency (+footnotes), Data Caps,

and Technology).

For example, KOBD should use the table listed below for challenges based on unreasonable data caps, as well as the other Table 2 and footnote revisions NTIA made for the final version (please note, the table has been reformatted for optimal viewing in the submission portal):

**Code: D**

**Challenge Type: Data cap**

**Description:** The only service plans marketed to consumers impose an unreasonable capacity allowance (“data cap”) on the consumer. (See Footnote [1] below).

**Specific Examples:**

- Screenshot of provider webpage.
- Service description provided to consumer.

**Permissible Rebuttals:** Provider has terms of service showing that it does not impose an unreasonable data cap or offers another plan at the location without an unreasonable cap.

In addition, KOBD should incorporate NTIA’s final guidance regarding screenshots as permissible rebuttal evidence: “If the evidence was a screenshot and believed to be in error, a screenshot that shows service availability” may be used for availability rebuttals (and, as discussed further, KOBD should additionally clarify that NTIA’s final guidance providing that “screenshot that shows service availability” means that screenshots showing service availability are acceptable rebuttal evidence for all availability challenges).

**Footnote [1]:** An unreasonable capacity allowance is defined as a data cap that falls below the monthly capacity allowance of 600 GB listed in the FCC 2023 Urban Rate Survey (FCC Public Notice DA 22-1338, December 16, 2022). Alternative plans without unreasonable data caps cannot be business-oriented plans not commonly sold to residential locations. A successful challenge may not change the status of the location to unserved or underserved if the same provider offers a service plan without an unreasonable capacity allowance or if another provider offers reliable broadband service at that location.

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**Page 12 (Evidence Review & Approach):** The state is seeking fairness in the review of challenges and rebuttals, which KCTA applauds. “Standards of review to be applied will be outlined in a Standard Operating Procedure manual. Reviewers will have sufficient training to uniformly apply the standards of review to all properly submitted challenges. Moreover, reviewers will be required to document their justifications for each determination and submit affidavits to ensure there are no conflicts of interest in making challenge determinations.” However, KCTA respectfully requests that providers/participants be afforded an opportunity to review the Standard Operating Procedure manual as there does not appear to be any mention that this document will be made public. While there is notation on Page 15 of the “Transparency Plan” which states that the broadband office will, upon approval by NTIA, publicly post an overview of the challenge process phases, challenge timelines and instructions on how to submit and rebut a challenge and that the documentation will be posted publicly for at least a week prior to the opening of the challenge submission window, there is nothing explicitly stated that the Standard Operating Procedure document is part of this public disclosure.

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**Page 12 (Evidence Review & Approach):** Although critical that challenges

and rebuttals are supported with sufficient evidence to substantiate the claims, KCTA urges KOBD to make three targeted changes to ensure that it administers an efficient and reliable challenge process:

(i) modify the proposed evidentiary requirements for availability challenges by limiting evidence to within the last six months, which will ensure that KOBD does not receive availability challenge evidence that is too stale to be credible;

(ii) modify the proposed evidentiary requirements for availability challenge rebuttals to clarify that providers:

1. are not required to disclose customers' bills to rebut availability challenges; and
2. are able to provide additional, satisfactory forms of rebuttal evidence that service is available as a standard installation at a certain location; and

(iii) modify the proposed evidentiary requirements for planned service challenges to clarify that submission of evidence of a construction contract, pole attachment license, or similar evidence of deployment, is sufficient to demonstrate that broadband will be deployed to a location.

(i) Justification for modification of the proposed evidentiary requirements for availability challenges. KCTA is concerned that some of the forms of evidence for availability challenges are potentially too stale or superficial to provide sufficient evidence that broadband service is not available at a particular location. Although the draft guidance offers as an evidentiary example for an availability challenge "a letter or e-mail dated within the last 365 days that a provider failed to schedule a service installation date within 10 business days of a request," one year is too stale to credibly demonstrate that service in a particular location is unavailable given the significant amount of deployment that is presently occurring. Given the current rate of broadband deployment, service could very well have been established in the last six to eight months, and indeed, providers are required to submit updates to the FCC's Broadband Data Collection portal every six months. Accordingly, KOBD should limit availability challenges to evidence within the last six months.

(ii) Justification for modification of the proposed evidentiary requirements for availability challenge rebuttals. KOBD should clarify that providers are not required to disclose customers' bills. There is often more than one service provider at a customer location, and the lack of billing statements associated with that location from one provider may simply mean that the customer is using a different service provider or chose not to subscribe at all. Where a provider's deployment to an area is recent, moreover, it may not yet have paying subscribers. Further, requiring information about the service status of a specific location may require cable providers to violate the statutory prohibition against disclosing "personally identifiable information" in most instances absent the express consent of the subscriber or a court order or administrative subpoena, including the provider's records reflecting customers' service addresses as well as the type of service provided. (See 47 U.S.C. § 551(c); 18 U.S.C. §§ 2701, et. seq.).

Instead, KOBD should clarify that providers may submit other forms of evidence to rebut availability challenges that readily meet NTIA's rebuttal example of "evidence that service is now available as a standard installation," including specifically evidence of a general mailing in the area offering service. Additionally, for the avoidance of any doubt, KOBD should

clarify that NTIA’s final guidance providing that “screenshot that shows service availability” means that screenshots showing service availability are acceptable rebuttal evidence for all availability challenges. Moreover, rebuttal evidence of availability should not be limited to confirmation that service was provided to a BSL within the previous 12 months. The ability of a cable network to serve a given location, once service is provided, typically does not change year-over-year, because the cable network does not have capacity constraints like other technologies such as fixed wireless access. Therefore, KOBD should allow evidence confirming that the provider has provided service to a BSL at any time in the past, barring more recent evidence to the contrary, to demonstrate availability.

(iii) Justification for modification of the proposed evidentiary requirements for planned service challenges. KCTA is also concerned that the evidence providers must submit to demonstrate that broadband will be deployed at a particular location by June 30, 2024, without an enforceable commitment (or a provider is building out broadband offering performance beyond the requirements of an enforceable commitment) is overly burdensome and unnecessary to demonstrate such a commitment. KOBD’s draft proposes to require providers to submit construction contracts or similar evidence of ongoing deployment, along with evidence that all necessary permits have been applied for or obtained. Requiring this additional demonstration is unnecessary, particularly for providers that will likely be responding to challenges in multiple states simultaneously. Thus, KOBD should allow providers to provide evidence of a construction contract, or pole attachment license for the build without the permitting evidence, which is sufficient to demonstrate an enforceable commitment while also easing the burden on staff reviewing the challenges.

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Page 12 (Evidence & Review Approach (Table 2: Challenge Types and Examples—Speed Tests): Given that KOBD’s draft guidance omitted the text of NTIA’s optional speed test module (even though it did list “Speed” on the table of challenges and retained speed as an element of an area challenge), KCTA urges KOBD to clarify that it will not accept speed test challenges, at least for cable and fiber providers, particularly because the FCC has already independently validated the fact that KCTA members consistently offer consumers actual speeds that meet or even exceed advertised speeds.

As an initial matter, KOBD should exclude speed tests because the “Optional Speed Test Module” of the NTIA Final Guidelines sets forth language that KOBD must use if they believe it to be appropriate to accept speed test challenges, but KCTA notes that KOBD chose not to include this module. Thus, KCTA urges KOBD to clarify that it is not permitting speed tests for any purpose in the challenge process. To the extent KOBD intended to permit “speed” tests as a challenge type, KCTA urges it to reconsider.

In general, speed tests are not designed to accurately measure network performance, and risk undermining Congress’s overall purpose to expeditiously and accurately determine unserved and underserved locations. Due to the inherent difficulty ensuring that speed tests contains accurate, verifiable information, the FCC only uses this 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 states to impose significant and burdensome requirements to ensure the sufficiency of a challenge. Then, because speed test challenges cannot be submitted by an individual subscriber, it must be gathered and submitted by a different entity, such as a local government or nonprofit organization.

If speed test data gathered and submitted meets the above-mentioned requirements, a responding provider will then offer a countervailing speed test. After that, KOBD must evaluate all this evidence to make a final determination of the challenge, which is separate and apart from the difficulty of ascertaining whether a subscriber met the parameters required to ensure the challenge is valid and may be considered. 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 difficult and burdensome—for providers, subscribers, and state reviewers—to ensure all of these requirements are met.

Fundamentally, accepting speed tests is also unnecessary to determine actual speeds offered to subscribers in Kansas, 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 MBA Report at 13). Further, the FCC concluded that “[c]ustomers of Charter, Comcast, [and] Cox ... experienced median download speeds that were very consistent; i.e., they provided greater than 95% of the advertised speed during peak usage period to more than 80% of panelists for more than 80% of the time. In particular, Charter, Comcast, [and] Cox ... provided 100% or greater than their advertised speed during the peak usage period to more than 80% of their panelists for more than 80% of the time.” (Id. at 16). Thus, speed tests are unnecessary, at least for cable and fiber providers, because the FCC has already independently validated the fact that KCTA members consistently offer consumers actual speeds that meet or even exceed advertised speeds.

KOBD also does not need to permit the use of speed tests within its challenge process because it has already proposed to account for most of the locations that have any real likelihood of being subject to valid speed tests by treating DSL as “underserved,” and can fully do so by similarly treating licensed fixed wireless as “underserved.” As discussed above, FCC data demonstrates that “actual speeds experienced by the subscribers of most ISPs are close to or exceed the advertised speeds. DSL broadband ISPs, however, continue to advertise ‘up-to’ speeds that, on average, exceed the actual speeds experienced by their subscribers.” (Id. at 11-13 (stating 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)). Similarly, in markets served exclusively by licensed fixed wireless service that were determined to be “served” and initially ineligible for BEAD funding, recent estimates suggest that these fixed wireless providers typically only have sufficient excess capacity to actually serve 10-15 percent of the homes and businesses in that market. Therefore, by treating DSL and licensed fixed wireless as “underserved,” and because the FCC has determined that cable and fiber providers consistently meet or exceed their advertised speeds, there would be no need or value to including speed tests in its challenge process.

In the alternative, if KOBD does not strike consumer speed tests as a basis for a challenge, it should, at a minimum, require that the submitting local government or nonprofit screen individual challenges to remove incomplete or frivolous challenges, and confirm that any submitted 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. Then, it would be incumbent upon KOBD to require the local government or nonprofit

screening the individual challenges to only entertain consumer speed tests that have at least some indicia of reliability before being submitted to KOBD for comprehensive review and verification. In addition, KOBD 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 KOBD to simply exclude the optional speed-test challenges altogether.

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**Page 14 (Evidence & Review Approach—Optional Area and MDU Challenge):** KCTA urges KOBD to use its discretion to exclude the optional area and MDU challenge module from its challenge process, which, as with speed test challenges, would undermine KOBD's ability to expeditiously and accurately identify the unserved and underserved locations in Kansas.

KCTA strongly shares KOBD's goal of accurately identifying each unserved and underserved location that will be eligible for BEAD funding; however, accepting area and MDU challenges would unnecessarily compromise KOBD's ability to conduct its challenge process in a fair and expeditious manner, as required by the IJA and the BEAD NOFO. As proposed, allowing area and MDU challenges would be counterproductive to the primary goal of efficiently and accurately identifying unserved and underserved locations, create unnecessary confusion, and add complexity to the challenge process because this optional NTIA module does not sufficiently describe how to conduct each challenge type. For example, although this module appears to suggest that area challenges will be permitted for challenge types other than speed—such as availability, latency, data cap, and technology—only availability and technology area challenges appear to be substantively addressed in the area and MDU challenge module.

In addition, area and MDU challenges are simply not representative of the relevant service or offering within an entire census block group or MDU. The fact that six or more broadband serviceable locations ("BSLs") using a particular technology (or in the case of an MDU challenge, at least three units or ten percent of the unit count listed in the Fabric within the same BSL, whichever is larger) are subject to a challenge is not itself evidence that every other BSL within that census block group or MDU is not served. Nonetheless, these challenges would presumably: require KOBD to first validate each individual challenge that would trigger an area or MDU challenge; require a provider to then demonstrate to KOBD that they are meeting the technology requirement for all served locations within the area or all units within an MDU; and then KOBD to review the provider's rebuttal at every location or unit. This would force KOBD to expend valuable staff resources necessary to review rebuttal evidence at what could be an exponentially higher number of locations than were challenged in the first place, all within the very brief rebuttal period. This would not only make area and MDU challenges an ineffective mechanism to accurately identify unserved and underserved locations for KOBD, but could also prevent KOBD from satisfying the requirement that it "review[s] all applicable challenge and rebuttal information in detail without bias, before deciding to sustain or reject a challenge." (NTIA BEAD Model Challenge Process at 12).

For these reasons, KCTA urges KOBD to exclude optional and MDU challenges from its challenge process.

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**Post Application Verification Process:** Finally, KCTA urges KOBD to adopt a post-application verification process, separate from the BEAD challenge process, which provides a unit of local government, nonprofit organization, or broadband service provider—the same parties who are eligible to



challenge KOBD's eligibility determinations—an opportunity within 30 days of publication of application submissions, to submit information on additional deployment and new non-BEAD grant funding awards not captured on the latest version of the state BEAD map.

NTIA's guidance contemplates such a process as it requires states to conduct an additional "deduplication review process" after the challenge process is complete. KCTA believes that this process should occur prior to the time the state selection process is finalized. Between the time KOBD initiates its BEAD challenge process and subgrantee selection, additional broadband facilities will likely be built and/or new broadband funding could get awarded. Taking these intervening developments into account ensures:

- (i) more funding availability for projects that address unserved and underserved locations;
- (ii) compliance with the BEAD Program's prioritization scheme; and
- (iii) compliance with the requirement not to treat as unserved or underserved locations with an enforceable commitment to deploy broadband.

Accounting for these new developments before finalizing the selection process would still allow KOBD ample time to complete the subgrantee selection process and submit its Final Proposal within the one-year period that the NOFO provides. (See BEAD NOFO at 2 ("Final Proposals will be due to NTIA no later than 365 days after the approval of the Initial Proposal by the Assistant Secretary")). KCTA urges KOBD to adopt a post-application verification process that provides the information necessary to accurately account for additional deployment and new non-BEAD Program grant funding awards that have not been captured on the latest version of the state's BEAD Program map.

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**Stephen Duerst on behalf of the Kansas Cable Telecommunications Association (KCTA)**

By submitting the Public Comment Form (the "Form") and any supporting evidence, you attest that all information furnished is true and accurate to the best of your knowledge and that any attachments are free of malware or viruses. You also acknowledge that falsifying any information could result in legal action against you and will bar you from submitting public comments to this web site in the future. You authorize the Kansas Office of Broadband Development, Kansas Department of Commerce (KOBD) to contact you if further information is needed. You expressly acknowledge and consent to some personal information, including your name, address, phone, e-mail, organization you represent, and comments, being posted for public view on the Kansas Department of Commerce web site at [www.kansascommerce.gov](http://www.kansascommerce.gov). The KOBD will use its best efforts to redact any personal identifiable information outside of the above that is not considered in the public domain. By typing your name and date and by submitting the Form, you acknowledge, authorize, and consent to this Public Comment Privacy & Acknowledgments.

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