

**U.S. DEPARTMENT OF COMMERCE  
National Telecommunications and Information Administration**

Infrastructure Investment  
and Jobs Act Implementation

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)  
) Docket No. 220105-0002  
) NTIA-2021-0002  
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**COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION**

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THE INTERNET & TELEVISION ASSOCIATION**

NCTA – The Internet & Television Association (“NCTA”)<sup>1</sup> hereby submits these comments in response to the Department of Commerce – National Telecommunications and Information Administration’s (“NTIA”) Request for Comment<sup>2</sup> on the implementation of the broadband programs established by the Bipartisan Infrastructure Law (“BIL”).<sup>3</sup> In enacting the BIL, Congress’s goal is to help “close the digital divide” and ensure that “all Americans have access to reliable, affordable, high-speed broadband.”<sup>4</sup> Consistent with this objective, NCTA encourages NTIA to adopt rules that prioritize funding for projects that connect unserved and underserved locations while avoiding waste, fraud, and abuse, so that all Americans have access to robust and reliable broadband and NTIA can achieve the Administration’s goal of reaching 100 percent connectivity.

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<sup>1</sup> NCTA is the principal trade association of the cable television industry in the United States, which is a leading provider of residential high-speed broadband service to U.S. households. Cable service providers have invested more than \$290 billion over the last two decades to deploy and continually upgrade networks and other infrastructure—including building some of the nation’s largest broadband and Wi-Fi networks.

<sup>2</sup> Infrastructure Investment and Jobs Act Implementation, 87 Fed. Reg. 1122 (Jan. 10, 2022) (“Notice”).

<sup>3</sup> Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021) (“IIJA”). The Notice refers to the law as the BIL, which is how we refer to it in these comments.

<sup>4</sup> Notice, 87 Fed. Reg. at 1122.

## I. EXECUTIVE SUMMARY

To best achieve the goals discussed in detail below, NCTA proposes the following framework:

### RESPONSES TO GENERAL QUESTIONS

#### Bringing Reliable, Affordable, High-Speed Broadband to All Americans

- [Question 1]<sup>5</sup> Consistent with the authorizing legislation, NTIA must ensure that eligible entities<sup>6</sup> fund projects that will connect unserved locations before funding projects to underserved locations.
- [Question 3] NTIA should adopt robust transparency requirements and collect and publish data from the eligible entities and subgrantees detailing newly connected locations, speed for each location, percentage of project completed, and any reasons outside of the provider's control that may have caused delay.
- [Question 4] NTIA should adopt consistent and enforceable guardrails and safeguards for funding, but should not impose or permit an eligible entity to impose undue regulatory obligations or product and service mandates on subgrantees as a condition of eligibility for funding.

#### Supporting States, Territories, and Sub-Grantees to Achieve the Goal

- [Question 6] NTIA should rely on existing state grant and funding processes to the greatest extent possible by adopting a presumptive reliance on existing state broadband programs to disburse program funds so long as they are consistent with the requirements of the BIL and those established by NTIA.

In order to meet the goals of the IJJA, NTIA should ensure that eligible entities establish safeguards to prevent waste, fraud, and abuse and could look to other federal programs as a model. Additionally, NTIA should implement consistent baseline requirements for state programs, including a robust challenge process.

To ensure timely and efficient deployment, an eligible entity should certify to NTIA that it has policies in place that require all pole owners in BEAD service project areas to provide subgrantees with timely and non-discriminatory access to poles.

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<sup>5</sup> As required by the Request for Comment, NCTA identifies the question number in brackets prior to each response.

<sup>6</sup> "Eligible entities" is used throughout these comments as defined in the BIL, IJJA § 60102(a)(2)(F).

- [Question 9] Any waiver of the matching fund requirement should be granted sparingly, and blanket waivers of the matching requirement should be strongly discouraged.

Eligible entities should give a preference to subgrantees that commit to obtain a portion of funding for a project exclusively from private resources.

#### Ensuring the Future of America is Made in America by All of America's Workers

- [Question 12] NTIA should adopt a blanket waiver of the “Buy American” requirement so that companies are able to procure equipment necessary to meet the program’s deployment deadlines and NTIA can thereby ensure that all Americans are connected as quickly as possible.

### **BROADBAND EQUITY, ACCESS, AND DEPLOYMENT PROGRAM**

#### Ensuring Publicly Funded Broadband Networks That Sustain and Scale

- [Question 13] NTIA should provide eligible entities with guidance on best practices to ensure that, prior to awarding funding, subgrantees have the financial, managerial, and technical expertise to complete projects in a timely and successful manner and operate new networks on a sustainable basis going forward.

BIL funding should be technology neutral, but NTIA should require that state programs include certain baseline requirements including reliability and scalability.

NTIA should identify existing objective standards and best practices for service quality, reliability, resilience, and cybersecurity and supply chain risk management practices to guide subgrantees, rather than adopt new requirements to address these issues.

- [Question 14] NTIA should require states to award deployment funds in the order specified in the BIL—first to unserved locations, only then to underserved locations, and only then to eligible community anchor institutions—to ensure compliance with statutory prioritization of projects.

NTIA should make clear that eligible entities can and should begin funding broadband adoption programs concurrently with funding of deployment in unserved areas.

NTIA should prohibit eligible entities from using grant funding to finance the overbuilding of service to the  $\leq 20$  percent of already served locations in an “unserved service project” or “underserved service project” (*i.e.*, any portion of a plan that overbuilds existing networks must be de-scoped from the receipt of BEAD funding in an unserved or underserved service project area).

## Allocation and Use of BEAD Funds to Achieve Universal, Reliable, Affordable, High-Speed Broadband

- [Question 16] NTIA should not award BEAD funds to new providers in areas where there is already an RDOF awardee or any area where a provider already has a binding commitment to deploy broadband in connection with other federal funding programs (*e.g.*, Treasury State and Local Fiscal Recovery Fund, Treasury Capital Projects Fund, USDA RUS ReConnect) or state or local funding programs.

NTIA should require eligible entities to utilize Federal Communications Commission (“FCC”) maps to identify unserved and underserved locations, including whether “reliable” service is available, and require NTIA and eligible entities to consult the forthcoming Broadband Deployment Locations Map required by BIL once that map is available.

- [Question 18] NTIA can take several actions to maximize the allocation and use of BEAD funding to achieve the goal of universal broadband coverage:
  - NTIA should not designate any “other uses” for BEAD funding beyond those expressly identified in the BIL, and should adhere to the funding priorities specified in the statute.
  - Funding for reduced-cost broadband in low-income multi-family residential buildings should be made available in locations where the percentage of individuals with a household income that is at or below 200 percent of the poverty line is higher than the national percentage of such individuals.
  - NTIA should define “priority broadband project” as infrastructure that is scalable to provide 1 Gbps/250 Mbps service and should not limit such projects to particular technologies.

## Low-Cost Broadband Service Option and Other Ways to Address Affordability

- [Question 22] NTIA should build on the FCC’s Affordable Connectivity Program (“ACP”) and specify that a provider’s participation in ACP presumptively qualifies as the low-cost broadband service option satisfying this requirement.
- [Question 23] NTIA should specify that a state or territory may not mandate the price or terms of a low-cost broadband offering and should consider including bulk arrangements.

## **MIDDLE MILE BROADBAND INFRASTRUCTURE GRANT PROGRAM**

- [Question 32] NTIA should prioritize middle mile funding for facilities that connect to last mile networks that provide or plan to provide broadband service to households in unserved areas. Middle mile funding should be limited to

deployment in lower-density areas, based on the proportion of unserved households, where network development is typically more costly and less economic than in other areas.

## II. INTRODUCTION AND SUMMARY

Despite tremendous investment in broadband by the private sector, including by NCTA members, and long-standing federal and state broadband infrastructure funding programs, there are still millions of Americans who live in areas that remain unserved and underserved by reliable broadband service because of the high costs of deployment. Through enactment of the BIL, Congress sought to address this pressing problem. NCTA shares the Administration's goal of extending broadband to these difficult-to-serve areas and its members look forward to participating in the BEAD program.

To achieve this objective most effectively, as Secretary Raimondo and Assistant Secretary Davidson have recognized,<sup>7</sup> Congress directed that funding must be sequenced first to unserved and then to underserved areas,<sup>8</sup> while precluding the inefficient and wasteful use of funding on projects in locations that already have access to reliable fixed broadband. NTIA's implementing rules must incorporate this framework.

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<sup>7</sup> White House Press Briefing by Principal Deputy Press Secretary Karine Jean-Pierre and Commerce Secretary Gina Raimondo (Nov. 9, 2021), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/11/09/press-briefing-by-principal-deputy-press-secretary-karine-jean-pierre-and-commerce-secretary-gina-raimondo> (“Secretary Raimondo Briefing”) (“[T]he whole name of the game here is to focus on the underserved and the unserved and on affordability. We have to make sure that we don't spend this money overbuilding . . . which means we'll have to work very closely with the FCC and using their maps to make sure that we focus the money where broadband doesn't exist now.”); Alan B. Davidson Senate Commerce Committee Questions For the Record Response to Sen. Blunt, Question 1, <https://www.commerce.senate.gov/services/files/EBE01489-2198-4183-A6CC-0EE2E5D7EB7D> (“As good stewards of taxpayer funds, we must work to ensure that federal broadband monies are spent efficiently. With respect to overbuilding, the [BIL] offers a framework to address this question. If confirmed, I am committed to following the directives laid out in the [BIL] to serve unserved areas first, and then underserved areas.”).

<sup>8</sup> *Id.* § 60102(f)(1), (h)(1)(A)(i).

NTIA should also leverage work already done at the state level by adopting a presumptive reliance on existing state broadband programs to disburse program funds to unserved areas, with certain modifications to incorporate the specific directives in the BIL and enhanced requirements that NTIA adopts in this proceeding to promote transparency and measure program effectiveness.

First, given the urgency of getting everyone connected, the substantial amount of funding available, and the concomitant need to ensure that these taxpayer funds are spent wisely, NTIA should adopt safeguards to guarantee that eligible entities direct funding to subgrantees with the expertise and experience to complete their projects successfully in accordance with the obligations set out in the statute and operate them moving forward on a sustainable basis. As a threshold matter, that means NTIA should preclude states from imposing undue regulatory burdens on recipients that were not specifically required by Congress. Notably, Congress did not condition the availability of funds on open access or prescriptive rate or service requirements, and states should be foreclosed from imposing such obligations on subgrantees. The assurance that such burdens will not be imposed will encourage qualified and experienced broadband providers to participate in the BIL programs, and will aid in deploying the BIL funds in the most effective manner and with minimal waste, consistent with Congress's intent.

Second, subgrantees will likely face significant operational challenges in constructing extensive broadband facilities within a four-year timeframe in the face of labor shortages, equipment shortages, transportation shortages, and electronics and silicon shortages, all of which will be exacerbated by the extraordinary demand for these resources created by the award of BIL funds for broadband and other infrastructure. NTIA should therefore act to remove obstacles to deployment that are within the control of eligible entities by, *e.g.*, streamlining applicable

permitting procedures to ensure that the awarded funds can be deployed as quickly as possible, and removing other bottlenecks to deployment such as restrictions on access to utility poles necessary to extend broadband to unserved and underserved areas and should ensure that states award funds only to subgrantees who have the capability to complete the work they commit to perform.

Finally, as Secretary Raimondo has pledged, the process for disbursing funds should be transparent at each stage of the application and funding process so that the public and interested parties can review and comment on state plans and then track funding as the monies are being made available consistent with the rules NTIA adopts.<sup>9</sup>

### **III. NCTA'S EFFORTS TO EXTEND BROADBAND TO RURAL AREAS AND LOW-INCOME HOUSEHOLDS**

NCTA's members are leaders in the broadband industry, offering affordable, reliable, and scalable broadband across the country. Over the past 10 years, cable companies have invested more than \$172 billion in fiber-rich broadband deployment and upgrades, including in low-income, rural, and remote areas. Cable companies offer 1-Gigabit downstream service to more than 88 percent of households they pass and continually invest in their broadband infrastructure to meet customer needs not only today but for the future. NCTA and its members have been an active part of the expansion of broadband, including the 10G initiative, an industry-led innovation to further scale America's high-speed networks to multi-gigabit speeds as demand evolves in the coming years.<sup>10</sup>

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<sup>9</sup> Secretary Raimondo Briefing.

<sup>10</sup> See, e.g., 10G, <https://www.10gplatform.com/> (last accessed Feb. 4, 2022); GCI, *Welcome to 2 Gig*, <https://www.gci.com/2gig> (last accessed Feb. 4, 2022); J. Fingas, *Comcast tests the first multigigabit cable modem*, Engadget (Jan. 13, 2022), <https://www.engadget.com/comcast-10gbps-multigigabit-cable-modem-test-150001003.html>.

Cable companies have proven their dedication to bringing fast, reliable broadband to unserved communities throughout the United States. NCTA members continue to work to expand the number of households served by investing their own private capital in rural expansion and by participating in federal support programs such as the FCC’s Rural Digital Opportunity Fund (“RDOF”), as well as state-level broadband deployment initiatives and joint public-private partnerships. Moreover, NCTA members have led the industry in promoting broadband adoption, connecting over 14 million Americans to the Internet via low-cost broadband offerings<sup>11</sup> that are available to 85 percent of U.S. households.<sup>12</sup> NCTA members were also Day One participants in the FCC’s Emergency Broadband Benefit program and are now participating in the FCC’s ACP, helping to actualize Congress’s and the Administration’s broadband adoption and affordability goals. Additionally, cable providers have invested \$650 million in digital literacy since 2011.<sup>13</sup>

#### **IV. RESPONSES TO GENERAL QUESTIONS**

##### **A. Bringing Reliable, Affordable, High-Speed Broadband to All Americans.**

In response to the Notice’s general questions, NCTA encourages NTIA to incorporate the following principles and procedures into the BEAD program to help support the BIL’s overarching goals of closing the digital divide:

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<sup>11</sup> *Broadband Data: Closing the Digital Divide With Broadband Adoption Programs*, NCTA (July 28, 2021), <https://www.ncta.com/whats-new/broadband-data-closing-the-digital-divide-with-broadband-adoption-programs>.

<sup>12</sup> *Expanding Access and Opportunity: Digital Divide*, NCTA, <https://www.ncta.com/positions/digital-divide> (last accessed Feb. 4, 2022).

<sup>13</sup> *Id.*

**Question 1: What are the most important steps NTIA can take to ensure that the BIL’s broadband programs meet their goals with respect to access, adoption, affordability, digital equity, and digital inclusion?**

To ensure that the BIL’s broadband programs meet Congress’s and the Administration’s goals to promote broadband access, adoption, affordability, digital equity, and digital inclusion, NTIA should ensure that each state has clearly outlined a plan for funding that will bring access to high-speed Internet to 100 percent of the unserved population before funding is available to underserved areas. To accomplish this, NTIA must, as the BIL requires,<sup>14</sup> prioritize projects that will connect unserved locations. Adhering to this priority will ensure that “every American has access to reliable high-speed internet.”<sup>15</sup>

To this end, NTIA should require eligible entities to publicly provide sufficient detail regarding proposed use of funds in their initial and final proposals to enable interested parties to confirm that the eligible entity’s plans meet the requirements of the statute and the Notice of Funding Opportunity. This detail should include (1) a description of the safeguards against funding duplicative investments in areas that are already served or are subject to a binding commitment to deploy broadband infrastructure; and (2) a demonstration by subgrantees of their ability to complete the promised construction commitment in a timely fashion, including their plans to procure the necessary labor, equipment, permits, and rights-of-way. NTIA should also require eligible entities to describe their proposed challenge process in their initial proposals to NTIA and provide interested parties with an opportunity to review and comment on that proposed challenge process.<sup>16</sup>

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<sup>14</sup> IIIA § 60102(f)(1), (h)(1)(A)(i).

<sup>15</sup> *Bipartisan Infrastructure Investment and Jobs Act Fact Sheet*, The White House (Aug. 2, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/02/updated-fact-sheet-bipartisan-infrastructure-investment-and-jobs-act>.

<sup>16</sup> See also Response to Question 6, *infra*, regarding an eligible entity’s challenge process.

**Question 3: What types of data should NTIA require funding recipients to collect and maintain to facilitate assessment of the BIL programs' impact, evaluate targets, promote accountability, and/or coordinate with other federal and state programs?**

To promote accountability, provide the ongoing ability to assess the success of the BIL programs and compliance with Congress's directives, and ensure coordination with other federal and state programs, NTIA should ensure that the public has sufficient information regarding eligible entity plans and projects before, during, and after funding decisions.

First, NTIA should require that letters of intent and initial and final proposals have sufficient detail to enable the public and interested parties to assess eligible entities' compliance with the BIL and the rules that NTIA adopts in this proceeding. NTIA should make those letters of intent and final proposals available on its website shortly (*e.g.*, no later than five days) after they are filed and NTIA should provide interested members of the public adequate time (*e.g.*, at least 30 days after publicly posting) to review and comment on those submissions. If NTIA determines that comments received raise verifiable and reasonable issues with credible evidence, NTIA should then take those comments into account in its review of these submissions.

Second, NTIA should collect and publish data from the eligible entities and subgrantees detailing newly connected locations, available advertised speed for each location, percentage of project completed, and any reasons outside of the provider's control that may have caused delay (*e.g.*, pole attachments).<sup>17</sup> This information should be collected at regular intervals to provide an accurate snapshot of deployment progress, in addition to the eligible entities' semiannual reporting requirement specified in the BIL.<sup>18</sup> NTIA should publish these periodic reports—with

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<sup>17</sup> Entities could request confidential treatment of sensitive information. Proprietary and competitively sensitive data would be redacted from the public versions of these reports although reporting that confirms that service is available at a funded location should not be considered confidential.

<sup>18</sup> IIJA § 60102(j)(1). The BIL also provides a semiannual reporting requirement for subgrantees. *Id.* § 60102(j)(2).

confidential or competitively sensitive information redacted. NTIA should make these reports available on its website no later than five days after receiving them. NTIA should also publish annual reports detailing the aggregate number of the remaining unserved and underserved households on a state-by-state basis, drawing from the data in the FCC’s data maps when that becomes available; and the progress made under the BEAD program in reducing the number of unserved and underserved households.

Third, the BIL requires the FCC to establish the Broadband Deployment Location Map not later than May 2023.<sup>19</sup> In the period prior to when this tool becomes available, NTIA should coordinate with the FCC to publish maps that are updated at least every six months showing where funding has been awarded for broadband deployment and collaborate with the FCC to present that information in conjunction with the FCC’s Broadband Data Collection (“BDC”) adopted pursuant to the Broadband DATA Act.<sup>20</sup> Specifically, NTIA should use the data from the FCC’s BDC to develop a map that reflects both deployment and funding commitments. This mapping effort will be critical to identifying any unserved locations that are not projected to get broadband (which under the BIL must be prioritized before funding other broadband infrastructure projects), as well as avoiding subsidized overbuilding of areas where commitments already have been made.

**Question 4: How should NTIA and grant recipients verify that funding is used in a way that complements other federal and state broadband programs?**

To ensure the most efficient and effective deployment of funds while also promoting the widest participation in BIL programs, NTIA should adopt guardrails and safeguards for funding,

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<sup>19</sup> *Id.* § 60105.

<sup>20</sup> Broadband Deployment Accuracy and Technological Availability Act, Pub. L. 116-130, 134 Stat. 228 (2020); 47 C.F.R. § 1.7001.

but should not impose undue regulatory obligations or product and service mandates on subgrantees as a condition of eligibility for funding, except as specifically provided in the BIL.<sup>21</sup>

For instance, NTIA should prohibit states from conditioning BIL funding on the adoption of regulatory requirements such as open access obligations. Congress did not include these as “subgrantee obligations” or “deployment and provision of service requirements” under the BIL,<sup>22</sup> and the complex questions involved regarding whether to impose such requirements are best suited for consideration in a proceeding of general applicability—not as patchwork conditions on funding. NTIA should also bar states from conditioning funding on the imposition of prescriptive rate or service requirements. Notably, the BIL prohibits NTIA from regulating broadband rates, and that prohibition should extend to eligible entities.<sup>23</sup> Likewise, because the BIL assigns to NTIA the responsibility for specifying network and service reliability and resiliency best practices, there is no need or basis for eligible entities to adopt additional or different practices regarding such matters.<sup>24</sup> NCTA’s proposals for NTIA’s guardrails and safeguards are detailed in response to Question 14.

## **B. Supporting States, Territories, and Sub-Grantees to Achieve the Goal.**

### **Question 6: How should NTIA assess a particular state or territory’s subgrant award process?**

To maximize the impact of the funding, NTIA should adopt a presumptive reliance on existing state broadband programs that focus on unserved areas to disburse program funds,<sup>25</sup> so

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<sup>21</sup> IIIA §§ 60102(g)(1) (setting forth subgrantee obligations to be determined by NTIA), 60102(h)(4).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* § 60102(h)(5)(d) (titled “No regulation of rates”).

<sup>24</sup> *Id.* § 60102(g)(1).

<sup>25</sup> *Id.* § 60102(e)(1)(B)(ii)(I)(aa) (eligible entity letter of intent “may include” details of “the existing broadband program or office of the eligible entity”).

long as they adhere to the specific requirements in the BIL, and the procedures and requirements adopted by NTIA in this proceeding to deter waste, fraud, and abuse. Many states already have programs created to promote broadband deployment in unserved areas. Leveraging the parts of these existing state programs that are consistent with the BIL will accelerate the deployment of broadband in the places where it is most needed where such programs are consistent with the goals of the BIL. If a state does not have an existing program for unserved areas, NTIA should require any new program created to administer the BIL programs to include the safeguards detailed below.

NTIA should require that all eligible entity programs meet certain baseline requirements. First, the eligible entity's process should be a competitive grant-based process where the award process and criteria are clearly defined and where all applications and details of applications are available for public review (excluding financial and proprietary information). Second, as noted above and consistent with the scope of "subgrantee obligations" set forth in the BIL, NTIA should prohibit eligible entities from imposing regulatory obligations on a subgrantee as a condition of receiving funds, *e.g.*, open access obligations or price regulation, or from according a preference to a bidder that agrees to any such obligations. Finally, an eligible entity may not provide a preference for government-owned or government-subsidized networks or public-private partnerships, non-profits, or cooperatives. While the BIL prohibits eligible entities from excluding these entities from eligibility for BEAD funds,<sup>26</sup> the statute does not authorize or require eligible entities to give such entities preferential eligibility. Rather, eligible entities should award funding to the most qualified subgrantees capable of deploying service to the highest percentage of truly unserved locations in the most cost-effective manner.

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<sup>26</sup> *See id.* § 60102(h)(1)(A)(iii).

**Challenge Process.** The BIL requires that, prior to the allocation of grant funds, an eligible entity shall ensure an “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.”<sup>27</sup> The state challenge process should utilize the FCC’s BDC and focus solely on deployment that has occurred in the period after the maps are published to ensure funding is targeted to truly unserved areas and to prevent the misuse of funds on duplicative broadband networks.

The BDC maps will provide granular information regarding deployment—on a location-by-location basis—structured to ensure more accurate and granular data than the FCC’s prior maps. The BDC maps will be used to determine baseline funding and the FCC has adopted sufficient protections to ensure these maps will be accurate.<sup>28</sup> For instance, the FCC already has a process to challenge the maps, via both crowdsourced data and third-party challenges, and the FCC will update the maps to reflect any corrections following successful challenges determined by the FCC. Eligible entities need not create waste in their programs by attempting to replicate this process.

To ensure a challenge process that is efficient and avoids overbuilding, NTIA should encourage states to use a process like the one adopted under the FCC’s RDOF program.<sup>29</sup> There,

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<sup>27</sup> *Id.* § 60102(h)(2)(A).

<sup>28</sup> *See* 47 C.F.R. § 1.7004 (describing the scope, content, and frequency of BDC filings); *id.* § 1.7006(d) (describing the fixed service challenge process); *id.* § 1.7008 (detailing the creation of broadband Internet access service coverage maps).

<sup>29</sup> *In re Rural Digital Opportunity Fund*, Report and Order, 35 FCC Rcd 686, 692-93 ¶ 14 (2020) (“*Rural Digital Opportunity Fund Order*”) (“Because there is an inevitable lag between the time when areas are served and the time that service is reflected in publicly available FCC Form 477 data, parties will be

the FCC only allowed challenges aimed at showing that a location deemed unserved was actually served (*e.g.*, because new deployment was not reflected on the latest map). NTIA should follow the FCC’s approach and prohibit challenges arguing that a location identified as served on the FCC map is actually unserved. This would be unnecessarily duplicative given the BDC challenge process described above,<sup>30</sup> would be difficult to administer and burdensome for eligible entities and broadband providers alike, and would unnecessarily delay the deployment process.

Additionally, consistent with the agency’s authority to oversee and correct state challenge processes,<sup>31</sup> NTIA should mandate other requirements as part of a robust challenge process that builds on best practices from states. First, similar to an approach taken by Virginia,<sup>32</sup> eligible entities should be required to aggregate all of the challenges in assessing whether the project complies with the up-to-20 percent served threshold in the definition of unserved and underserved service projects.<sup>33</sup> Second, NTIA should establish a process to enable the public to notify NTIA directly of potential impermissible uses of funding by eligible entities (*e.g.*, use of deployment funding in served areas) even outside the eligible entity’s challenge process.

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given an opportunity to identify areas that have subsequently become served, and the Bureau will have the opportunity to compare the preliminary list of eligible areas with the final list to identify any obvious reporting errors.”).

<sup>30</sup> 47 C.F.R. § 1.7006 (“Data Verification”); *In re Establishing the Digital Opportunity Data Collection*, Third Report and Order, 36 FCC Rcd 1126, 1154-64 ¶¶ 70-96 (2021).

<sup>31</sup> *Id.* § 60102(h)(2)(D).

<sup>32</sup> See Virginia Telecommunication Initiative, Virginia Dep’t of Housing and Community Development, <https://www.dhcd.virginia.gov/vati> (last accessed Jan. 21, 2022).

<sup>33</sup> See IJA § 60102(a)(1)(B), (D) (defining unserved and underserved service projects as those in which “not less than 80 percent of broadband-serviceable locations served by the project” meet the definition of an “unserved location” or “underserved location”).

Finally, to facilitate efficient challenge processes, NTIA should require that eligible entities ensure the following: (1) proposed projects are easily identified, with proposed project areas drawn based on a polygon identifying the locations to be covered and in GIS format (*e.g.*, shapefiles); (2) a provider should have at least 45 days after a project is proposed to challenge an area in the proposed service project where that provider already provides service, has begun construction to provide service, or has an existing binding federal or state obligation to deploy broadband network infrastructure and to provide service; (3) the proposed subgrantee has adequate time to respond, up to 60 days; and (4) the challenger must be timely notified of the decision regarding its challenge.

***Access to Poles and Rights-of-Way; Resilient Networks; Prohibition on Cross-Subsidies.*** Secretary Raimondo has said she is committed to the administration’s goal of universal broadband by 2030.<sup>34</sup> To ensure timely and efficient deployment, an eligible entity should certify to NTIA that it has policies in place that require all pole owners in BEAD service project areas to provide subgrantees with timely and non-discriminatory access to poles, ducts, conduits, and rights-of-way, at non-discriminatory rates, in accordance with the FCC’s or the entity’s pole attachment rules.<sup>35</sup> Further, NTIA should provide that any build deadlines will be

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<sup>34</sup> *White House Wants Universal Broadband by 2030 but Funding Could Take Years to Deliver*, CNBC (Dec. 15, 2021), <https://www.cnbc.com/2021/12/15/commerce-secretary-gina-raimondo-on-bidens-universal-broadband-plan.html>.

<sup>35</sup> NTIA has authority to impose this requirement as a reasonable condition on funding directly related to achieving the goal of the BEAD program to extend broadband facilities to unserved and underserved areas. “Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power ‘to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.’” *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (citation omitted). This authority necessarily extends to federal agencies that are responsible for implementing Congress’s grant programs. *See New York v. Dep’t of Just.*, 951 F.3d 84, 115 (2d Cir. 2020) (“Thus, where Congress places conditions on a State’s receipt of federal funds—whether directly, or by delegation of clarifying authority to an executive agency—there is no commandeering of reserved State power so long as the State has ‘a legitimate choice whether to accept the federal conditions in exchange for federal funds.’” (emphasis added) (citation omitted)).

extended as a result of pole-owner delay in providing such access or performing related make-ready activities.<sup>36</sup> Without such policies in place, it will be incredibly difficult—if not impossible—to reach 100 percent of currently unserved families and small businesses by 2030.

To the same end, NTIA should (1) clarify that eligible entities must allow subgrantees to use BEAD funds for the costs of pole replacements within unserved areas covered by a subgrantee’s funding award, if such removal and replacement is necessary to accommodate the attachment of facilities that will be used by such subgrantee to provide broadband service to unserved locations; and (2) allow an eligible entity to award BEAD funds, consistent with the requirements of the IJJA, to a subgrantee that has already been awarded broadband deployment funding through BEAD or other federal, state, or local programs, but only for such necessary pole replacement costs, within the unserved areas funded by those programs, that are not otherwise covered by such programs. Additionally, eligible entities should also permit subgrantees to use BEAD grants to deploy new facilities underground in areas where it is feasible and appropriate.<sup>37</sup>

Eligible entities should also provide for expedited state and local permitting for the deployment of facilities funded by BEAD grants and should facilitate non-discriminatory access to rights-of-way at non-discriminatory rates, terms, and conditions. Specifically, subgrantees that are utilities, cooperatives, and local governments should be prohibited from preferential permitting or access to rights-of-way.

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<sup>36</sup> These activities include performing field surveys of the poles in project areas, estimating the costs of preparing those poles to accommodate new broadband attachments, and the actual work to prepare the poles for those attachments.

<sup>37</sup> Undergrounding is one means of improving network resilience, and Congress specifically directed NTIA to define best practices for ensuring the “resilience of broadband infrastructure.” IJJA § 60102(g)(1)(C).

Finally, eligible entities should also be required to adopt safeguards to prohibit potential cross-subsidization of broadband services by utilities, cooperatives, and local governments<sup>38</sup> in order to prevent BEAD funds from being used to fund projects that unfairly compel financial support from ratepayers or taxpayers.

**Question 9: Under what circumstances, if any, should NTIA agree to waive the matching fund requirements?**

To ensure that the BIL’s funding is awarded to entities with a demonstrated commitment and actual stake in completing a project, any waiver of matching funds should be granted sparingly, and blanket waivers of matching requirements should be strongly discouraged. As Congress recognized by adding such a requirement,<sup>39</sup> a “contribution derived from non-Federal funds” helps to more efficiently allocate risk for these substantial capital expenditures and helps promote vested participation by qualified, investment-worthy subgrantees, including the most experienced broadband companies. Finally, NTIA should direct eligible entities to require that subgrantees commit to obtaining a certain percentage of the funding over the life of the project exclusively from *private* resources and to give preference and priority to subgrantees that commit to higher matching percentages (and not just from the eligible federal sources of matching funds).<sup>40</sup>

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<sup>38</sup> Specifically, NTIA should require that eligible entities certify that any government-owned, government subsidized, or cooperative grantee is prohibited from cross-subsidizing their broadband services and network upgrades/maintenance from their other revenue sources/tax monies. *See, e.g.*, Ga. Code § 46-3-200.2 (prohibiting cross-subsidization of broadband and electric services by electric cooperatives).

<sup>39</sup> IIIA § 60102(h)(3).

<sup>40</sup> *Id.* § 60102(h)(3)(B)(iii). The BIL provides that the matching requirement does not apply in high-cost areas. *Id.* § 60102(h)(3)(A)(i); *see also id.* § 60102(a)(2) (defining high-cost area as “an unserved area in which the cost of building out broadband service is higher, as compared with the average cost of building out broadband service in unserved areas in the United States”). If NTIA nonetheless permits eligible entities to impose a matching requirement to awards in these areas, the percentage should be determined on a sliding scale basis that takes into consideration the expense of each project.

**C. Ensuring the Future of America is Made in America by All of America’s Workers.**

**Question 12: What steps, if any, should NTIA take to ensure maximum use of American-made network components and that supply shortages are addressed in ways that create high quality jobs for all Americans?**

While NCTA generally supports a Made in America requirement, its communications providers’ real-world experiences in deploying broadband networks indicate that such a requirement is infeasible at this time and would not create the conditions necessary for the nation to reach 100 percent broadband connectivity, especially within the timeframe required by the BIL. The nation is facing supply chain constraints across all segments of the economy, including with respect to broadband deployment.<sup>41</sup> These constraints will likely be amplified due to the increased demand associated with the new federal funding for deployment under the BIL and similar programs. Even prior to the pandemic, broadband providers faced supply chain constraints for certain equipment including electronics used in broadband networks, which forced many providers to anticipate need and order supplies years in advance. For example, the experience of NCTA members indicates that fiber and equipment necessary for customers to use broadband service (modems, gateways, and termination gear) must be ordered one to two years in advance.

In light of these challenges, and to ensure that the nation can reach the goal of 100 percent broadband connectivity, NTIA should adopt a blanket waiver of the “Buy American” requirement. Notably, the Department of Commerce previously determined that applying the Buy American provision for the use of certain broadband equipment in public Broadband Technology Opportunities Program (“BTOP”) projects would be inconsistent with the public

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<sup>41</sup> See Susan Helper & Evan Soltas, *Why the Pandemic Has Disrupted Supply Chains*, White House (June 17, 2021), <https://www.whitehouse.gov/cea/written-materials/2021/06/17/why-the-pandemic-has-disrupted-supply-chains>.

interest.<sup>42</sup> Then, NTIA recognized that “much of the finished products used to manage and operate broadband infrastructure and offer broadband service are manufactured outside of the United States” in a “very competitive and complex production landscape with components and end products being manufactured and assembled in a larger number of countries.”<sup>43</sup> Because the waiver would “facilitate the construction of modern broadband networks”—an essential component of both the Recovery Act as detailed in BTOP and the BIL here—NTIA determined that applicants “must have the flexibility to incorporate the most technically-advanced components into their infrastructure, and a limited waiver gives them the ability to incorporate the latest technologies.”<sup>44</sup> It should do so again here.

## V. BROADBAND EQUITY, ACCESS, AND DEPLOYMENT PROGRAM

### A. Ensuring Publicly Funded Broadband Networks That Sustain and Scale.

There are several steps NTIA can take to ensure funding goes toward sustainable and scalable broadband networks. Specifically:

**Question 13: What guidance or requirements, if any, should NTIA consider with respect to network reliability and availability, cybersecurity, resiliency, latency, or other service quality features and metrics?**

NTIA should ensure that eligible entities award funds to providers that have the demonstrated technical and financial expertise to deploy and operate reliable broadband networks in a timely fashion. As noted above, broadband providers will face a range of technical and operational issues in building out broadband networks within the BIL’s four-year timeframe. These challenges will be exacerbated by constraints on labor and equipment shortages, which are

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<sup>42</sup> Notice of Limited Waiver of Section 1605 (Buy American Requirement) of the American Recovery and Reinvestment Act of 2009 (ARRA) for the Broadband Initiatives Program, 74 Fed. Reg. 31402 (July 1, 2009).

<sup>43</sup> *Id.* at 31403.

<sup>44</sup> *Id.*

likely to be made more acute by the increased demand created by the BEAD and other similar federal and state programs for the construction of broadband networks.

That increased demand will also pose challenges for providers in securing a trained, skilled workforce for the deployment of broadband networks. Deploying broadband networks requires a combination of skilled, specialized labor and general construction crews. Supporting a network over its lifetime involves not only initial construction, but also a myriad of resources from the provider and from within each local community to ensure continued operation, maintenance, and upgrade of the broadband networks. Finding these crews and skilled labor for ongoing network support will be a major challenge.

Given these challenges, NTIA should adopt several rules to ensure funded projects will deliver promised performance within the timeframe required by the BIL. First, eligible entities should be required to prioritize funding for providers with proven track records in delivering high-quality broadband service over networks that are resilient, reliable, and secure. Well-established broadband providers with a strong track record of private network investment are the foremost leaders in developing and operationalizing state-of-the-art best practices regarding security, resiliency, and supply chain management and have a history of avoiding use of high-risk suppliers. A preference for proven providers would also be consistent with the practices of other federal agencies to promote the efficient use of funds and reduce the potential for waste, fraud, and abuse.<sup>45</sup>

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<sup>45</sup> For example, the FCC in RDOF required an applicant to submit a certification that it has provided broadband services for at least two years. If an applicant cannot meet this requirement, it faces additional scrutiny and is required, for example, to provide additional information, including detailed financial information. 47 C.F.R. § 54.804(a)(7).

Second, to further ensure the funded projects will deliver promised performance, NTIA should also require that subgrantees meet certain baseline requirements. Facilities funded by BEAD grants should not only be required to deliver the statutorily-required minimum 100/20 Mbps service, but also have the capability to scale over time as broadband applications and consumer demand evolve. They should be able to deliver at least 80 percent of the advertised speeds during the peak busy hour(s) on the network for at least 80 percent of the time,<sup>46</sup> and the median idle latency in the ISP's access network should not exceed 100 milliseconds.<sup>47</sup>

To ensure compliance with these standards, NTIA should require that subgrantees must be certified by a professional engineer,<sup>48</sup> that the deployment will reliably serve all locations, and meet all of the project requirements at all locations within the required timeframe. NTIA should also require that subgrantees identify company personnel familiar with broadband planning in these areas (just as they would identify key personnel when responding to other government

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<sup>46</sup> See *Eleventh Measuring Broadband America Fixed Broadband Report: A Report on Consumer Fixed Broadband Performance in the United States*, FCC, at Section 2.C & Chart 6 (Dec. 31, 2021), <https://www.fcc.gov/reports-research/reports/measuring-broadband-america/measuring-fixed-broadband-eleventh-report>.

<sup>47</sup> The FCC adopted a similar latency requirement for the RDOF Program. *Rural Digital Opportunity Fund Order*, 35 FCC Rcd at 726 ¶ 32 (“Low latency means 95 percent or more of all peak period measurements of network round trip latency are at or below 100 milliseconds”); see also BITAG, *Latency Explained: A Broadband Internet Technical Advisory Group Technical Working Group Report* (Jan. 10, 2022), <https://bitag.org/latency-explained.php>. Further, SamKnows, an international statistics and analytics firm, can be used to measure speed and latency under the RDOF performance measures and could similarly be used to measure latency under load here. *Measuring Broadband America*, FCC, <https://www.fcc.gov/general/measuring-broadband-america> (updated Dec. 31, 2021); see *In re Connect America Fund*, Order on Reconsideration, 34 FCC Rcd 10109, 10138-39 ¶ 77 n.200 (2019) (proposing SamKnows as a possible source for the required performance testing).

<sup>48</sup> Similar to RDOF, subgrantees should be able to use an internal resource to meet this requirement. See *Rural Digital Opportunity Fund Phase I Auction Scheduled for October 29, 2020: Notice and Filing Requirements and Other Procedures for Auction 904*, Public Notice, 35 FCC Rcd 6077, 6122 ¶ 301 n.513 (2020) (“*RDOF Notice and Filing Requirements*”) (“For purposes of this requirement, while it is not necessary that the professional engineer certifying the network have a Professional Engineer license, the certification should describe the professional engineer’s qualifications such that the certifier’s expertise is apparent.”).

RFPs/applications—*see, e.g.*, the RUS ReConnect application), and these personnel should be available for interviews to answer questions regarding the application.

Grants should be awarded on a technology-neutral basis, provided that the applicant can demonstrate that the technology chosen will reliably deliver the promised level of performance to the proposed service area within the statutory four-year time frame.<sup>49</sup> It is unnecessary for NTIA to specify a particular technology as a requirement for an award.<sup>50</sup> Moreover, a technology-neutral award process will promote broader provider participation and competition for BEAD funding. In addition to demonstrating that its chosen technology is capable of delivering the promised level of performance, the applicant should be required to explain its plans for procuring all necessary labor, equipment, permits, and rights-of-way. In reviewing such submissions, special scrutiny may be warranted for providers that do not have a demonstrated track record of deployment with their chosen technology or in their proposed geographic area.<sup>51</sup>

Third, the BIL requires NTIA to identify standards for service quality, reliability, resilience, and cybersecurity supply chain risk management practices to guide subgrantees.<sup>52</sup>

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<sup>49</sup> For instance, in RDOF, the FCC approved applicants with unproven technologies, many of whom have since defaulted on a large portion of their bids. *See, e.g., In re the Rural Digital Opportunity Fund Auction (Auction 904)*, Order, AU Docket No. 20-34, DA 21-1311 (WCB rel. Oct. 20, 2021) (denying LTD Broadband’s petition for waiver because LTD failed to submit its ETC applications in three states in a timely manner and finding LTD in default in its bids in those states); *Rural Digital Opportunity Fund Support For 7,608 Winning Bids Ready To Be Authorized; Bid Defaults Announced*, Public Notice, AU Docket No. 20-34, DA 21-1582, Attachment B (rel. Dec. 16, 2021) (detailing RDOF defaults).

<sup>50</sup> Specifically, fiber need not be deployed to the home for consumers to get the benefits of fiber deployment. Cable’s hybrid-fiber coax (“HFC”) networks utilize a combination of fiber transport to the neighborhood and coaxial cable for the last segment to deliver gigabit speeds. These networks are also readily scalable to higher speeds, up to 10 Gbps. Wireless networks may be used and can achieve speeds in excess of 100 Mbps.

<sup>51</sup> *See, e.g., supra* footnote 38 (detailing RDOF’s experience requirements).

<sup>52</sup> IIJA, § 60102(g)(1).

Rather than adopt new requirements to address these issues, however, NTIA can and should reference existing standards and best practices.<sup>53</sup> The adoption of particularized standards for BEAD grants is unnecessary and would introduce delay and uncertainty to the deployment of broadband facilities funded by the program. For instance, construction of networks should meet state and local building regulations and other applicable codes, such as National Electric Safety Code (“NESC”) and National Electrical Code (“NEC”). NESC codes apply to outside plant and facilities, such as wiring on poles, grounding practices and many other aspects. Trenching for fiber and cables should also follow applicable regulations and industry guidelines. NEC codes are part of the National Fire Code and cover primarily inside plants. Established broadband providers will have their own best practices that they adhere to in addition to following state and local codes.

For cybersecurity, NTIA should require that grantees and subgrantees utilize the NIST Cybersecurity Framework (“CSF”) to develop a cybersecurity program, assess and communicate cybersecurity requirements to stakeholders, particularly vendors, implement the core functions of the CSF (identify, protect, detect, respond, and recover), and implement relevant cybersecurity standards, guidelines, and practices included in CSF’s Informative References.

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<sup>53</sup> Doing so is required by Section 12(d) of the National Technology Transfer and Advancement Act and would be consistent with White House and National Institute for Standard and Technology guidance instructing federal agencies to leverage existing voluntary consensus standards in regulatory and procurement activities. *See* Pub. L. 104–113, §12(d), Mar. 7, 1996, 110 Stat. 783, as amended by Pub. L. 107–107, div. A, title XI, §1115, Dec. 28, 2001, 115 Stat. 1241 (“[A]ll Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments.”); Office of Mgmt. & Budget, Circular A-119, at 8 (Jan. 27, 2016), <https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-119-1.pdf> (“Your agency must use voluntary consensus standards in its regulatory, procurement, and program activities in lieu of government-unique standards, unless use of such standards would be inconsistent with applicable law or otherwise impractical.”); 15 C.F.R. § 287.4(e) (instructing federal agencies to “[c]onsider leveraging the activities and results of other governmental agency and private sector programs in lieu of creating government-unique programs or to enhance the effectiveness of proposed new and existing conformity assessment.”).

**Question 14: What criteria should NTIA require states to consider to ensure that projects will provide sustainable service, will best serve unserved and underserved communities, will provide accessible and affordable broadband in historically disconnected communities, and will benefit from ongoing investment from the network provider over time?**

To ensure that projects will provide sustainable service, will best serve unserved and underserved communities, will provide accessible and affordable broadband in historically disconnected communities, and will benefit from ongoing investment from the network provider over time, NTIA must require states to award funds in compliance with the statutory prioritization of projects, *i.e.*, make all awards for unserved location projects first, then underserved location projects, then community anchor institutions and multi-family residential buildings.<sup>54</sup> This will ensure that funding is available to meet areas with the greatest need for broadband access, as intended by Congress.

**B. Allocation and Use of BEAD Funds to Achieve Universal, Reliable, Affordable, High-Speed Broadband.**

**Question 16: How should NTIA treat prior buildout commitments that are not reflected in the updated FCC maps because the projects themselves are not yet complete?**

As required by the BIL, NTIA should coordinate with other federal agencies disbursing broadband funding to avoid duplicative funding, protect against waste, and minimize subsidized overbuilding.<sup>55</sup> Specifically, NTIA should require eligible entities to utilize FCC maps to

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<sup>54</sup> IIJA § 60102(h)(1)(a)(i). We discuss the applicability of BEAD to multi-family residential buildings in response to our answer to Question 18 below.

<sup>55</sup> *Id.* § 60102(m) (expressing the sense of Congress that “Federal agencies responsible for supporting broadband deployment, including the Commission, the Department of Commerce, and the Department of Agriculture, to the extent possible, should align the goals, application and reporting processes, and project requirements with respect to broadband deployment supported by those agencies”); *see also* Consolidated Appropriations Act, 2021, Pub. L. No. 116-270, div. FF, tit. IX, § 903 (2020); *id.* § 903(f)(2)(A) (directing “any agency that offers a Federal broadband support program” to “coordinate with” the NTIA’s newly-formed Office of Internet Connectivity and Growth to ensure “the largest number of unserved locations in the United States . . . have access to high-speed broadband”).

identify unserved and underserved locations including whether “reliable” service is available and require NTIA and eligible entities to consult the map of federally funded broadband projects authorized in BIL.<sup>56</sup>

NTIA should not award BEAD funds to new providers in areas where there is already an RDOF awardee or any area where a provider already has a binding commitment to deploy broadband in connection with other federal funding programs (*e.g.*, Treasury State and Local Fiscal Recovery Fund, Treasury Capital Projects Fund, USDA RUS ReConnect) or state or local funding programs.<sup>57</sup> Otherwise, if NTIA adopted such a policy, it would result in a wasteful use of BEAD funds and jeopardize the success of projects where a provider already has a legal obligation to deploy broadband. NTIA should make clear that BEAD funding will not be made available for new projects that serve locations already covered by an award of funds under a different federal, state, or local government program or where a provider already has made an enforceable commitment to deploy broadband infrastructure that provides at least 100/20 Mbps service.<sup>58</sup> States should be required to identify any locations covered by these federal, state or local funds, and such locations should be de-scoped from the states’ plans, either as part of NTIA’s review of these plans or in connection with ensuring a robust state challenge process.

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<sup>56</sup> The allocation of BEAD funds will be based on the date on which the FCC’s maps are “made public,” IIJA § 60102(c)(1)(A), (c)(3)(A), but those maps will be refined over time through a challenge process.

<sup>57</sup> However, NTIA should provide an exception for RDOF defaults. Specifically, NTIA should award BEAD funds in areas where providers were awarded RDOF funds but defaulted and as such, are not building in those areas.

<sup>58</sup> *Id.* § 60102(e)(4)(A)(iii) (“To ensure efficient and effective use of taxpayer funds, an eligible entity shall, to the greatest extent practicable, align the use of grant funds proposed in the final proposal under clause (i) with funds available from other Federal programs that support broadband deployment and access.”); *see also RDOF Notice and Filing Requirements*, 35 FCC Rcd at 6122 ¶ 119 (detailing the RDOF requirement that applicants certify that their RDOF deployment is independent from any other deployment obligations).

**Question 18: What additional uses, if any, should NTIA deem eligible for BEAD funding?**

NTIA can take several actions to maximize the allocation and use of BEAD funding to achieve the goal of universal access to broadband. First, NTIA should make clear that, even if an unserved or underserved service project area includes up to 20 percent of locations that are already served, this does not mean that funding can be spent on these already served locations within a service project area. That is, NTIA should prohibit eligible entities from using grant funding for any overbuilding of service to those  $\leq 20$  percent of locations (*i.e.*, any portion of a plan that overbuilds existing networks must be de-scoped from the receipt of BEAD funding in an unserved or underserved service project area).

Such a policy would reflect Secretary Raimondo's observation that "the whole name of the game here is to focus on the underserved and the unserved and on affordability. We have to make sure that we don't spend this money overbuilding . . . which means we'll have to work very closely with the FCC and using their maps to make sure that we focus the money where broadband doesn't exist now."<sup>59</sup> Indeed, those  $\leq 20$  percent of locations already have access to broadband service and are therefore likely to be lower-cost areas that could be used as an economic anchor for a project *without* the need for a BEAD subsidy. It would also be a poor use of taxpayer funds to subsidize competition to already served households rather than focusing funding on areas that lack any broadband.

Second, NTIA should not designate any other uses for BEAD funding beyond those expressly identified in BIL,<sup>60</sup> and should adhere to the funding priorities specified in the statute.

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<sup>59</sup> Secretary Raimondo Briefing.

<sup>60</sup> IIA § 60102(f) (specifically identifying (1) unserved/underserved service projects; (2) connecting eligible community anchor institutions; (3) data collection, broadband mapping, and planning; (4) installing Internet and Wi-Fi infrastructure or providing reduced-cost broadband within a multi-family residential building; and (5) broadband adoption, including providing affordable Internet-capable devices;

While the BIL also provides that the funding may be used in other ways deemed appropriate by NTIA, the demands for meeting the explicitly identified uses will likely exceed even the substantial amount of funding provided by the BIL. In any event, any “other uses” identified by NTIA should be funded only after all of the express priorities have been met. The “other uses” provision should not be used as an end-run around the carefully-structured prioritization of projects established by Congress.

Specifically, given Congress’s dedicated appropriation for middle mile connectivity, NTIA should consider middle mile projects ineligible for BEAD funding. If NTIA should choose to award BEAD grants for middle mile infrastructure, it should do so only when demonstrably necessary to support specific last-mile deployment projects also funded by the BEAD program. This focus will allow NTIA to coordinate the middle mile program with the BEAD program—ensuring that the two programs work together, without waste or duplication, to make high-speed broadband available to all Americans.

Third, to implement funding for reduced cost broadband in low-income multi-family residential buildings,<sup>61</sup> NTIA should specify eligible locations as those in which the percentage of individuals with a household income that is at or below 200 percent of the poverty line applicable to a family of the size involved is higher than the national percentage of such individuals, as determined under section 673(2) of the Community Services Block Grant Act.<sup>62</sup> While the BIL defines this threshold as “at or below 150 percent of the poverty line,”<sup>63</sup> NTIA

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in addition to a catch-all “any use determined necessary by the Assistant Secretary to facilitate the goals of the Program”).

<sup>61</sup> *Id.* § 60102(f)(4).

<sup>62</sup> *See* 42 U.S.C. § 9902(2) (defining “poverty line”).

<sup>63</sup> IIJA § 60102(f)(4)(B).

can increase eligibility under its authority to utilize funds to promote broadband adoption. NTIA should clarify, however, that a building that is eligible for support under this test, or under the other test provided in the statute (*e.g.*, “substantial share of unserved households”<sup>64</sup>) does not count as an unserved location if the building is otherwise already passed by a broadband provider offering service with at least 25 Mbps downstream and 3 Mbps upstream.

Fourth, NTIA should define “priority broadband project” as infrastructure that is scalable to provide reliable 1 Gbps/250 Mbps service over time as consumer demand dictates, balancing the goals of promoting advanced broadband service over the widest array of technologies. In addition, NTIA should not limit the technologies that can be used to define priority broadband projects. These technologies may include scalable HFC technology, fiber to the premises, or other potential technologies. As noted above, NCTA members already are offering fast, reliable, gig-level broadband service across the country using scalable HFC networks. By pushing fiber deeper into the network and coupling it with ongoing innovation and advances in DOCSIS architecture, HFC technology has proven effective at scaling over time and consumers show a strong demand for the service.<sup>65</sup>

### **C. Low-Cost Broadband Service Option and Other Ways to Address Affordability.**

#### **Question 22: How should NTIA define the term “eligible subscriber” for the low-cost broadband option?**

The BIL requires that BEAD funding recipients offer at least one low-cost broadband service option and directs NTIA to determine which subscribers are eligible for that low-cost

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<sup>64</sup> *Id.* § 60102(f)(4)(A).

<sup>65</sup> *See, e.g., Stat Roundup: The Best of 2021*, NCTA (Dec. 21, 2021), <https://www.ncta.com/whats-new/stat-roundup-the-best-of-2021>; *Broadband Stats: Infrastructure Success, Past and Present*, NCTA (Dec. 9, 2021), <https://www.ncta.com/whats-new/broadband-stats-infrastructure-success-past-and-present>.

option and to approve each state’s proposed definition of a low-cost broadband service option.<sup>66</sup> NCTA encourages NTIA to build upon Congress’s and the FCC’s efforts to develop the ACP, and to specify that a provider’s participation in ACP presumptively qualifies as the low-cost broadband service option satisfying this requirement.<sup>67</sup>

Rather than duplicate efforts, NTIA should adopt the ACP’s eligibility criteria to define “eligible subscriber” under the BIL. These criteria, which have been modified and refined from the FCC’s original Emergency Broadband Benefit program definition, have been honed by the careful consideration of Congress over the past year. The ACP eligibility criteria not only include those households that receive benefits from federal aid programs (*e.g.*, Medicaid, SNAP, Federal Public Housing Assistance, SSI, WIC, or Lifeline) or qualify based on their income (*i.e.*, household income at or below 200 percent of the Federal Poverty Guidelines), but also incorporate eligibility determinations for providers’ existing low-income broadband programs that were in place as of April 1, 2020.<sup>68</sup> Moreover, because eligible entities must submit their definition of low-cost broadband service option to NTIA for approval, NTIA should conclude that eligible entities interpreting the low-cost broadband service option to include participation in ACP are automatically deemed approved by NTIA.

**Question 23: What factors should NTIA consider in guiding the states in design of the low-cost broadband service options?**

Under the BIL, Congress has charged states and territories with developing low-cost broadband service options in consultation with NTIA and broadband providers, and subject to

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<sup>66</sup> *Id.* § 60102(h)(5)(A).

<sup>67</sup> *See generally id.* § 60502; *In re Affordable Connectivity Program*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 21-450, FCC 22-2 (rel. Jan. 21, 2022) (“*ACP Order*”).

<sup>68</sup> 47 C.F.R. § 54.1800(j)(5).

approval by NTIA.<sup>69</sup> Consistent with the BIL’s prohibition of NTIA’s regulation of broadband rates,<sup>70</sup> NTIA should specify that an eligible entity may not dictate the price or terms of a low-cost broadband offering.

***Use of BEAD Funds for Broadband Adoption.*** The BIL authorizes the use of BEAD funds for broadband adoption.<sup>71</sup> While the FCC’s ACP program will make available more than \$14 billion to subsidize the costs of broadband for eligible households, BEAD can serve to supplement ACP and address gaps in that program. For instance, NTIA should consider using BEAD funds to provide support for bulk service arrangements—where a third party, such as a school district or landlord, purchases broadband services on behalf of its constituents. These bulk arrangements would permit the third-party purchaser to receive the relevant low-cost broadband benefit for their constituents and would encourage these third parties to facilitate access to broadband. The FCC itself has recognized the benefit of allowing bulk arrangements and sought comment on expanding the program in public housing.<sup>72</sup> NTIA could also consider using BEAD funds to allow states to supplement their own low-income broadband benefit programs or to supplement Digital Equity Act funding to support programs that encourage adoption.

Notably, broadband adoption funding is not expressly included in the BIL’s order of priority for awarding funds, which describes the priority of awarding funds for deployment.<sup>73</sup>

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<sup>69</sup> IIJA § 60102(h)(5)(B).

<sup>70</sup> *Id.* § 60102(h)(5)(D).

<sup>71</sup> *Id.* § 60102(f)(5).

<sup>72</sup> *ACP Order* ¶ 103. The FCC also sought comment on a pilot project that would focus on expanding ACP participation by Federal Public Housing Assistance beneficiaries, further recognizing the benefit of bulk arrangements in targeting these underserved households. *ACP Order* ¶ 282.

<sup>73</sup> IIJA § 60402(h)(1).

NTIA therefore can and should instruct states that they may award funds for adoption programs concurrently with deployment awards.

## VI. MIDDLE MILE BROADBAND INFRASTRUCTURE GRANT PROGRAM

### **Question 32: How should the Assistant Secretary ensure that middle mile investments are appropriately targeted to areas where middle mile service is non-existent or relatively expensive?**

NCTA members agree that middle mile infrastructure is essential to American connectivity, but caution that some areas without broadband face issues unrelated to any lack of middle mile infrastructure. The \$1 billion allocated for middle mile infrastructure grants under the BIL is a substantial amount of funding, but it will fall far short of narrowing the digital divide if wasted on overbuilding networks in areas that already have high-speed broadband. To that end, the BIL requires grant applicants to “prioritize . . . connecting middle mile infrastructure to last mile networks that provide or plan to provide broadband service to households in *unserved* areas.”<sup>74</sup> It also directs NTIA to give priority to “projects in which the eligible entity designs the route of the middle mile infrastructure to enable the connection of *unserved* anchor institutions.”<sup>75</sup>

To ensure that middle mile investments are appropriately targeted to areas to meet these statutory priorities, NTIA should limit middle mile funding to more remote, lower-density areas where network development is typically more costly and less economic than other areas. This prioritization would best fulfill Congress’s directive to utilize these funds to “encourage the expansion and extension of middle mile infrastructure *to reduce the cost of connecting unserved and underserved areas* to the backbone of the internet.”<sup>76</sup> In densely populated areas, by

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<sup>74</sup> *Id.* § 60401(e)(1)(A) (emphasis added).

<sup>75</sup> *Id.* § 60401(b)(2)(A)(ii), (e)(1)(A) (emphasis added).

<sup>76</sup> *Id.* § 60401(b)(1)(A) (emphasis added).

contrast, remaining gaps in broadband availability generally have little or nothing to do with a lack of middle mile infrastructure, and instead are almost entirely related to distinct factors that limit last-mile deployment, such as barriers to property access or pole attachments by ISPs.

Within this framework, in its evaluation of where to target middle mile development, NTIA should look to the *proportion* of unserved households in a given geographic area. This provides a more accurate indicator of middle mile availability than the *number* of unserved households. Additionally, NTIA should consider remoteness in its prioritization of middle mile development. Geographic accessibility is a key driver of middle mile network costs, and geographically remote areas are least likely to have middle mile network access. While the BIL permits middle mile grants for certain other purposes,<sup>77</sup> a middle mile grant program that gives first priority to projects that will enable new last-mile connections in unserved or underserved service project areas will have the greatest impact in narrowing the digital divide.

## **VII. CONCLUSION**

Achieving the Administration's goal of connecting all Americans will take a collaborative approach by all stakeholders. NCTA members have consistently demonstrated their commitment to expanding broadband connectivity and promoting broadband adoption, and we look forward to continuing that commitment through participating in the BIL programs. Adopting the proposals outlined above will fulfill the goal of bridging the digital divide by directing funding to the highest-priority projects (*i.e.*, projects in unserved and underserved areas); ensuring transparency and accountability; and avoiding duplicative spending on areas that already have reliable broadband rather than those areas with the greatest need.

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<sup>77</sup> *Id.* § 60401(b)(2)(A)(iv).

Respectfully submitted,

/s/ Rick Chessen

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