

**Before the  
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION  
U.S. DEPARTMENT OF COMMERCE  
Washington, D.C.**

Infrastructure Investment and Jobs Act            )     Docket No. 220105-0002  
Implementation    )

**COMMENTS OF ACA CONNECTS**



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## TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY .....	1
II.	NTIA SHOULD ESTABLISH AND REQUIRE STATES TO IMPLEMENT TRANSPARENT, IMPARTIAL, AND AUDITABLE PROCESSES FOR QUALIFYING ELIGIBLE LOCATIONS, AWARDED PROJECTS, AND DECIDING CHALLENGES .....	8
A.	NTIA Should Establish a Uniform Process for Ensuring that States Prioritize Unserved and Underserved Locations and Community Anchor Institutions in the Order Prescribed by Statute .....	12
B.	NTIA Should Develop a Uniform Application that a State Must Use for Entities to Apply to Seek BEAD Program Funding .....	13
C.	NTIA Should Require States to Use a Single-Round, Sealed Bid Competitive Process for Evaluation of Proposed Deployment Projects.....	14
III.	TO EVALUATE SUBGRANT APPLICATIONS AND AWARD FUNDS, NTIA SHOULD ESTABLISH AND REQUIRE EACH STATE TO IMPLEMENT STANDARDS AND QUANTITATIVE METRICS THAT FOLLOW THE STATUTE’S DIRECTIVES, AS ELABORATED UPON BY NTIA .....	16
A.	NTIA Should Establish Standards and Metrics to Evaluate Whether Subgrantee Applicants Have the Construction, Managerial, Financial, and Technical Capabilities to Fulfill BEAD Program Award Obligations.....	19
B.	NTIA Should Establish Standards and Metrics to Ensure that Proposed Network Solutions Meet the Requirements in the Statute and Established by NTIA .....	21
C.	NTIA Should Clarify and Establish Standards for Other Priorities, Preferences, and Requirements that States Should Use to Evaluate a Provider’s Subgrant Project Plans, Including Deployment Timelines, Proposed Service Areas, and Commitment to Have Locations Take Service.....	29
D.	The Amount of Support Requested Should Be Evaluated Based on the Price-Per-Location and the Cost-Effectiveness of the Proposed Subgrant Project.....	32
IV.	NTIA SHOULD USE – AND REQUIRE STATES TO USE – FCC BROADBAND DATA MAPS AND ADDITIONAL INFORMATION THAT PROVIDE CURRENT AND ACCURATE INFORMATION ABOUT UNSERVED AND UNDERSERVED LOCATIONS .....	33

A.	NTIA Should Harmonize Its Definitions of “Unserved” and “Underserved” Locations with Those the FCC will Apply in Formulating the Broadband DATA Map Upon Which the IJJA Requires NTIA to Rely in Distributing Funding Under the BEAD Program .....	33
B.	NTIA Should Establish Standards That States Should Use to Identify Eligible Community Anchor Institutions .....	36
C.	Unserved and Underserved Locations Must Be Based on the FCC’s Broadband DATA Map, Which Should Incorporate Results from an Initial Challenge Process at the FCC .....	37
D.	NTIA Should Establish a Uniform Process by Which Entities and Other Stakeholders Can Challenge Determinations of Unserved and Underserved Areas Made by States .....	40
V.	NTIA SHOULD ESTABLISH MEASURES THAT STATES MUST IMPLEMENT TO INCREASE TRANSPARENCY AND MAXIMIZE USE OF LIMITED BEAD PROGRAM FUNDS .....	43
A.	Letter of Intent Data Requirements .....	43
B.	Initial Proposal Data Requirements .....	44
C.	Other State Information Data Requirements .....	45
D.	Public Availability of All State Submissions .....	45
VI.	NTIA SHOULD CLARIFY THAT A SUBGRANTEE’S PARTICIPATION IN THE AFFORDABLE CONNECTIVITY PROGRAM CONSTITUTES A “LOW-COST BROADBAND SERVICE OPTION” AND THAT STATES MAY NOT REGULATE THE RATES CHARGED FOR A “LOW-COST BROADBAND SERVICE OPTION” .....	46
VII.	NTIA SHOULD ESTABLISH ROBUST ACCOUNTABILITY MEASURES TO PREVENT WASTE, FRAUD, AND ABUSE OF BEAD PROGRAM FUNDS .....	47
A.	Audit Process for Application Evaluations, Awards, and the Challenge Process .....	49
B.	Independent Inspector General .....	49
C.	Deployment Deadlines .....	50
D.	Limitations on Transferability .....	51
E.	Default Penalties .....	52
F.	State Reporting Obligations .....	53
VIII.	CONCLUSION .....	54

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**COMMENTS OF ACA CONNECTS**



**I. INTRODUCTION AND SUMMARY**

ACA Connects – America’s Communications Association (“ACA Connects”) hereby comments on the Notice and Request for Comment (“Notice”) issued by the National Telecommunications and Information Administration (“NTIA”) concerning implementation of the Infrastructure Investment and Jobs Act (“IIJA”).<sup>1</sup> ACA Connects comments exclusively on NTIA’s implementation of the Broadband Equity, Access and Deployment (“BEAD”) grant program.<sup>2</sup>

ACA Connects’ membership comprises more than 600 small and medium-sized broadband, video, and voice providers, including traditional cable companies, telecommunications providers, and municipalities. ACA Connects Members’ services

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<sup>1</sup> *Infrastructure Investment and Jobs Act Implementation*, Notice and Request for Comment, Docket No. 220105-0002, RIN 0660-ZA33 (January 10, 2022).

<sup>2</sup> Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 60102 (2021) (hereinafter, the “Statute”).

are available to 25 million households across the 50 States and U.S. territories, including six million in rural areas. ACA Connects Members have decades of experience delivering high-quality, reliable, high-performance broadband services at reasonable prices. Members' networks utilize DOCSIS and fiber-to-the-home architectures to deliver speeds of at least 100 Mbps download and 20 Mbps upload and up to -- and now beyond -- 1 Gbps symmetric. Members have funded their networks and operations through private investment, government support, or a combination of the two, and they continue to use these sources of funding to invest billions of dollars to expand and upgrade their networks, including to deploy fiber and provide gigabit speed, low latency service.

ACA Connects Members are community-based providers. The owners and employees of these providers typically live and work in areas where service is provided, and they count family, friends, and neighbors as customers. As such, ACA Connects Members recognize the need to connect and make broadband and other communications services affordable in their hometowns. They also know which locations in their service territories are unserved or underserved, and many have been gradually connecting these locations without government funding by investing in edging out from their networks. In other instances, these locations are too high cost to reach without government support, and our Members participate -- and seek to participate -- in federal and State deployment programs targeted at high cost and unserved areas to reach them.

At the federal level, ACA Connects Members have participated -- and are participating -- in the Federal Communications Commission's ("FCC's") Rate of Return, Connect America Fund II Auction ("CAF II"), Alternative Connect America Cost Model ("ACAM"), and Rural Digital Opportunity Fund ("RDOF") programs, as well as the U. S. Department of Agriculture's ("USDA's") Rural Utility Service ("RUS") ReConnect Program and traditional telecommunications program.<sup>3</sup> Members also have participated or are participating in many State deployment programs, including those that have been recently supported by federal allocations (e.g., American Rescue Plan Act ("ARPA") State and local block grant funding). Funds awarded from all of these programs have helped these and other experienced providers to expand their services to high-cost and hard to reach areas that were unserved and underserved. Members additionally engage with these government support programs as challengers to proposed projects, and by doing so, they have helped ensure that limited government funds are distributed to areas that are truly unserved and underserved and not in areas where Members have invested in delivering services or have commitments to build under existing federal and State funding programs.

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<sup>3</sup> ACA Connects Members participate most frequently in the Rate of Return program – 36% of recipients in the program are Members, and they received 45% of the allocated funding. In the RDOF, approximately 115 Members participated in the auction – about 30% of the total participants. 61 Members won support, totaling more than \$1.3 billion. Of that amount, about \$497 million went to 57 Members that were not the incumbent price-cap carrier. For the CAF Phase II Auction, of the 220 bidders that qualified, many were ACA Members, and of the 103 winning bidders, about 20% were ACA Members. Most recently, Members have filed applications to participate in NTIA's Broadband Infrastructure Program ("BIP").

ACA Connects Members have a large stake in the success of the BEAD Program, and our comments are directed toward providing NTIA with lessons learned and solutions to help make that happen. Many Members already are planning to participate in the BEAD Program and bring their experiences and capabilities as long-time providers to bear in seeking subgrants from States and Territories (hereinafter, “States”) and in participating in the challenge process. These Members have learned through participation in prior government programs which approaches work and which ones thwart a program’s ability to achieve its aims most cost effectively. To that end, as discussed herein, NTIA should require States to award subgrants using transparent and impartial processes that have precise standards for evaluating proposed projects and that assess these standards based on quantitative metrics.<sup>4</sup>

The BEAD Program is an unprecedented opportunity to close the broadband deployment and adoption gaps. In a report ACA Connects prepared with the business consulting firm Cartesian, we determined that there are approximately 19 million locations without 100/20 Mbps broadband service and it would cost between \$35-\$67

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<sup>4</sup> Highlighting one recent “lesson learned,” numerous ACA Connects Members just participated in one State’s broadband grant program process for use of American Rescue Plan Act funding where the State set forth limited standards, did not indicate how it would weigh the standards, and did not evaluate submissions based on quantitative metrics. In essence, this process was an unaccountable “beauty contest,” where the most meritorious proposals did not prevail. Such a process dissuades providers from participating, undermines public trust that the process was fair, and, perhaps most importantly, will not result in the broadband deployment gap being closed in the most cost-effective manner.

billion to make gigabit service available to these location.<sup>5</sup> Thus, the BEAD Program should have sufficient funding to achieve its objective, but only if NTIA consistent with the statutory directive to permit States to allocate funding among deployment, adoption, and other broadband-related projects establishes processes and standards that ensure States spend funding most cost effectively by maximizing the number of locations that can receive high performance, reliable, future-proof (*i.e.*, fiber)<sup>6</sup> broadband service from experienced and financially sound providers for each dollar of support.

While the Statute provides considerable direction on how to achieve these outcomes, it also provides NTIA with substantial discretion to structure the program in a way that maximizes success and minimizes waste, fraud, and abuse.<sup>7</sup> NTIA should

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<sup>5</sup> “Addressing Gaps in Broadband Infrastructure Availability and Service Adoption, A Cost Estimation & Prioritization Framework,” ACA Connects at 11 (June 2021) available at <https://acaconnects.org/broadband-infrastructure-study/>.

<sup>6</sup> “Future-proof” networks will permit broadband service performance and other capabilities to increase to meet increased consumer demands, which are certain to occur, without major new investment, including additional government support.

<sup>7</sup> IILJ, § 60102(i) (“The Assistant Secretary may issue such regulations or other guidance, forms, instructions, and publications as may be necessary or appropriate to carry out the programs, projects, or activities authorized under this section, including to ensure that those programs, projects, or activities are completed in a timely and effective manner.”); IILJ, § 60102(b)(4)(A) (“As part of the Program, the Assistant Secretary, in consultation with the Commission, shall provide technical support and assistance to eligible entities to facilitate their participation in the Program, including by assisting eligible entities with—(i) the development of grant applications under the Program; (ii) the development of plans and procedures for distribution of funds under the Program; and (iii) other technical support as determined by the Assistant Secretary.”); IILJ, § 60102(b)(4)(B) (“The Assistant Secretary shall provide technical and other assistance to eligible entities—(i) to support the expansion of broadband, with priority for—(I) expansion in rural areas; and (II) eligible entities that consistently rank below most other eligible entities with respect to broadband access and deployment.”). Any expansion in rural areas should be consistent with other provisions of the program.

exercise this authority to achieve those goals, within the bounds of the Statute, by building upon prior federal and State deployment programs and apply the lessons learned about the processes and requirements used by those programs.

NTIA has decades of experience awarding grants (*e.g.*, the Broadband Technology Opportunities Program) and has recently demonstrated in its Notices of Funding Opportunities (“NOFOs”) for the BIP, Tribal Broadband Connectivity Program (“TBCP”), and Connecting Minority Communities (“CMC”) Pilot Program that it has a solid grasp on the process for soliciting grants and the standards and metrics by which to judge which grant applications should prevail.<sup>8</sup> But the BEAD Program, by having NTIA award grants to States and having States award subgrants for deployment and other projects, is far different. Accordingly, ACA Connects submits it requires NTIA, in its role overseeing the distribution of BEAD Program funds by more than 50 jurisdictions, to develop rules and requirements that ensure States distribute funds according to statutory mandates, including NTIA directives, and hold subgrantees accountable for complying with the law in completing and implementing their projects.

Specifically, NTIA should:

- Establish and require grantees to use uniform processes for reviewing and awarding subgrant projects that are clear and understandable (*i.e.*, transparent), impartial, and auditable;
- Require grantees to make reasonable and objective subgrant awards by establishing and mandating that grantees apply uniform standards and

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<sup>8</sup> Information on these programs is available on NTIA’s “Grants” webpage, available at <https://www.ntia.doc.gov/category/grants>.

quantitative metrics that carry out the directives, priorities, and preferences in the Statute, as elaborated upon by NTIA, including by –

- Deeming fiber-to-the-premises builds to be “priority broadband projects” and considering these projects first when reviewing applications for eligible unserved, and then underserved, projects,
  - Preferring eligible unserved and underserved projects by experienced and financially capable providers that offer the highest performance with the most reliable network,
  - Preferring eligible unserved and underserved projects that have the greatest percentage of unserved and underserved locations,
  - Requiring subgrantees to achieve a minimum take rate of 30% and giving a preference for committing to a higher take rate, and
  - Evaluating applications based on the average price-per-location for the proposed project and giving a preference for applications seeking less support on this basis;
- To accurately identify eligible project locations –
    - Harmonize definitions of “unserved” and “underserved” locations that States and it are required to use under the BEAD Program to allocate and distribute funding with the definitions and related interpretations used by the FCC in developing the Broadband DATA Map;
    - Use – and require States to use – the FCC’s Broadband DATA Map that incorporates results from an initial challenge process at the FCC to identify locations that are unserved and underserved, as those terms are defined in the Statute and are consistent with FCC’s definition of “availability,”
    - Establish a standard process for a State to identify “eligible community anchor institutions, and
    - Require that all subgrant applications for deployment projects be subject to a uniform challenge process across all States that is transparent, impartial, and auditable;
  - Clarify that by participating in the Affordable Connectivity Program (“ACP”), a subgrantee complies with the obligation to offer a "low-cost broad-band service option" and that States may not regulate the rates

charged for a "low-cost broadband service option" offered by a provider who receives funding; and

- Implement robust accountability measures to prevent waste, fraud, and abuse of BEAD Program funds.

Collectively, these measures will help States quickly and effectively implement programs to distribute BEAD Program funding, maximize participation by qualified providers and other entities, speed deployments to unserved and underserved households, and ultimately enable NTIA to be a responsible steward of taxpayer funds by ensuring they go toward the most cost-effective and beneficial uses. Each of these measures is discussed in greater detail herein.

## **II. NTIA SHOULD ESTABLISH AND REQUIRE STATES TO IMPLEMENT TRANSPARENT, IMPARTIAL, AND AUDITABLE PROCESSES FOR QUALIFYING ELIGIBLE LOCATIONS, AWARDED PROJECTS, AND DECIDING CHALLENGES**

In Question 6 of the Notice, NTIA asks what process steps it should require States to follow to competitively select entities and whether there are specific types of competitive processes that should be presumed eligible. From ACA Connects' perspective, a response to this inquiry also touches upon the processes for qualifying eligible locations, and, after awards are made, auditing the results.

To begin with, ACA Connects shares the Secretary of Commerce's goal "to make sure that every small business, farm, family, and student in America has access to affordable, reliable, high-speed broadband."<sup>9</sup> Further, as discussed above, Congress

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<sup>9</sup> "Written Statement of Gina M. Raimondo, Secretary U.S. Department of Commerce, Before the Senate Committee on Appropriations, Subcommittee on Commerce, Justice, Science and Related Agencies, "Expanding Broadband

provided the BEAD Program with sufficient funding -- in combination with other government support programs and private efforts -- to make this happen. That said, establishing programs for awarding and overseeing the distribution of funds is challenging when only a single agency is involved, but the challenges increase exponentially when more than 50 jurisdictions are engaged. Further, the BEAD Program is a federal statute where a federal agency is responsible to Congress for applying strict and detailed requirements that have priorities, preferences, and other directives unlike any federally funded programs for broadband deployment that States have implemented so far.<sup>10</sup> As such, NTIA is ultimately responsible for its success and should establish processes and standards that States must follow in awarding and overseeing subgrants.<sup>11</sup>

In addition, by establishing competitive bidding processes and standards for awarding subgrants, NTIA will ensure all States engage in responsible and accountable decision making, which will lead to the program's success.<sup>12</sup> While many States have

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Access: Department of Commerce Broadband Programs in the Infrastructure Investment and Jobs Act,” (Feb. 1, 2022) (“Raimondo Testimony”) available at <https://www.appropriations.senate.gov/imo/media/doc/CJS%20-%20DOC%20Secretary%20Written%20Testimony%20for%2002.01.22.pdf>.

<sup>10</sup> As such, it differs greatly from the State and local government block grant program in the American Rescue Plan Act. Pub. L. 117-2, § 9833 (2021).

<sup>11</sup> Having such uniform processes and standards also will ensure NTIA has the ability to oversee to ensure compliance.

<sup>12</sup> ACA Connects notes its approach is consistent with the Resolution the National Association of Regulatory Utility Commissioners is currently considering for its upcoming meeting, which calls for “uniformity” among federal and State governments in awarding broadband deployment grants. See “RESOLUTIONS PROPOSED FOR CONSIDERATION AT THE 2022 WINTER POLICY SUMMIT OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY

implemented broadband grant programs, others have little to no experience in awarding broadband deployment grants. That is, they do not have experience in developing their own processes and standards. Further, even States that have awarded deployment grants have used dubious processes and awarded funding based on subjective factors. In fact, ACA Connects Members with experience with State funding programs have often encountered processes that were neither transparent nor objective and that lacked reasonable standards and known metrics. In the end, these programs attracted applicants that had little experience or commitment to follow through on buildout obligations or who received far more funding than required. Of course, States are not alone in failing to establish proper processes and standards. Even at the federal level, the FCC has designed and operated programs that failed to vet applicants sufficiently to ensure they met financial and technical standards, resulting in winning bidders that could not deliver on the commitments they made. Given the enormous amount of funding in the BEAD Program and the many jurisdictions involved, the potential for

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COMMISSIONERS (UPDATED: FEBRUARY 1, 2022),” (“Resolution urges the FCC, NTIA, and other federal agencies awarding broadband funding to work with states and community stakeholders to ensure that the rules for broadband grant awards are uniform, says ‘NARUC, consistent with CAF II and RDOF rules, seeks to prevent redundant and duplicative allocations of federal and state funding in particular geographic areas, so as to avoid overbuilding broadband networks,’ urges policy makers to ‘use the FCC’s guidance on broadband mapping and the collection and sharing of program performance data,’ to identify programs that will serve unserved and underserved locations, and contends all federal agencies awarding broadband funding should adopt GAO’s guidance regarding data collection, tracking expenditures of federal dollars, and monitoring the progress and overall performance of federally funded broadband projects.”) available at <https://pubs.naruc.org/pub/2A923E05-1866-DAAC-99FB-786F50E0FCBC>.

inadvertent mistakes in implementation – and possibly even intentional non-compliance – by grantees and subgrantees across the country is significant.

A patchwork of processes and standards for grant programs across the States also can inhibit the broadest participation by qualified providers. For example, if providers have to navigate divergent subgrant processes and requirements, they are likely to be deterred because of the burdens from bidding – often simultaneously -- in multiple states, even when they have the experience, financial wherewithal, and other qualifications to put BEAD Program funding to the best use in areas in need. In addition, by requiring common processes and standards, NTIA will increase the chances that every State will attract qualified applicants. A State with inadequate processes may attract an extensive number of unqualified entities that can easily “check the boxes” but not truly be able to deliver the services they claim. At the same time, more experienced and qualified providers might be deterred from applying in these States to avoid being unfairly stacked up against a flood of unqualified entities who seek grants at funding levels that are insufficient to meet their commitments. These States may therefore have little choice but to award funds to entities that will, at best, inefficiently and ineffectively use the funds, and at worst, fail to meet their deployment obligations.

ACA Connects’ recommended approach seeks to ensure the Statute’s goals are met while carrying out the Statute’s requirement that States should have the freedom to

use funding to meet their unique needs among the various statutorily permitted uses.<sup>13</sup> Under ACA Connects’ approach, States will determine how to allocate their funding among deployment, adoption, and other broadband related projects. As the Secretary of Commerce said in recent testimony, “it doesn’t make sense to address Kansas challenges with Rhode Island solutions. That’s why the law has built-in flexibility to address each states’ specific needs.”<sup>14</sup>

In sum, NTIA can best ensure the BEAD Program’s success by exercising its authority under the Statute to establish uniform qualifying location, application, competitive bidding, evaluation, and accountability mechanisms – along with quantitative metrics to evaluate applications – that States must use to award BEAD Program funds.

**A. NTIA Should Establish a Uniform Process for Ensuring that States Prioritize Unserved and Underserved Locations and Community Anchor Institutions in the Order Prescribed by Statute**

The Statute gives clear direction on how States must distribute BEAD Program funds for subgrant projects providing service to unserved and underserved locations and community anchor institutions. First, States must distribute program funds to “all” unserved locations within the State before distributing funds to underserved locations.<sup>15</sup> Second, States must distribute program funds to “all” underserved locations within the

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<sup>13</sup> IILJ, § 60102(f).

<sup>14</sup> *Raimondo Testimony*.

<sup>15</sup> IILJ, § 60102(h)(1)(A).

State before distributing funds to community anchor institutions.<sup>16</sup> Third, States may award any remaining funds to connect eligible community anchor institutions.<sup>17</sup> The only exceptions to these requirements are that an “unserved service project” and “underserved service project” may include up to 20% of served locations.<sup>18</sup>

To carry out these statutory directives and facilitate its “order of awards”, NTIA should require States to first consider and award funds for eligible unserved service projects, then eligible underserved service projects, which may include unserved locations, and finally for projects involving community anchor institutions which may include unserved and underserved locations. In addition, States should require applicants to certify that upon submitting an application that the locations they have selected to serve are unserved or underserved, consistent with the statutory definitions.

**B. NTIA Should Develop a Uniform Application that a State Must Use for Entities to Apply to Seek BEAD Program Funding**

The application is the first step in the process for distributing BEAD Program funds, and therefore the first tool for ensuring those funds are distributed to qualified applicants to achieve the goals and directives of the Statute. Accordingly, NTIA should exercise its authority to develop a standard application that each States must use for entities seeking subgrants. The information requested in the application, along with supporting documentation, should reflect the core reasons for choosing a provider and

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> IILJ, § 60102(a)(1)(B) and (D).

be tied explicitly to the standards and quantitative metrics that NTIA should impose on States to evaluate applications, which are discussed below and which will enable a State to easily compare and rank applications during the evaluation process. While applicants may be given the option to provide brief narratives that can be used to support or clarify the objective factual information provided to meet the standards and quantitative metrics, States should otherwise not give weight to such qualitative submissions.<sup>19</sup>

**C. NTIA Should Require States to Use a Single-Round, Sealed Bid Competitive Process for Evaluation of Proposed Deployment Projects**

ACA Connects favors use of reverse auctions to award funding for deployment projects, because they have been shown by the CAF II and RDOF auctions to maximize awards for high-performance networks while minimizing costs per location served; however, reverse auction mechanics are likely too complicated for States to implement.<sup>20</sup> Thus, ACA Connects submits that NTIA require States to use a single round, sealed bid process with quantitative metrics for evaluation criteria to score applicants. A potential model for such a process is the *Uniendo a Puerto Rico Fund and Connect USVI Fund* (Puerto Rico/USVI) program process run by the FCC in 2020

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<sup>19</sup> NTIA does not need to develop the uniform application when it provides the NOFO. Rather, NTIA can make it available when it receives Initial Proposals.

<sup>20</sup> There is no inherent flaw in distributing funding through reverse auctions. Instead, ACA Connects faults the FCC for permitting applicants to bid using commercially unproven technologies and not sufficiently vetting the qualifications of applicants.

to award deployment grants to providers.<sup>21</sup> Under that program, applicants submitted a single bid, and all bids were considered simultaneously by the FCC.<sup>22</sup> To evaluate the bids, the FCC relied on three criteria: network performance, network resiliency and redundancy, and price per location.<sup>23</sup> The FCC assigned minimum threshold qualifications and point values for each of the three criteria.<sup>24</sup> Applicants who failed to meet the minimum qualifications for any of the criteria were disqualified, and applicants who exceeded the minimum qualifications received additional points.<sup>25</sup>

In selecting the single-round bid format, the FCC found that it “retains many of the competitive benefits of an auction but can facilitate more prompt funding and deployment as compared with a multi-round proposal or negotiated approach process.”<sup>26</sup> It also emphasized that the approach “relies on objective criteria that are preferable to a more subjective competitive proposal process or negotiated approach because it better implements our policy goals of promoting efficiency, certainty, transparency, and impartiality, and allows us to compare applications using different network technologies and offering differing performance.”<sup>27</sup> Required use of a single-

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<sup>21</sup> *The Uniendo a Puerto Rico Fund and the Connect USVI Fund; Connect America Fund; and ETC Annual Reports and Certifications*, WC Docket Nos. 18-143, 10-90, and 14-58, Report and Order and Order on Reconsideration, FCC 19-95 (rel. Sept. 30, 2019) (“*First Puerto Rico and USVI Funds Order*”).

<sup>22</sup> *Id.* at para. 11.

<sup>23</sup> *Id.* at para. 13.

<sup>24</sup> *Id.* at paras. 14-33.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at para. 11.

<sup>27</sup> *Id.*

round, sealed bid format for States to distribute BEAD Program funds will offer these benefits and the quantitative approach – according to criteria discussed below – will ensure that States will award funds to the most cost-effect projects and facilitate oversight by NTIA.

**III. TO EVALUATE SUBGRANT APPLICATIONS AND AWARD FUNDS, NTIA SHOULD ESTABLISH AND REQUIRE EACH STATE TO IMPLEMENT STANDARDS AND QUANTITATIVE METRICS THAT FOLLOW THE STATUTE’S DIRECTIVES, AS ELABORATED UPON BY NTIA**

While the Statute allows States to specify how they will allocate BEAD Program funds among deployment, adoption and other projects,<sup>28</sup> it gives the NTIA authority to provide guidance on the prioritization of awards to applicants,<sup>29</sup> and as noted above, broad discretion to implement rules and requirements to implement the program. NTIA should exercise its authority to develop a set of evaluation criteria (standards) and quantitative metrics to judge applications and award subgrants for deployment projects, which NTIA should require States to use in conjunction with the single-round, sealed bid competitive process to evaluate applications. The goal should be for States to make impartial decisions that carry out the priorities, preferences, and other requirements of the Statute.

NTIA has already demonstrated that it recognizes the value in quantitative evaluation criteria by using this methodology for the recent BIP, TBCP, and CMC

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<sup>28</sup> See IILJ, § 60102(e)(4)(A)(i).

<sup>29</sup> IILJ, § 60102(h)(1)(B) (“The Assistant Secretary may provide additional guidance on the prioritization of subgrants awarded for the deployment of a broadband network using grant funds received under this section.”).

NOFOs. The Puerto Rico/USVI process also serves as a useful model. Further, NTIA should apply for BEAD Program deployment subgrants the lessons learned from prior federal and State grant programs. Most importantly, NTIA should ensure subgrantees have the experience and financial wherewithal to build and operate the proposed networks using commercially proven network technologies and are offering future-proof, reliable, cost-effective, and timely solutions. Specifically, as discussed in greater detail below, NTIA should require that subgrant applications be evaluated based on their: (1) managerial, financial, technical experience and expertise, (2) proposed deployment technology and operations; (3) project plans; and (4) amount of support-per-location.

Like the Puerto Rico/USVI process, each criterion would have minimum threshold requirements that subgrant applicants must meet to be considered and then would receive additional points for exceeding those thresholds. The criteria and weighting are described in more detail below.

Having NTIA develop a uniform evaluation methodology, and not leaving it up to the States, will further ensure States award funds in an impartial manner to the most cost-effective projects that construct the most future-proof and reliable networks providing high-performance service and that are completed on time. It also will help avoid some of the pitfalls experienced in other federal and State programs. NTIA is not only the single agency that Congress has charged to implement and be responsible for the success of the program, but because of its long-term relationships with the FCC, RUS, and States, it is well-positioned to apply the lessons learned from prior federal and State deployment programs. For example, while the design of the RDOF auction

maximized performance for the least amount of support, the FCC did not adequately vet applicants' experience, financial wherewithal, and technical capabilities. As a result, too many applicants that had little-to-no experience building and operating communications networks and that used commercially unproven technologies outbid more qualified providers, and some of these applicants have already defaulted. Similarly, because the weighting system for network performance was not tied to the value of the technology being proposed to deploy and was not designed to maximize participation, applicants using technologies that are less capable – or even unproven -- were able to prevail. These flaws undermined the integrity of the process and confidence that the process produced the most cost-effective results that achieved the aims of the program.

NTIA's development of a common evaluation mechanism with standards and quantitative metrics will have other benefits as well. For example, it can enable States, especially those who have little or no experience awarding deployment funds, to meet their obligation to "distribute the funds in an equitable and non-discriminatory manner."<sup>30</sup> ACA Connects has found from reviewing State programs that this is not an insignificant concern. For instance, our Members have reported that one State erred by allocating deployment funds without sufficient direction to counties who had little or no experience in awarding grants to providers. As a result, several counties eschewed a competitive

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<sup>30</sup> IILJ, § 60102(g)(2)(C)(i). States are also required to "ensure, through a stipulation in any contract with a subgrantee for the use of [BEAD Program] funds, that each subgrantee uses the funds in an equitable and nondiscriminatory manner." IILJ, § 60102(g)(2)(C)(ii). NTIA should clarify this so that it is not unreasonably burdensome on subgrantees, such as by specifying that this provision would not mean that subgrantees would have to use an RFP process for all vendors.

award process and instead gave inexperienced providers exclusive rights to use support to build broadband infrastructure. Such an outcome is neither good for consumers nor the best use of limited government support – and NTIA can avoid it by establishing the competitive process and the metrics for awards.

**A. NTIA Should Establish Standards and Metrics to Evaluate Whether Subgrantee Applicants Have the Construction, Managerial, Financial, and Technical Capabilities to Fulfill BEAD Program Award Obligations**

Building and operating a sustainable broadband network is a complex endeavor. While the Statute seeks participation from a broad array of providers,<sup>31</sup> grantees should only award funds to qualified providers to ensure projects are completed as proposed and on time and consumers receive the required, reliable service – and to avoid waste, fraud, and abuse of program funds. The Statute affirms the importance of this requirement by directing NTIA to “establish standards for how [States] shall assess the capabilities and capacities of a prospective [entity]” to ensure the entity:

- (i) is capable of carrying out activities funded by the BEAD Program in a competent manner in compliance with all applicable Federal, State, and local laws;
- (ii) has the financial and managerial capacity to meet (a) the commitments of the made by the State and entity, (b) the requirements of the BEAD Program, and (c) other requirements established by NTIA; and

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<sup>31</sup> ILLJ, § 60102(h)(1)(A)(iii) (“An eligible entity, in awarding subgrants for the deployment of a broadband network using grant funds received under this section, as authorized . . . may not exclude cooperatives, nonprofit organizations, public-private partnerships, private companies, public or private utilities, public utility districts, or local governments from eligibility for such grant funds.”).

- (iii) has the technical and operational capability to provide the services promised by the entity in the manner contemplated by the funding award.<sup>32</sup>

Thus, NTIA should develop standards and metrics for States to evaluate applicants based on their experience, financial wherewithal, and technical capabilities to build and operate networks using the proven network technologies they propose to use and within the proposed timelines.

ACA Connects submits that the evaluation criteria and metrics should include the following factors, each with minimum threshold requirements and additional points for exceeding that threshold:

1. Years of experience providing broadband services (minimum of 0 years with additional points for each additional year up to 10); and
2. Years of experience operating a broadband network with the proposed technology solution at the size and scale proposed (minimum of 0 years with additional points for each additional year up to 10).

In addition, applications should submit the following certifications, attesting that they in fact have the necessary qualifications:

1. Certification (and certified financial reports or the equivalent demonstrating) that the entity has sufficient financial wherewithal to undertake the project in conjunction with other activities.
2. Certification that the entity has not defaulted on any loan or other debt instrument in the past 10 years (minimum);
3. Certification that the entity has not been excluded or prohibited from participating in any federal or State or local government grant or loan program (minimum);
4. Certification (and supporting documentation demonstrating) that the entity's managerial and financial resources are not already overcommitted to planned

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<sup>32</sup> IILJ, § 60102(e)(1)(v), (2).

deployments, including all privately-funded and government supported deployments (minimum); and

5. Certification (and supporting documentation demonstrating) that the entity's managerial and financial resources are sufficient if it is awarded BEAD Program or other government support in other States, including supporting information about what program support the entity has applied for or will seek under the BEAD Program and the status of those applications (minimum).

**B. NTIA Should Establish Standards and Metrics to Ensure that Proposed Network Solutions Meet the Requirements in the Statute and Established by NTIA**

The Statute provides substantial direction and discretion to NTIA to ensure that BEAD Program funds are awarded to network technologies that meet minimum performance requirements set out in the Statute.<sup>33</sup> The Statute then goes even further than this baseline by requiring States to “prioritize funding for deployment of broadband infrastructure for priority broadband projects,”<sup>34</sup> which are projects designed to provide broadband service that meets speed, latency, scalability, reliability, quality of service, and any related criteria established by the Assistant Secretary.<sup>35</sup> NTIA delves into the issue of network technology, performance, and other attributes in questions in the

Notice:

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? What criteria should NTIA establish to assess grant recipients' plans to ensure that service providers

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<sup>33</sup> IILJ, § 60102(h)(4)(A), IILJ, § 60102(h)(4)(B).

<sup>34</sup> IILJ, § 60102(h)(1)(A)(ii).

<sup>35</sup> IILJ, § 60102(a)(1)(I)(i).

maintain and/or exceed thresholds for reliability, quality of service, sustainability, upgradability and other required service characteristics?

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?

First, NTIA should determine that a “priority broadband project” – that is, a project that the Statute directs States to prioritize as it awards funds first to unserved service projects, then to underserved services projects, and then to eligible community anchor institutions<sup>36</sup> – is one where the applicant commits to building a fiber-to-the-premises network to all project locations.<sup>37</sup> Fiber networks have already demonstrated that they

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<sup>36</sup> IILJ, § 60102(h)(1)(A)(ii).

<sup>37</sup> ACA Connects’ recommendation on the definition of a “priority broadband project” is not duplicative of statutory language (IILJ, § 60102(a)(1)(I)(iv)(II)) requiring States to give priority to projects based on “the speeds of the proposed broadband service.” Rather, our recommendation is based on the fact that fiber-to-the-premises networks are far superior to other technologies based on overall capabilities, *e.g.*, future-proof, reliable, low-latency, and underlying technology for other networks.

ACA Connects further notes that the statutory requirement that States should prioritize certain projects (IILJ, § 60102(a)(1)(I)(iv)) should be read consistent with other critical factors that will ensure a project’s success, *i.e.*, having experienced and financial capable providers and building future-proof, high performance networks. For instance, it may be “expedient” to put up a wireless tower to cover an entire eligible area, but consumers in that area would be ill-served if the Statute’s other requirements are not met. The Statute (IILJ, § 60102(h)(1)(B)) gives the Assistant Secretary the authority to “provide additional guidance on the prioritization of grant awards for the deployment of a broadband network,” and ACA Connects recommends the Assistant Secretary make clear that any actions by States to prioritize projects should be consistent with other statutory requirements and the ultimate goal of bringing future-proof, reliable, and high performance broadband service to all eligible locations.

not only provide the most superior and reliable broadband performance today but will continue to do so in the future without significant additional capital expenditures. Already, fiber networks are being deployed with capabilities to deliver 5 Gbps service, far beyond that of any other technology.<sup>38</sup> Fiber-to-the-premises networks additionally provide fiber connectivity for 5G wireless networks, smart city and smart grid, and other advanced networks.

Consistent with the Statute, NTIA should require States to consider first priority broadband project applications that are unserved service projects and make awards for these according to the standards and metrics set forth below. States then should consider and award support for other (non-priority) unserved service projects, again awarding grants based on the standards and metrics. After completing review and making awards for unserved service projects, States should undertake the same process for awarding grants in underserved areas.

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ACA Connects further urges the Assistant Secretary not to require States to prioritize, or otherwise give preferences to, projects that meet “regulatory requirements” that are not mandated by the Statute, *e.g.*, provision of wholesale service at specified rates or provision of retail service consistent with open internet requirements. Congress, in enacting the Statute, balanced the imposition or prioritization of, or preference for, such requirements, which come at a cost, with the need to bring service to unserved and underserved locations. The Assistant Secretary should not upset this balance, which would result in fewer unserved or underserved locations being connected.

<sup>38</sup> See *e.g.*, January 20, 2022 announcement of Ziplify™ to provide 5 Gbps service available at <https://www.globenewswire.com/news-release/2022/01/20/2369835/0/en/Ziplify-Fiber-launches-fastest-home-internet-in-the-Northwest-enables-5-gig-and-2-gig-service-to-nearly-170-000-addresses-in-60-cities-and-towns-in-WA-OR-and-ID.html>.

As for the standards and metrics, including for preferences, that NTIA should require States to use to evaluate the network technologies being proposed by applicants for their projects, ACA Connects recommends, consistent with the discussion in the prior paragraph on the process that States should follow, States should conduct the following evaluation:

**Performance.** The Statute provides that any entity receiving BEAD Program funds must deliver speeds of at least 100/20 Mbps to all locations in a proposed eligible service area “with a latency that is sufficiently low to allow reasonably foreseeable, real-time, interactive applications.”<sup>39</sup> The Statute also specifies that states must “give priority to projects based on . . . the speeds of the proposed broadband service.”<sup>40</sup> Thus, providers must commit at a minimum to deliver 100/20 Mbps service with below 100 ms of latency, which should be measured according to the performance metrics established by the FCC for its high cost programs.<sup>41</sup> In addition, ACA Connects submits that providers receive a preference (additional points) for offering service at increased speeds up to the highest current offering on the market<sup>42</sup> and a preference for providing lower latencies to a minimum of 20 ms.

**Network Capacity at Deployment Deadline.** Network design is critical to ensure the network has sufficient capacity to meet users’ needs, as well as statutory

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<sup>39</sup> IILJ, § 60102(h)(4)(A)(i)(I).

<sup>40</sup> IILJ, § 60102(h)(1)(A)(iv)(II).

<sup>41</sup> *Performance Measures Testing*, USAC, <https://www.usac.org/high-cost/annual-requirements/performance-measures-testing/>.

<sup>42</sup> See *supra.*, n. 38.

requirements. Today's most frequently deployed fiber networks are designed from the outset with sufficient capacity to ensure the requisite performance is delivered to all households in the service territory when all households subscribe with no additional construction – other than installing drops. A fixed wireless network, on the other hand, may be designed to have capacity that will evolve over time, that is, require much more subsequent network construction to ensure that if all households in the service territory subscribe, each will receive the requisite performance.<sup>43</sup> As a result, while such a network's initial build might provide coverage to all locations in the area, the capacity of the network available to each user may be insufficient as additional locations are connected to and access the service, resulting in performance below what is promised. Similarly, a satellite network might be able to provide coverage to an entire region, but the capacity of the network decreases when more households are connected, meaning new, costly satellites must be launched to increase capacity.<sup>44</sup> The Statute provides that a project's network must cover all locations in the project area with the required

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<sup>43</sup> In reviewing projects and making awards, States should ensure that for an application using fixed wireless or satellite technology, a network's performance is assessed both in the project service area and in other service areas that the network will serve.

<sup>44</sup> See e.g., "NTCA, Fiber Broadband Association Equip FCC with Model to Evaluate LEO Satellite RDOF Applications," NTCA—The Rural Broadband Association (Feb. 8, 2021) available at <https://www.ntca.org/ruraliscool/newsroom/press-releases/2021/8/ntca-fiber-broadband-association-equip-fcc-model>.

performance characteristics in four years,<sup>45</sup> and NTIA should ensure that States require subgrantees to meet this mandate.

**Reliability.** The Statute defines “reliable broadband service” to mean “broadband service that meets performance criteria for service availability, adaptability to changing end-user requirements, length of serviceable life, or other criteria, other than upload and download speeds, as determined by the Assistant Secretary in coordination with the Commission.”<sup>46</sup> ACA Connects submits that NTIA should exercise its authority to clarify this definition in two respects. First, any project using a network technology that can scale to meet future end-user requirements for service to all locations with minimal additional capital expenditures and without the need to obtain significant government approvals or licenses, including for use of spectrum, should be deemed “reliable” and granted a preference. Second, while projects must at a minimum provide broadband service “with network outages that do not exceed, on average, 48 hours over any 365-day period,”<sup>47</sup> NTIA should require States to give a preference to networks engineered to provide superior network resiliency and redundancy. The

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<sup>45</sup> IILJ, § 60102(h)(4)(C). *See supra.*, n. 44. Prior to making subgrant deployment awards, States should review the FCC’s *Performance Measures Testing* and ensure all applicants are capable of achieving the benchmarks in those tests – and then apply those testing requirements to recipients of support.

<sup>46</sup> IILJ, § 60102(a)(1)(L). The statute also requires that support recipients “incorporate best practices, as defined by the Assistant Secretary, for ensuring reliability and resilience of broadband infrastructure.” IILJ, § 60102(g)(1)(C).

<sup>47</sup> IILJ, § 60102(h)(4)(A)(i)(III). This requirement should be read in the context of normal operations and not during a natural or other disaster that destroys all or parts of the network.

Puerto Rico/USVI order may be instructive on this point. The FCC assigned points for network resiliency and redundancy depending on a project’s network technology and type of deployments, *i.e.*, aerial wireline, wireless, or underground fiber deployments, and depending on backup network capabilities, including path diversity.<sup>48</sup> In evaluating the level of network reliability of an applicant’s submission, States should recognize that measures necessary to improve reliability in one area (*i.e.*, fire-prone areas) may not be the same as other areas (*i.e.*, deserts), and not all deployment options are available in all areas. For instance, in some areas underground fiber deployments are not practical.

**Quality of Service.** The Statute specifies that BEAD Program funds should be provided for projects that provide “consistency in quality of service” and requires fund recipients to “adhere to quality-of-service standards . . . established by the Assistant Secretary.”<sup>49</sup> ACA Connects submits that “consistency in quality of service” means that when the network is functioning, the provision of service consistently meets the performance metrics and capacity that is expected to be available using the technology. ACA Connects recommends that NTIA require any project receiving funds meet at a minimum the FCC’s *Performance Measures Testing* requirements, including as those requirements evolve, and provide proof to the State according to the FCC’s procedures.<sup>50</sup>

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<sup>48</sup> *First Puerto Rico and USVI Funds Order* at paras. 27-33.

<sup>49</sup> IILJ, § 60102(a)(2)(I)(i), (g)(1)(A).

<sup>50</sup> *See supra*, n.41. NTIA’s authority to adopt this requirement stems from IILJ, § 60102(j)(2)(B)(VII), which provides that subgrantees shall “include any other data that would be required to comply with the data and mapping collection standards

**Cybersecurity and Supply Chain Security.** Under the Statute, entities that receive BEAD Program funding (1) must “comply with prudent cybersecurity and supply chain risk management practices, as specified by the Assistant Secretary, in consultation with the Director of the National Institute of Standards and Technology and the Commission,” and (2) must not use program support to purchase or support any covered communications equipment or service, as defined in the Secure and Trusted Communications Networks Act of 2019, or fiber optic cable and optical transmission equipment manufactured in the People’s Republic of China, except by waiver by the Assistant Secretary in specific circumstances.<sup>51</sup> As an initial matter, NTIA, in defining the prudent cybersecurity and supply chain risk management practices funding recipients must comply with, should specify that these requirements only apply to the portion of an entity’s network funded and operated using program support. Additionally, to avoid deterring smaller providers from seeking subgrants, NTIA should follow a risk-based approach to managing cybersecurity risk so that what constitutes prudent is based on the capabilities of the entity and the risk factors that entity faces.<sup>52</sup> For evaluation purposes, entities should be required to certify that they will comply with the cybersecurity and supply chain risk management practices established by NTIA and the

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of the” FCC, and from ILLJ, § 60102(j)(2)(B)(VIII), which gives the Assistant Secretary the authority to adopt “other reasonable reporting requirements.”

<sup>51</sup> ILLJ, § 60102(g)(1)(D).

<sup>52</sup> See, e.g., Framework for Improving Critical Infrastructure Cybersecurity, Version 1.1., National Institute of Standards and Technology (April 16, 2018), available at <https://nvlpubs.nist.gov/nistpubs/CSWP/NIST.CSWP.04162018.pdf> (establishing a risk-based approach for cybersecurity).

purchase restrictions prescribed by Statute, and should be disqualified if they fail to provide this certification.

**C. NTIA Should Clarify and Establish Standards for Other Priorities, Preferences, and Requirements that States Should Use to Evaluate a Provider’s Subgrant Project Plans, Including Deployment Timelines, Proposed Service Areas, and Commitment to Have Locations Take Service**

The Statute also provides that BEAD Program funding should be prioritized to projects based on: (i) “deployment of a broadband network to persistent poverty counties or high-poverty areas,” and (ii) “the expediency with which a project can be completed.”<sup>53</sup> It also requires that an entity who receives program funds must provide access to broadband service to each customer served by the project that desires broadband service,<sup>54</sup> as well as inform the public about the deployment “to increase adoption.”<sup>55</sup> As discussed above, these factors and requirements should be assessed in conjunction with other factors and requirements that collectively provide a clearer, more quantitative basis on which to evaluate a proposed deployment project. The following sets forth ACA Connects recommendations for providing priorities or preferences for certain factors:

***Deployment to Persistent Poverty Counties or High-Poverty Areas.*** Among the most important projects are those that will deploy broadband to a persistent poverty county or a high-poverty area, especially when such projects also demonstrate a

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<sup>53</sup> IILJ, § 60102(h)(1)(A)(iv).

<sup>54</sup> IILJ, § 60102(h)(4)(A)(ii).

<sup>55</sup> IILJ, § 60102(h)(4)(F); IILJ, § 60102(h)(4)(G).

commitment to promptly sign up households and maintain a high take rate. ACA Connects recommends that NTIA ensure States give a high priority to such projects.

***Percent of Locations That Are Unserved or Underserved.*** The Statute requires that for projects to be eligible for BEAD Program funding, not less than 80% of locations must be either unserved or underserved. To maximize the efficacy of the program in closing the deployment gap, NTIA should establish and require States to apply a preference in the evaluation metrics for projects that propose to serve a percentage of unserved households greater than 80% -- with those proposing to serve only unserved locations (*i.e.*, 100%) given the highest preference.<sup>56</sup>

***Expediency of Completion.*** The Statute requires entities who receive program funding to “deploy the broadband network and begin providing broadband service to each customer that desires broadband service not later than 4 years after the date on which the entity receives the [funding],” except that a deadline may be extended under certain circumstances.<sup>57</sup> The State also provides that projects that can be completed more expeditiously should get a priority.<sup>58</sup> While there is no doubt value in getting a project completed sooner than four years, ACA Connects submits that providers already have an incentive to expedite the build since they are committing matching funds.<sup>59</sup>

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<sup>56</sup> NTIA should consider advising States to require that while project proposals need not be for contiguous geographic areas, they should be geographically proximate to maximize network and operational efficiencies and facilitate State oversight. States also should be advised not to break up proposals in ways that would be impractical for providers to deploy.

<sup>57</sup> IILJ, § 60102(h)(4)(C).

<sup>58</sup> IILJ, § 60102(h)(1)(A)(iv)(III).

<sup>59</sup> IILJ, § 60102(h)(3)(A).

Further, addressing “expediency” is a much more complicated than, for instance, giving a priority to areas with high poverty rates. If “expediency” alone received a priority, providers may choose smaller builds even though a larger build may be more economic. Or, they may choose to deploy technologies that are not future-proof or reliable and will require significant investment in the future to meet consumer demands greater performance or reliability. Or, some may find it to their financial advantage to over-promise and then under-deliver. Thus, ACA Connects recommends that NTIA and States should only prioritize projects that be completed sooner than four years where all other factors are equal, *e.g.*, if there are two fiber-to-the-premises projects, each seeking to deploy service to a similar number of locations each of which is unserved, then the State should prioritize the project that would be completed sooner. And applicants should be required, in such cases, to present evidence in their submissions to back their claim that they can deploy faster than the industry norm for build outs. Otherwise, to avoid problems that would undermine the success of the project, NTIA and States should tread carefully in prioritizing builds that would be more expedient.

***Take-Rate.*** The ultimate goal of deployments supported by BEAD Program funds is to secure adoption by households in unserved areas. As discussed above, the Statute addresses this adoption objective by requiring subgrantees to make the public aware of the deployment. To make this requirement more tangible, ACA Connects recommends that NTIA establish and require States to require any project to have a penetration rate of more than 30% within one year of the project’s completion -- which is relatively low given that the locations are largely unserved or underserved -- and give a

preference to projects where the provider commits (subject to a penalty) to having a higher penetration rate at that time.<sup>60</sup>

**D. The Amount of Support Requested Should Be Evaluated Based on the Price-Per-Location and the Cost-Effectiveness of the Proposed Subgrant Project**

The Statute does not explicitly require a State to choose or even favor applications based upon the amount of support for a project. Nevertheless, NTIA, and in turn the States, must be responsible stewards of taxpayer funds. Accordingly, ACA Connects recommends that NTIA use its authority to require States to evaluate applications based on the amount of support requested, and in doing so, NTIA should require that this evaluation be based on the average price-per-location for the proposed project and giving a preference for applications seeking less support on this basis.

For average price-per-location, NTIA should require States to measure the price against a preset reserve price. ACA Connects proposes that NTIA require States to use as a benchmark the reserve price set in the FCC's ACAM, which has been used in numerous competitive bidding processes – including the Puerto Rico/USVI competitive bidding process – as an objective standard by which to measure the cost to build a fiber-to-the-premises network.<sup>61</sup> NTIA should set a minimum threshold that entities

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<sup>60</sup> See e.g., “AT&T Readies to Take Back Wireline Broadband Share From Cable With 2GB and 5GB Fiber Services,” NextTV (Jan. 26, 2022) (“T&T ended 2021 with around 6 million fiber-to-the-home (FTTH) customers, while listing U.S. market penetration for FTTH services at around 37%.”) available at <https://www.nexttv.com/news/atandt-readies-to-take-back-wireline-broadband-share-from-cable-with-2gb-and-5gb-fiber-services>.

<sup>61</sup> See *Connect America Fund; High-Cost Universal Service Support*, WC Docket Nos. 10-90 and 05-337, Report and Order, DA 14-534 (re. April 22, 2014); see,

must seek support at the ACAM reserve price to qualify and give additional preferences as applicant seeks less support.

**IV. NTIA SHOULD USE – AND REQUIRE STATES TO USE – FCC BROADBAND DATA MAPS AND ADDITIONAL INFORMATION THAT PROVIDE CURRENT AND ACCURATE INFORMATION ABOUT UNSERVED AND UNDERSERVED LOCATIONS**

As discussed herein, in the Statute, Congress made clear that BEAD Program funds should only be distributed to unserved and underserved locations based on current and accurate mapping information, and the FCC alone, acting pursuant to the Broadband DATA Act and the Statute, can provide such crucial baseline information for all States.

**A. NTIA Should Harmonize Its Definitions of “Unserved” and “Underserved” Locations with Those the FCC will Apply in Formulating the Broadband DATA Map Upon Which the IIJA Requires NTIA to Rely in Distributing Funding Under the BEAD Program**

In the Notice (Question 16), NTIA inquires about how to treat “prior buildout commitments” in relation to a location being deemed unserved or underserved.<sup>62</sup> ACA Connects believes that to maximize use of the BEAD Program’s limited funding, and to leverage the availability and usefulness of the FCC’s Broadband DATA Map, thereby

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*e.g., Connect America Fund Phase II Auction Scheduled for July 24, 2018 Notice and Filing Requirements and Other Procedures for Auction 903, AU Docket No. 17-182 and WC Docket No. 10-90, Public Notice, FCC 18-6, paras. 210-211 (Feb. 1, 2018). The reduction is the amount set to comply with the general “Matching Requirement” in IILJ, § 60102(h)(3) and should be altered for high-cost areas.*

<sup>62</sup> Notice at 1125.

reducing the administrative costs of running the program for States,<sup>63</sup> NTIA’s inquiry should be more expansive. It should clarify the terms “unserved” and “underserved” by harmonizing them with those that are applied by the FCC in formulating the broadband map upon which the IIJA requires NTIA to rely in distributing funding under the program. As such, ACA Connects recommends the following.

First, consistent with the FCC’s broadband data collection rules, a location should be deemed served if a provider can make service available within 10 business days.<sup>64</sup> Second, a location should be deemed served where a provider previously had a broadband subscriber.<sup>65</sup> Third, a location should be deemed served if it is in a particular geographic area where a provider is receiving or has received universal service support to provide broadband service -- or has other federal, State, or local obligations to make service available in the area<sup>66</sup> -- and the provider has begun to make service available

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<sup>63</sup> ACA Connects notes that unless the NTIA’s definition of “unserved” and “underserved” rests upon criteria that can be discerned from the Broadband DATA Map, then such map cannot serve as a reliable resource to NTIA, States, subgrant applicants, and others, creating significant extra burdens and confusion.

<sup>64</sup> 47 C.F.R § 1.7001(19).

<sup>65</sup> *Cf. Establishing the Digital Opportunity Data Collection; Modernizing the FCC Form 477 Data Program*, Second Report and Order and Third Further Notice of Proposed Rulemaking, 35 FCC Rcd 7460, 7470, para. 23 (2020) (describing circumstances where, in FCC’s Broadband Data Collection, providers must include locations in their coverage shapefiles or location lists). As the FCC explained, the “fact that such a location previously had a subscription provides evidence that the provider has built out its broadband network infrastructure to, and is capable of providing a standard broadband installation at, that location.” *Id.* at n.71.

<sup>66</sup> Aside from service obligations in exchange for government funding, such obligations may also encompass, for example, a provider’s voluntary service commitment made during government review of a proposed transaction.

in that area.<sup>67</sup> In light of the provider’s enforceable deployment commitments in the area, combined with the evidence that the provider will follow through on such commitments via the provider having begun to make service available in the area, the location still should be considered served even if service is not yet available to the specific location in question, and cannot be provided to that specific location within 10 business days. Fourth, a location should be deemed served, with respect to “latency sufficient to support real-time, interactive applicants,” only where such location is situated in a geographic area where the network round-trip latency associated with each maximum speed combination reported for such area is less than or equal to 100 ms, based on the 95<sup>th</sup> percentile of measurements, as the FCC requires with respect to the Broadband Data Collection.<sup>68</sup>

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<sup>67</sup> *Cf. id.* at para. 23.

<sup>68</sup> *Cf. Establishing the Digital Opportunity Data Collection; Modernizing the FCC Form 477 Data Program*, Third Report and Order, 36 FCC Rcd 1126, 1138, para. 27 (2021). *See also, id.* at 1140, para. 30. As the FCC articulated, this information will provide it and the public useful information “about the latency associated with the highest-speed broadband service available from each fixed provider and technology at each location across the country,” and will enable the FCC “to assess which locations have fixed service available below 100 ms . . . when making eligibility determinations” in the universal service context. Moreover, the FCC found that “because the 100 ms threshold is used in several high-cost universal service contexts, and because the data collected pursuant to the Broadband DATA Act must be used in determining new awards of high-cost universal service funding, it is logical to align the two” in establishing the below-100 ms in at least 95 percent of measurements threshold for a served location for purposes of the Broadband Data Collection. Likewise, it is logical for NTIA to apply the same latency threshold in defining served and unserved locations pursuant to the BEAD Program, which, in determining the distribution of funding, will rely upon the maps produced by the FCC from data derived from the Broadband Data Collection.

**B. NTIA Should Establish Standards That States Should Use to Identify Eligible Community Anchor Institutions**

Under the Statute, a State must submit with its initial proposal “each community anchor institution under the jurisdiction of the [state] that is an eligible community anchor institution.”<sup>69</sup> The Statute specifies that a community anchor institution is eligible if it “lacks access to gigabit-level broadband service.”<sup>70</sup> Community Anchor Institutions are attractive customers for existing providers. As such, most community anchor institutions are positioned to obtain gigabit-level broadband services through a request for proposal (“RFP”) process and may not have gigabit-level broadband service because they have not solicited providers. NTIA should clarify the definition of “eligible community anchor institution” to specify that it “lacks access to gigabit-level broadband service” only if it demonstrates that it cannot obtain connectivity or service from an existing provider through the issuance of an RFP. Only where the community anchor institution cannot purchase service from an existing provider should it be permitted to build itself, and in that instance, only if it can show that it had issued an RFP compliant with State procurement rules to hire a contractor for the build. These institutions further should be required to submit supporting information to demonstrate that it was not able to obtain service through an RFP process.<sup>71</sup>

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<sup>69</sup> IILJ, § 60102(e)(3)(A)(i).

<sup>70</sup> IILJ, § 60102(a)(1)(E).

<sup>71</sup> Separately, States should have the option to provide a “voucher” to community anchor institutions to help them purchase services.

**C. Unserved and Underserved Locations Must Be Based on the FCC’s Broadband DATA Map, Which Should Incorporate Results from an Initial Challenge Process at the FCC**

To identify “unserved” and “underserved” locations, the Statute requires that NTIA and States use information in the FCC’s forthcoming Broadband DATA Map.<sup>72</sup> Accordingly, once released, NTIA must use the FCC’s Broadband DATA Map to make funding allocation decisions,<sup>73</sup> and States must use the map to identify unserved and underserved areas in their initial proposals and in requiring subgrant applicants to file projects that are consistent with this data.<sup>74</sup> This Congressional direction is not only required, but it is entirely justifiable and reasonable because it provides a transparent, comprehensive, and standardized metric to use across the country, which will ensure that NTIA and all States use a common basis for the allocation of funds and that all

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<sup>72</sup> IILJ, § 60102(a)(1)(A); IILJ, § 60102(a)(10)(C). In these sections, the Statute defines “unserved location” to mean a “broadband-serviceable location” that the Broadband DATA Map shows (1) has no access to broadband service or (2) lacks access to service offered with speeds of 25/3 Mbps and latency low enough to support real-time, interactive applications and similarly by defining “underserved location” as a location that, “as determined in accordance with the Broadband DATA Map, lacks access to reliable broadband service offered with” speeds of at least 100/20 Mbps and latency sufficient to support real-time, interactive applications.

<sup>73</sup> IILJ, § 60102(c)(1)(A), (c)(3).

<sup>74</sup> IILJ, § 60102(e)(3)(A)(i); IILJ, § 60102(f)(1) (limiting use of funds by subgrantees to unserved service projects and underserved service projects); IILJ, § 60102(a)(B) (defining unserved service projects as projects where not less than 80 percent of the broadband-serviceable locations served by the project are unserved locations), IILJ, § 60102(a)(D) (defining underserved service projects as projects where not less than 80 percent of the broadband-serviceable locations served by the project are unserved locations or underserved locations); IILJ, § 60102(a)(H) (defining “broadband-serviceable location” to have the meaning prescribed by the FCC, which is a serviceable location identified in its Broadband DATA Maps, 47 C.F.R. 1.7000(a)(11)).

States have a common basis upon which to conduct their own challenge processes and determine whether subgrantee proposed projects actually serve unserved and underserved locations.

That said, NTIA should use the discretion provided in the Statute<sup>75</sup> to wait, and require States to wait, until after an initial challenge process at the FCC is completed to rely on the FCC's broadband map to make funding allocations. The first iteration of the FCC's map may provide granular – *i.e.*, location – information, but because it will not have been subject to challenges, it is unlikely to be sufficiently accurate in identifying unserved and underserved locations both because the data is somewhat out of date and because providers submissions may be inaccurate.<sup>76</sup> ACA Connects recommends that to address this problem, NTIA should give stakeholders a limited time – say 30 days – to file challenges with the FCC and then permit the FCC's review process to work as set forth in the Broadband DATA Act and in the Statute. While this may take approximately 150 days after the FCC's initial map is released, it should substantially increase the accuracy of the map, which will lend greater credibility to the allocation and

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<sup>75</sup> ILLJ, § 60102(c)(1)(A) (“On or after the date on which the broadband DATA maps are made public”; ILLJ, § 60102(c)(3) (“On or after the date on which the broadband DATA maps are made public”).

<sup>76</sup> ACA Connects' concern about having an accurate map appears to be shared by Commerce Secretary Raimondo. See “Raimondo Emphasizes NTIA Work With States on IJJA Broadband Funding,” TR Daily (Feb. 1, 2022) which quotes the Commerce Secretary stating, “So the maps will tell us who's unserved and underserved and that's why we can't deploy any of this money until we have accurate maps.”.

subgrant awards processes.<sup>77</sup> Moreover, by allowing for the initial map to be challenged, NTIA would avoid an outbreak of disputes among States and with the NTIA over whether a State is receiving the amount of funding to which it is entitled under the Statute. Allowing an initial round of the challenge process to play out at the FCC is consistent with Congress's desire that BEAD Program funds be distributed using reliable information regarding unserved and underserved areas.<sup>78</sup> In addition, allowing an initial round of the challenge process to be completed at the FCC will also facilitate a more streamlined and less burdensome challenge process for subgrant applications in the States.<sup>79</sup>

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<sup>77</sup> Under the FCC's current rules, a party can challenge the accuracy of the maps for any location at any time. Providers have to respond to challenges within 60 days of notice, then the provider and challenger have 60 days to attempt to resolve the challenge. If the parties are unable to reach a consensus, they must notify the FCC, which must resolve the issues. If a provider accepts a challenge, comes to consensus with the challenges are agrees to make a change, or the FCC decides in the challenges favor, the provider must submit a correction to the map within 30 days. 47 C.F.R. § 1.7000(d). Under IILJ, § 60102(h)(2)(E)(i), the FCC is required to resolve challenges "not later than 90 days after the date on which a final response by a provider" is filed.

<sup>78</sup> For example, by establishing a challenge process for state and territory determinations about unserved and underserved areas, Congress showed a clear intent that location determinations be made accurate before funding is distributed.

<sup>79</sup> To the extent that States and NTIA wish for money to be distributed sooner than the completion of any challenge process to the initial version of the FCC's map, NTIA may want to consider providing the allocation of support to States in two parts: with a portion of the grant given when the initial map is released, followed by the remainder after completion of the challenge process clarifies the exact amount each State would deserve. If NTIA adopts such a process, it will need to ensure that States do not award deployment subgrants until the FCC issues the "challenged" map.

**D. NTIA Should Establish a Uniform Process by Which Entities and Other Stakeholders Can Challenge Determinations of Unserved and Underserved Areas Made by States**

The Statute specifies that:

After submitting an initial proposal . . . and before allocating grant funds . . . for the deployment of broadband networks, [a state or territory] shall ensure a transparent, evidence-based, and expeditious challenge process under which a unit of local government, nonprofit organization, or other broadband service provider can challenge a determination made by the [state or territory] 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>80</sup>

If a State makes modifications from its initial proposal following a successful challenge, it must notify NTIA.<sup>81</sup> The Statute also provides that the Assistant Secretary can “modify the challenge process . . . as necessary” and may reverse determinations by a state or territory “with respect to the eligibility of a particular location or community anchor institution for grant funds.”<sup>82</sup>

If, as discussed above, NTIA aligns the definition of unserved and underserved to be fully consistent with the information that can be extracted from the Broadband DATA Map, the burden on States to verify locations that are eligible for support because they are unserved or underserved will be significantly reduced. Moreover, if NTIA requires States to wait until after the FCC completes an initial round of its challenge process for the Broadband DATA Map before they can identify unserved and underserved

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<sup>80</sup> IILJ, § 60102(h)(2)(A).

<sup>81</sup> IILJ, § 60102(h)(2)(C).

<sup>82</sup> IILJ, § 60102(h)(2)(D)(ii).

locations, the burden on the States to undertake a challenge process will be even further lessened, although it will still be important for States to undertake a rigorous challenge process because each year many millions of locations get upgraded or new broadband service – and providers may not have updated their information on the FCC’s Broadband DATA Map, either via a direct submission or in response to a challenge at the FCC, or the latest information that they have submitted has not yet been incorporated into the latest public version of the map,

Further, in conducting its challenge process, States should “align support” by eliminating or minimizing to the greatest extent feasible the instances where BEAD Program funds are used to deploy broadband in the same areas where there are existing federal or State commitments. To facilitate this determination, States should permit stakeholders to provide information that may be above and beyond the information available on the Broadband DATA Map. Accordingly, a location should be deemed served where a State plans to use federal, State, or other funding that it has already received or that it is otherwise entitled to receive to ensure the location will be served.<sup>83</sup> NTIA can ensure that a State in fact notifies it that funds exist for this purpose by ensuring a State meets its obligation in the Final Proposal to “align the grant funds

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<sup>83</sup> *Cf. Rural Digital Opportunity Fund; Connect America Fund*, Report and Order, 35 FCC Rcd 686, 692, para. 13 (2020) (excluding from eligibility for FCC RDOF support—*i.e.*, deeming them served—census blocks having been identified as awarded funding through State broadband subsidy programs to provide qualifying broadband service).

allocated...with the user of other funds that the eligible entity receives from the Federal Government, a State, or private entity for related purposes.”<sup>84</sup>

Accounting for the above, ACA Connects proposes that NTIA establish and States adopt a subgrant challenge process that incorporates the following:

1. Require subgrant applicants to certify that they relied on the most recent version of the FCC Broadband DATA Map as of the date of their application to identify unserved and underserved locations in their proposed project;
2. Allow at least 45 days after the State releases the unserved and underserved locations and eligible community anchor institution locations that subgrant projects propose to cover for stakeholders to challenge the proposed locations by submitting evidence showing that a location or institution is actually served, consistent with the NTIA’s definition of unserved and underserved as harmonized with the FCC’s definition as ACA Connects’ suggested above, or to the extent that the NTIA wishes to have an even more expansive definition of served with respect to an entity having a binding commitment, but has not made sufficient progress toward a deployment to be captured on the Broadband DATA Map, which must be new material evidence not submitted during the FCC challenge process;
3. Give subgrant applicants at least 45 days to respond to challenge; and
4. Resolve the challenge as soon as possible after the subgrantee’s response but within no more than 90 days.<sup>85</sup>

ACA Connects urges the Commission to request that States schedule when they will undertake their challenge processes through NTIA to avoid unreasonably burdening

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<sup>84</sup> IILJ, § 60102(c)(4)(A)(i)(I)(bb). The Statute (IILJ, § 60102(e)(4)(A)(iii).) also mandates that States “to the greatest extent practicable, align the use of grant funds . . . with funds available from other Federal programs that support broadband deployment and access.”

<sup>85</sup> The process also should require a State to impose a penalty for an applicant’s failure to follow the information on the FCC’s Broadband DATA Map and for a challenge that makes an allegation without any supporting information

providers and other participants in the challenge process as a result of multiple States conducting challenge processes at the same time, especially States that have abbreviated timetables for filing and responding.

**V. NTIA SHOULD ESTABLISH MEASURES THAT STATES MUST IMPLEMENT TO INCREASE TRANSPARENCY AND MAXIMIZE USE OF LIMITED BEAD PROGRAM FUNDS**

To participate in the BEAD Program, the Statute provides that states must seek approval from NTIA, including by submitting a Letter of Intent, Initial Proposal, Action Plan, and Final Proposal. NTIA should utilize this information collection to obtain information about State programs that forward the objectives of the Statute.

**A. Letter of Intent Data Requirements**

Under the Statute, States seeking support are to submit a Letter of Intent (“LOI”), which must include any content prescribed by the Assistant Secretary and may include a description the State’s existing broadband program or office, including “the amount of funding that the eligible entity has available for broadband deployment or other broadband-related activities . . . and the sources of that funding, including whether the funds are from the eligible entity or from the Federal Government under the American Rescue Plan Act of 2021”.<sup>86</sup> NTIA should require that States, in submitting this information, provide details regarding the following: how much money is available; how much money has been allocated for broadband deployment or other broadband-related

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<sup>86</sup> IILJ, § 60102(e)(1)(B).

projects that have not yet been initiated; and the amount and sources of other funding besides that originating from the entity or money provided by ARPA.

## **B. Initial Proposal Data Requirements**

The Statute also provides that States must submit an Initial Proposal that “identifies existing efforts funded by the Federal Government or a State within the jurisdiction of the eligible entity to deploy broadband and close the digital divide.”<sup>87</sup>

NTIA should clarify that States are required, as part of this submission, to identify where such money is currently being spent and what is planned to be built in these areas. In addition, when a State identifies unserved and underserved locations in its Initial Proposal,<sup>88</sup> it should also be required to identify locations where a provider has committed to provide higher speed broadband through a federal or State program and to submit this information to the FCC to update the Broadband DATA Map.

The Statute also gives the Assistant Secretary, in collecting information on an Initial Proposal, the authority to establish “local coordination” requirements for States.<sup>89</sup> NTIA should exercise this authority by requiring States to solicit and take into account any submissions from broadband providers on where they plan on deploying broadband in the near future using private investments or through subsidized builds.

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<sup>87</sup> IILJ, § 60102(e)(3)(A)(i)(III).

<sup>88</sup> IILJ, § 60102(e)(3)(A)(i)(V).

<sup>89</sup> IILJ, § 60102(e)(3)(A)(ii).

### **C. Other State Information Data Requirements**

NTIA should ensure that a State's action plan include sufficient information to ensure those plans can be executed. Under the Statute, States that receive BEAD Program funds must submit a 5-year action plan that provides information established by the Assistant Secretary and may include information about broadband service needs and proposed solutions. ACA Connects recommends that NTIA mandate that action plans include not only the information set forth in the Statute but additional information to facilitate execution of the plans. Specifically, States should be required to assess current and past private sector and government investments in broadband deployment, planned private sector and government investments (to be included with localized data), problems related to adoption in the State, and the likely availability of labor and materials, as well as possible permitting, pole access, or rights-of-way access barriers, when the State is providing its assessment of the amount of time it would take to build out universal broadband service. A State also should identify any measures it has taken or should take to remove barriers to deployment, such as facilitating access to poles and rights-of-way and making permitting process more streamlined and objective.

### **D. Public Availability of All State Submissions**

To ensure transparency, NTIA should make public all State submissions to NTIA, including the LOIs, Initial and Final Proposals, and action plans.<sup>90</sup> Each of these submissions will contain information that could have a significant impact on providers

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<sup>90</sup> IILJ, § 60102(e)(4).

and other stakeholders. For example, LOIs must contain information regarding the processes States will use to distribute BEAD Program funds, the timeline for the awards, and oversight of fund recipients. Information such as this is important to helping providers make informed choices about where to participate in the program and should therefore be made public.

**VI. NTIA SHOULD CLARIFY THAT A SUBGRANTEE’S PARTICIPATION IN THE AFFORDABLE CONNECTIVITY PROGRAM CONSTITUTES A “LOW-COST BROADBAND SERVICE OPTION” AND THAT STATES MAY NOT REGULATE THE RATES CHARGED FOR A “LOW-COST BROADBAND SERVICE OPTION”**

Under the Statute, BEAD Program fund recipients must offer at least one “low-cost broadband service option” for eligible subscribers and States must, in consultation with the Assistant Secretary and prospective funding recipients, establish a proposed definition of “low-cost broadband service option.”<sup>91</sup> The Statute also prohibits NTIA from regulating the rates charged by entities but does not specify the same prohibition for States. In Question 23 of the Notice, NTIA asks whether NTIA should “define a baseline standard for the ‘low-cost broadband service option’ to encourage states/territories to adopt similar or identical definitions and to reduce the administrative costs associated with requiring providers to offer disparate plans in each state and territory.”

ACA Connects submits that NTIA should establish a standard for a “low-cost broadband service option” that States should follow. In particular, NTIA should specify

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<sup>91</sup> ILLJ, § 60102(h)(5)(B)(ii).

that if an entity participates in the FCC’s Affordable Connectivity Program (“ACP”), which allows eligible subscribers to apply a discount of up to \$30 to a broadband service plan and which has proven to be highly successful in enrolling more than nine million low-income subscribers, that the entity is offering a qualified “low-cost broadband service option.”<sup>92</sup> Use of the ACP to meet this standard is beneficial because that program has clearly defined rules and a well-established and objective mechanism to determine eligibility. Furthermore, eligible households may apply the benefit to any of the providers’ service offerings, giving them a multitude of options.

Additionally, NTIA should fulfill the Statute’s goal of promoting broadband adoption<sup>93</sup> by requiring States to specify a percentage of BEAD Program funds that must be used to advertise and encourage eligible households to sign up for the ACP.

## **VII. NTIA SHOULD ESTABLISH ROBUST ACCOUNTABILITY MEASURES TO PREVENT WASTE, FRAUD, AND ABUSE OF BEAD PROGRAM FUNDS**

Accountability measures are essential to ensure that the program requirements in the Statute and established by NTIA are followed by the States and by subgrantees and to prevent waste, fraud, and abuse of program funds. The Statute specifies several

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<sup>92</sup> As an alternative, entities must offer at least one offering to eligible ACP customers that is below \$30 so eligible ACP Customers have the option of paying \$0.

<sup>93</sup> IILJ, § 60102(f)(5) (permitting use of funds to promote adoption); IILJ, § 60102(g)(4)(G) (requiring subgrantees to “carry out public awareness campaigns in service areas that are designed to highlight the value and benefits of broadband service in order to increase the adoption of broadband service by consumers.”).

accountability measures<sup>94</sup> and directs the “Assistant Secretary . . . [to] establish, in coordination with relevant Federal and State partners, appropriate mechanisms to ensure appropriate use of funds.”<sup>95</sup> NTIA should utilize this authority to clarify and expand on the measures prescribed in the Statute and establish the suggested accountability measures, as described below.<sup>96</sup>

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<sup>94</sup> IILJ, § 60102(j)(1)(A) (requiring an initial report from states and territories that describes accountability mechanisms for fund recipients); IILJ, § 60102(j)(1)(B) (requiring semiannual reports from states and territories); IILJ, § 60102(j)(1)(C) (requiring a final report); IILJ, § 60102(f)(3) (providing for deobligation of funds); IILJ, § 60102(f)(2)(B) (requiring contract provisions with fund recipients for recovery of funds); IILJ, § 60102(h)(6) (requiring fund recipients to return funds for failure to fulfill obligations); IILJ, § 60102(j)(2) (requiring semiannual reports by fund recipients).

<sup>95</sup> IILJ, § 60102(g)(3)(A).

<sup>96</sup> ACA Connects notes that on January 28, 2022, the FCC adopted additional accountability measures for the CAF and RDOF programs. These include: “The Rural Broadband Accountability Plan makes a number of changes and enhancements to existing audit and verification procedures:

Increased audits and verifications of support recipients...

- The number of audits and verifications will double in 2022 as compared to 2021 and include on-site audits as well as audits and verifications based upon random selection.
- USAC will conduct more verifications prior to a program’s first required deployment milestone.

Increased audits and verifications of large dollar and higher risk recipients...

- The largest dollar recipients will be subject to an on-site audit in at least one state.
- Higher risk recipients will be subject to additional audits and verifications.

Increased program transparency...

- For the first time, results of verifications, audits, and speed and latency performance testing will be made public on USAC’s website.”

**A. Audit Process for Application Evaluations, Awards, and the Challenge Process**

NTIA should create mechanisms to audit a State’s subgrant application evaluation and award decisions and challenge process. Further, NTIA should make public these audits, with a comparison of all State audits. By being transparent, NTIA will lend credibility to the program and motivate States to avoid waste, fraud, and abuse. In addition, by auditing the challenge process, NTIA will enable it to have a reasoned basis for making determinations as to whether to overturn challenge process decisions by States, as provided for by the Statute.<sup>97</sup> NTIA can facilitate these audits by adopting ACA Connects’ proposed objective processes, criteria, and standards for evaluating applications and awarding subgrants and for the challenge process. Otherwise, the task, which is essential, would overwhelm NTIA’s resources and capabilities.

**B. Independent Inspector General**

NTIA should establish an Independent Inspector General (“IIG”) position to accept and investigate allegations of waste, fraud, and abuse in the BEAD Program and take necessary corrective action. As we believe all recognize, the BEAD Program’s double-layered grant program with complex requirements and its enormous amount of funding are unprecedented, and its mission is so critical to achieve. Consequently, the stakes are great, and the opportunities for “mischief” are significant. Establishing an IIG

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<sup>97</sup> IILJ, § 60102(h)(2)(D)(ii).

position is a necessary and commonsense solution to maximize the program’s success and minimize waste, fraud, and abuse.<sup>98</sup>

### **C. Deployment Deadlines**

NTIA should provide guidance to States on setting conditions for when a subgrantee can receive an extension of its deployment deadline and setting new deployment milestones. The Statute requires that an entity that receives BEAD Program funds must “deploy the broadband network and begin providing broadband service to each customer that desires broadband service not later than 4 years after the date on which the entity receives the subgrant, except that an eligible entity may extend the deadline . . . if—(i) the eligible entity has a plan for use of the grant funds; (ii) the construction project is underway; or (iii) extenuating circumstances require an extension of time to allow the project to be completed.”<sup>99</sup> The Statute does not otherwise specify the reasons for which an eligible entity may seek an extension or who determines whether an entity has satisfied one of the factors necessary for being granted an extension. As such, this provision leaves substantial room for interpretation that could result in significant delays in deployment obligations if not clarified by NTIA.

We thus recommend that NTIA should clarify that an entity may only seek an extension if it can show that after reasonable effort, it has been unable to source necessary materials, secure the needed labor, or obtain required access to poles or rights-of-way from private or public owners to initiate or complete the construction. In

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<sup>98</sup> See Inspector General Act of 1978, P. L. 95-452, 92 Stat. 1101.

<sup>99</sup> IILJ, § 60102(h)(4)(C)(iii).

submitting a request, a subgrantee should specify the precise reason for its request and provide the entity's plan to address the problem and the amount of additional time required, along with supporting documentation. A State should extend the deadline for only the amount of time that the entity proves is necessary.

To track progress of deployments, NTIA should follow the RDOF rules and require that States set interim deployment milestones – which will depend upon the timeframe to which an entity commits in its application – that entities must meet and impose penalties for failing to meet them.<sup>100</sup> Coupled with reporting obligations, deployment milestones will give States insight in the progress entities are making toward their planned deployment and help States identify early on whether an entity is making progress toward fulfilling its deployment obligation before four years have passed or after it is in default.

#### **D. Limitations on Transferability**

To inhibit entities that are not committed to constructing a network and providing service from gaming the subgrant process and requirements – and lend credibility to the program -- NTIA should establish limitations on transfers of, or substantial changes in, ownership or control. We recommend that NTIA prohibit any such transfers or changes prior to the time the subgrantee completes its deployment. In addition, NTIA should

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<sup>100</sup> *Rural Digital Opportunity Fund; Connect America Fund*, WC Docket Nos. 19-126 and 10-90, Report and Order, FCC 20-5, ¶ 45 (rel. Feb. 7, 2020) (“*RDOF Order*”). Under the RDOF, entities that failed to meet their deployment obligations were subject to additional reporting requirements and withholding of program support until the entity came into compliance.

establish a process and requirements that States must follow in approving any transfer or change in control after this time. These proposals follow on, and are similar to, the process and requirements that NTIA used in the Broadband Technology Opportunities Program.<sup>101</sup>

### **E. Default Penalties**

As discussed earlier in lessons learned from existing grant program, the “integrity” of the BEAD Program will depend on NTIA establishing significant default penalties that States must apply to deter and punish violations by subgrantees. The Statute requires that States stipulate in contracts with subgrantees “reasonable provisions for recovery of funds for nonperformance” and that subgrantees must “return up to the entire amount” if they fail to use the funds as permitted by the Statute.<sup>102</sup> Based on experience with the RDOF program, ACA Connects submits that these penalties need to be more substantial than in that program to prevent waste, fraud, and abuse.<sup>103</sup>

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<sup>101</sup> See “FACT SHEET, Broadband Technology Opportunities Program, Sale, Lease, Transfer, Disposition, and Mortgage of Infrastructure Project Assets,” (“BTOP Notices of Funds Availability (NOFAs) prohibit the sale or lease of award-funded broadband facilities or equipment during their useful life unless NTIA grants a waiver.”) available at [https://www2.ntia.doc.gov/files/btop\\_sale-of-assets\\_factsheet\\_2015-4-15.pdf](https://www2.ntia.doc.gov/files/btop_sale-of-assets_factsheet_2015-4-15.pdf).

<sup>102</sup> IILJ, § 60102(f)(2)(B).

<sup>103</sup> *RDOF Order* at ¶ 115. One of the most significant lessons from the FCC’s RDOF program is that the default penalties were set too low to deter and punish entities from seeking program support when they did not intend or were unable to meet their commitments or provided false or misleading information to the FCC. The RDOF established a base forfeiture amount of \$3,000 with potential for upward adjustments.

In addition to full recoupment of program funds, as provided for under the statute, NTIA should establish a base forfeiture penalty for negligent or unintentional violations of the requirements established by the Statute, NTIA, or the States and a greater base forfeiture penalty for willful or intentional violations or provision of false or misleading information to NTIA or a State.

#### **F. State Reporting Obligations**

NTIA should clarify the reporting obligations of States to ensure NTIA is receiving information necessary to oversee the program and that it continues to receive reports until funding recipients have fulfilled their deployment and operating obligations.

Under the Statute, States must submit a semiannual report to NTIA that “(i) describes how [it] expended the grant funds; (ii) describes each service provided with the grant funds; (iii) describes the number of locations at which broadband service was made available using the grant funds, and the number of those locations at which broadband service was utilized; and (iv) certifies that [it] complied with the requirements of this section and with any additional reporting requirements prescribed by the Assistant Secretary.”<sup>104</sup> NTIA also should use its authority to establish three additional reporting requirements. First, it should require States to submit information in a timely manner about the providers who have applied for funding and then those that were awarded program funds so that NTIA can assess whether any particular provider is overcommitting on, or otherwise exceeding its ability to perform, on projects in multiple

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<sup>104</sup> IILJ, § 60102(j)(1)(B).

states. Second, NTIA should require that States aggregate and summarize the information reported by subgrantees and submit that in their reports to NTIA.<sup>105</sup> Third, NTIA should require States to provide NTIA with a description of any requests by subgrantees to extend deployment deadlines and failures by subgrantees to meet deployment milestones or complete deployment obligations, or other defaults by subgrantees.

Under the Statute, a State must submit semiannual reports to NTIA until all funds distributed to a State are expended, and a State must submit a final report not later than one year after the State has expended all grant funds.<sup>106</sup> To prevent these provisions from being read to mean that reporting will stop after a State distributes the funds to awardees, NTIA should clarify that the time at which all funds have been expended is the time at which all subgrantees have reached the deadline for fulfilling, or have actually fulfilled, their deployment and operational obligations using the funds, whichever is later. This will ensure that NTIA will continue to receive information from States about the subgrantees meeting their deployment and operational obligations up to the time that they are actually completed.

## **VIII. CONCLUSION**

The BEAD Program is an unprecedented opportunity to close the broadband deployment and adoption gaps, and for it to succeed, NTIA must ensure that States

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<sup>105</sup> IILJ, § 60102(j)(1)(A)(iv) (requiring states to report to NTIA any other information required by the Assistant Secretary).

<sup>106</sup> IILJ, § 60102(j)(1)(B).

award funds impartially to the most cost-effective, future-proof projects with the greatest likelihood of completion on time and with the deepest commitment to providing quality and responsive service to residences, businesses, and anchor institutions. To achieve this, NTIA should establish measures to help States quickly and effectively implement programs to distribute BEAD Program funding and maximize participation by qualified providers and other entities. The foregoing proposals put forth by ACA Connects, if implemented, will help NTIA achieve those outcomes.

Respectfully submitted,

By: 

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