



January 6, 2023

The Honorable John Thune  
United States Senate  
511 Dirksen Senate Office Building  
Washington, DC 20510

Dear Senator Thune:

On behalf of NTCA–The Rural Broadband Association (“NTCA”) and its approximately 850 small community-based providers of broadband in 45 states across rural America, I am pleased to offer herein responses to your letter of December 6, 2022. As you are well aware, leveraging a mix of entrepreneurial spirit, community commitment, private capital, and essential programs like the high-cost Universal Service Fund (“USF”), traditional and more recently created Rural Utilities Service (“RUS”) programs, and many of the other governmental initiatives referenced in your letter, NTCA members have led the charge in South Dakota and in other deeply rural areas across the country in deploying cutting-edge broadband networks and delivering services that are as robust and reliable as those available in urban markets. These providers stand ready both to help close the digital divide in areas beyond those that they serve today, and to sustain their good work to date in keeping millions of rural Americans connected to the rest of the world.

Based upon this proven track record of performance and a deep understanding and unique on-the-ground perspective of how the funding mechanisms discussed herein operate and can be properly coordinated with each other (and with the coming Broadband Equity, Access, and Deployment (“BEAD”) program), NTCA offers its responses herein to the questions raised by your December 6 letter. We are grateful for your prior leadership that has enabled so much of the progress made to date in promoting access to broadband throughout the country, we appreciate your interest in considering how to improve, coordinate, and make more efficient the workings of these various efforts, and we look forward to working with you on these important issues going forward.

**Infrastructure Investment and Jobs Act-Specific Issues:**

- 1. As part of the IIJA, Congress established a technology-neutral approach for the BEAD program. Do you believe NTIA followed Congress’ intent in establishing a technology-neutral approach? If not, should Congress consider amending the IIJA to make it more explicit that all technologies are allowed to participate?**

All technologies are eligible to participate in the BEAD program; there is nothing in the BEAD program Notice of Funding Opportunity (“NOFO”) to the contrary.

Not all technologies are equally capable, however, and it does not violate a principle of “technological neutrality” to take stock of and account for the relative attributes and limitations of different technologies as demonstrated in the marketplace. With billions of dollars and millions of unserved Americans at stake, it is prudent and responsible for the federal government (and, in turn, the state

governments leveraging federal resources) to invest taxpayer resources based upon more than speculation as to potential future performance, marketing hype, and overstated claims of capability not borne out by real-world applications throughout rural America. By contrast, a thoughtful and practical strategy for making effective use of government funds, thereby delivering on the promise of broadband for those so long in need, rightly should look first to proven methods of delivery and promote the deployment of networks that without question can meet the demands of rural communities and users for decades to come.

For these sound reasons, even as it clearly did not preclude any technology from eligibility for BEAD funding, the National Telecommunications and Information Administration (“NTIA”) wisely chose to *weight* certain kinds of networks with an award preference based upon actual, real-world experience and the broader benefits certain technologies provide. More specifically, the NOFO identifies “Priority Broadband Projects” that are defined as “a project that will provision service via end-to-end fiber-optic facilities to each end-user premises.” As the NOFO rightly observed, such prioritization makes sense given “[a] project that will rely entirely on fiber-optic technology to each end-user premises will ensure that the network built by the project can easily scale speeds over time to meet the evolving connectivity needs of households and businesses and support the deployment of 5G, successor wireless technologies, and other advanced services.” This prioritization of course flows directly from the explicit text of the Infrastructure Investment and Jobs Act (“IIJA”) itself as articulated by Congress.<sup>1</sup> Moreover, this prioritization makes sense when one considers how the Internet has changed and continues to evolve – in terms of consumer and wholesale network demands – and represents a decision that is both prudent and efficient in looking to technologies that have proven time and again capable of keeping pace with such demands.

One could perhaps argue that the NOFO treats certain technologies differently not in eligibility – because, again, all technologies are eligible for funding with the only question being relative prioritization – but rather in determining which areas are or are not “served.” Specifically, the NOFO indicates that an area will not be deemed “served” for purposes of BEAD to the extent that satellite and unlicensed fixed wireless networks are offered there because such services are not deemed “reliable.” This again, however, reflects a practical assessment of real-world conditions and realistic track records on the ground in rural America. Specifically, even if some claim that satellite and unlicensed fixed wireless technologies can serve *anyone*, there is substantial reason to question their ability to serve *everyone*. These networks face meaningful limitations on their ability to deliver committed supply to users over a network that is shared with other users – and in the case of unlicensed spectrum, with other use cases. Asserting that such services can serve *everyone* would be tantamount to claiming that just because a grocery store in a small town has several cartons of milk, the entire town has theoretical access to milk. This would of course be true only as long as the entire town does not try to buy milk at the same time. Claims that new satellite-based services will be able to fulfill a widespread mission of universal service, for example, are belied both by expert technical analysis and recent reports of actual consumer experience.<sup>2</sup>

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<sup>1</sup> See IIJA at § 60102(a)(2)(I).

<sup>2</sup> See, e.g., *Starlink is getting a lot slower as more people use it, speed tests show*, ars Technica (Sept. 23, 2022) (available at: <https://arstechnica.com/tech-policy/2022/09/ookla-starlinks-median-us-download-speed-fell-nearly-30mbps-in-q2-2022/>); Cartesian, Inc., *Starlink RDOF Assessment*, Final Report (Feb. 8, 2021) (available at: <https://www.fcc.gov/ecfs/document/10208168836021/2>).

Similarly, although many NTCA members have experience leveraging fixed wireless technology to serve end users in hard-to-reach areas, the consensus with respect to such services is that while they may offer a stop-gap solution in initiating service to such areas, they do not offer a promising long-term solution for broadband access. It is clear as well that unlicensed spectrum in particular does not offer the kind of reliable performance that rural consumers need to participate in today's digital economy and world alongside urban users.<sup>3</sup>

For these reasons, NTCA submits that: (1) the BEAD program's rules are consistent with the IJA as written when it comes to treatment of varying technologies; (2) the program rules allow providers to apply for funding regardless of technology choice; (3) the program rules rightly recognize the very real and measurable differences in capabilities and limitations as between technologies in affording a priority to fiber networks and identifying unserved areas; and (4) there is therefore no need to amend the IJA with respect to this issue.

**2. In the BEAD [NOFO], there are detailed reporting requirements on subgrantees who do not use a unionized workforce or a project labor agreement. As a practical matter, do you think this favors certain providers over others? Does Congress or NTIA need to take further action to remove this requirement?**

NTCA submits that this requirement, while well-intentioned, may discourage the rapid deployment of broadband as envisioned by BEAD. Therefore, NTCA recommends that Congress and/or NTIA consider how best to remove or otherwise substantially modify this requirement. This recommendation is based upon several factors, including the labor composition of many NTCA members; trends within unionized workforces, generally; current labor market tightness; and "deployment seasons" that many NTCA members confront when deploying advanced communications infrastructure. All of these factors support flexibility for subgrantees to recruit and retain capable workforces without being subject to additional reporting or other requirements to which other subgrantees are not obligated.

As background, private sector union participation has declined steadily over the past 40 years. The U.S. Bureau of Labor Statistics ("BLS") reports that in 2021, the number of wage and salary workers belonging to unions decreased by more than a quarter-million workers, a full one-half percent from 2020. And the current 10.3% union participation rate is almost half that rate in 1983 (20.1%), the

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<sup>3</sup> See, e.g., NTCA Broadband/Internet Availability Survey Report (Dec. 2022) ("NTCA Survey Report"), at 5-6 (highlighting continued declines in use of licensed and unlicensed fixed wireless as compared to fiber by NTCA members in offering broadband services to rural consumers) (available at: <https://www.ntca.org/sites/default/files/documents/2022-12/2022%20Broadband%20Survey%20Report%20%28FINAL%2011-28-22%29.pdf>); see also, e.g., *Internet of Things: FCC Should Track Growth to Ensure Sufficient Spectrum Remains Available*, U.S. Government Accountability Office (Nov. 2017) (describing stakeholder and FCC staff position that "managing interference is becoming more challenging as the number of IoT and other wireless devices grows, particularly in bands that do not require a spectrum license") (available at: <https://www.gao.gov/assets/gao-18-71.pdf>).

first year for which comparable data is available.<sup>4</sup> BLS also reports that workers ages 45 to 54 had the highest union participation rate, while workers ages 16 to 24 exhibited the lowest union participation rates. While BLS reports higher median earnings for union, as opposed to non-union, workers, it cautions those comparisons “are on a broad level and do not control for many factors that can be important in explaining earnings differences.”<sup>5</sup> To be sure, a discussion of union participation contemplates many nuanced issues, including participation by industry sector and larger discussions encompassing the various interests implicated by union participation. But, and most critically for this instant discussion, declines in union participation, particularly among younger workers, mean that additional NOFO reporting obligations for *non-union* subgrantees will create disincentives for those firms that need to hire the increasing majority of workers necessary to meet broadband labor market demands.

These disincentives are compounded by an already tight job market. NTCA is well aware of labor shortages and has engaged several efforts to meet emerging needs, including the publication of a guide for broadband providers and post-secondary educational institutions,<sup>6</sup> a partnership with a technical college,<sup>7</sup> and work with the Communications Workers of America (“CWA”) to provide Occupational and Safety Health Administration training for telecom workers.<sup>8</sup> In fact, NTCA has both “union shops” and non-union affiliated companies within its membership. NTCA’s recommendation to remove the NOFO requirement is thus not a comment on the role of unions, but is rather an observation on the disparate level of obligations that will be applied to subgrantees. More specifically, given current union participation rates and 40-year trends toward *declining* participation, the increased reporting obligations would be imposed upon a *growing* representative proportion of the workforce that is expected to rapidly deploy much-needed high-speed broadband networks in unserved areas of the Nation.

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<sup>4</sup> “Union Members – 2021,” Bureau of Labor Statistics, U.S. Department of Labor (Jan. 20, 2022) (available at: <https://www.bls.gov/news.release/pdf/union2.pdf>).

<sup>5</sup> The BLS report presents data among several combined and disaggregated categories of age, sex, race, and ethnicity.

<sup>6</sup> Joshua Seidemann, “Labor and Workforce Development in the Rural Telecom Sector,” Smart Rural Community (2022) (available at: <https://www.ntca.org/sites/default/files/documents/2022-04/discussion-guide-for-rural-workforce-development-web.pdf>).

<sup>7</sup> “NTCA Partners with Northwood Tech,” The Spooner Advocate (Nov. 17, 2022) (available at: [https://www.apg-wi.com/spooner\\_advocate/news/regional/ntca-partners-with-northwood-tech/article\\_a4d139b7-cd6f-5656-a730-532e8996084c.html](https://www.apg-wi.com/spooner_advocate/news/regional/ntca-partners-with-northwood-tech/article_a4d139b7-cd6f-5656-a730-532e8996084c.html)).

<sup>8</sup> “Communications Workers of America Announces New and Expanded Apprenticeship and Training Initiatives, Millions in Investments to Grow and Diversity Workforce Ahead of Nationwide Broadband Expansion,” Communications Workers of America (Nov. 2, 2022) (available at: <https://cwa-union.org/news/releases/communications-workers-america-announces-new-and-expanded-apprenticeship-and-training>).

The IJA, through BEAD, envisions a vast and comprehensive, if not generational, effort to fast-track broadband deployment. The tight labor market for many sectors, including broadband, has been recognized by both private and public sector interests. In fact, the Administration championed the “White House Talent Pipeline Challenge,” which is aimed at cultivating workers to meet, *inter alia*, the demand for skilled labor that will result directly from IJA initiatives (the aforementioned technical college and CWA initiatives of NTCA were created in direct response to the Talent Pipeline Challenge). Moreover, while there are varying opinions of how to measure tightness in the labor market (*i.e.*, ratio of job openings to unemployment vs. ratio of active openings to active applicants),<sup>9</sup> the overall current experience of broadband providers as well as stand-alone engineering and construction firms reflects a binding labor shortage that began to manifest sharply during the COVID-19 pandemic and which has yet to see relief. Accordingly, imposing obligations on firms that discourage their ability to tap into approximately 90% of workers in the private sector market is inconsistent with the stated National interest in rapid broadband deployment. For these reasons, Congress and/or NTIA should take action to remove the requirement and place all prospective sources of a needed labor workforce on equal footing.

Relatedly, while NTCA members recognize the significance of a compelling package of compensation and benefits to attracting and retaining a trained workforce – especially in rural areas – it is important to ensure that any prevailing wage requirements or scoring criteria do not impose unreasonable burdens on smaller businesses or fail to reflect the realities of smaller rural markets. Applying the same standards for wages in urban and deeply rural areas where market factors, including but not limited to costs of living, may differ substantially would not represent sound or informed public policy.

**3. The BEAD NOFO promotes government-owned networks. Do you believe government-owned networks are an effective entity to deploy broadband networks? If yes, please explain.**

Despite the IJA’s purported neutrality regarding the type of provider eligible for a sub-grant, the NOFO promotes government-owned networks by imposing burdensome requirements on eligible entities and pressures states to waive laws that place restrictions on government owned networks, even if the restrictions predate IJA enactment. While providing options for eligible entities is important, and NTCA members have successfully entered into public-private partnerships for the provision of broadband services (and, in some cases, *are* themselves local municipal providers who entered into the telecommunications business decades ago to address a lack of then-telephony services), there are legitimate concerns surrounding the creation of any preference for government-owned networks specifically.

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<sup>9</sup> See, *i.e.*, Rand Ghayad, Carl Shan, and Yao Huang, “The U.S. Labor Market is Less Tight Than it Appears,” Harvard Business Review (Nov. 7, 2022).

Unlike traditional utilities, broadband is dynamic, requiring consistent investment to keep up with technological changes – this is a skill-set that is elusive for any new entrant without experience in the field and is particularly difficult for governmental entities with limited flexibility to adjust to changes in the space. As the Center for Growth and Opportunity explained, “building a new government-owned network does not automatically cause economic growth or other benefits. Indeed, many government broadband projects fail to break even. . . the actual benefits to citizens can be outweighed by costs.”<sup>10</sup> Moreover, according to an economic study by the Technology Policy Institute, there is little evidence “to prove that municipal broadband yields any effect on changes in household broadband subscriptions, unemployment rates, or labor forced participation rates.”<sup>11</sup>

While there may be a role for local governments in the provision and adoption of broadband services in areas where no private sector entity has shown any willingness to serve, there certainly should be no special emphasis placed upon or preference afforded to government-owned networks. Instead, the focus should be upon encouraging community-based companies and cooperatives with experience in the broadband industry and a proven track record of effective ongoing performance to expand into neighboring areas through investments that leverage these new grant programs.

**4. One of the provisions of the IIJA requires products and materials used for broadband projects to be produced in the United States. Given the current supply chain issues, should Congress consider modifying this obligation or otherwise clarify this provision?**

NTCA supports the goals of increasing domestic production, but there currently exist gaps in the domestic manufacturing base and the challenges tend to be amplified for small providers who serve rural areas.<sup>12</sup> Member companies report that bulk orders from large companies are typically fulfilled in advance of those from small companies. Small company lead times are frequently longer and bulk discounts are recently unavailable to help offset significant inflation in products. While certain supplies and equipment are known to be in limited supply now, it is logical that as deployment increases, additional supplies or equipment thought to be in ample supply could experience shortages.

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<sup>10</sup> Will Reinhart, “Are Government-Owned Broadband Networks Effective?” The Center for Growth and Opportunity at Utah State University (October 2020) (available at: <https://www.thecco.org/wp-content/uploads/2020/10/Are-Government-Owned-Broadband-Networks-Effective.pdf>).

<sup>11</sup> Sarah Oh, “What Are the Economic Effects of Municipal Broadband,” Technology Policy Institute (July 2019) (available at <https://techpolicyinstitute.org/wp-content/uploads/2019/11/OhTPRC2019.pdf>).

<sup>12</sup> In a recent NTCA survey of its members, nearly 85% of respondents reported experiencing an inability or delay in procuring supplies needed for network deployment. Specifically, members experiencing delays reported problems procuring Customer Premises Equipment (85.9%), fiber (79.7%), network electronic components (79.1%) and it is taking longer to replace older equipment (57.4%). These delays or inability to procure supplies resulted in delayed network construction and delayed installation of service. See NTCA Broadband/Internet Availability Survey Report (December 2022) (available at: <https://www.ntca.org/sites/default/files/documents/2022-12/2022%20Broadband%20Survey%20Report%20%28FINAL%2011-28-22%29.pdf>).

Again, it is important to take reasonable steps to promote domestically-sourced capacity, and it is critical as well to ensure the security of the telecommunications and broadband supply chain. But strict measures under the Build America, Buy America Act<sup>13</sup> compelling use of products that cannot be obtained within a reasonable amount of time or at reasonable cost will undermine, rather than promote, American interests as reflected in the call to ensure every American is connected to broadband. Lack of clarity and the inability to identify clearly even what equipment does or does not comport with these requirements presents an even greater risk and deterrent to program participation, especially for smaller providers who do not have staff to engage in detailed forensic investigations as to the components in various products. As a coalition of broadband providers stated, “[e]ven network products that are assembled in the United States by U.S. companies rely on foreign inputs from their global partners. While a few individual network elements might meet the 55% domestic content threshold they are extremely limited in number, and it appears that no combination of network products would meet the IIA’s content requirements from end-to-end.”<sup>14</sup> There is also serious question about whether even the most diligent and dedicated efforts of manufacturers to ramp up domestic production can do so in a timeframe necessary to fulfill the ambitious deployment goals of the many federal and state programs now underway.

Congress should therefore consider what steps might be taken to strike this balance more carefully than strict and inflexible requirements in this regard and what otherwise might be done to relieve supply chain constraints (such as allowing use of pre-award supplies to the extent already held by providers and ready for use in specific projects, as discussed further in the response to Question 6 below). For example, Congress should encourage NTIA to utilize the authority found in the IIA to waive these provisions.<sup>15</sup> Moreover, to help rectify the situation and address where supply shortages could delay deployments, Congress should direct NTIA to compile and update, no less than quarterly, a list of supplies, equipment and components: (a) that meet the domestic production requirement; and (b) for which blanket waivers of the domestic production requirement are available otherwise. Further, NTIA should define with more precision a streamlined waiver process with clear standards for smaller providers to meet in seeking relief of any such requirements and grant individual waivers to companies who can demonstrate that supply chain delays will negatively impact their ability to meet their internal deployment targets. Absent such streamlining, clearer guidance, and “clear goalposts” for compliance, there is substantial concern that smaller providers in particular will decline to participate in these programs to the extent they might have otherwise.

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<sup>13</sup> See Letter from NTCA, *et al.* to Secretaries Raimondo, Secretary Buttigieg, and Secretary Vilsack (Jan. 31, 2022) (available at: <https://tiaonline.org/wp-content/uploads/2022/01/Industry-Letter-on-IIA-and-Buy-American-v7.4-FINAL-1.pdf>).

<sup>14</sup> *Id.*

<sup>15</sup> IIA, § 70914.

**5. The Broadband Buildout Accountability Act, S. 3671, would remove the Freedom of Information Act exemption in the BEAD program. Should Congress enact this legislative proposal? If not, why?**

While oversight and transparency are important to ensure that federal funds are being used appropriately and efficiently, Congress must be careful that it does not inadvertently create a situation in which private entities' financial information, business plans, or other competitively sensitive information is made publicly available. Exemption 4 of the Freedom of Information Act ("FOIA") protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."<sup>16</sup> The exemption affords protections to those who are required to furnish commercial or financial information to the government by safeguarding them from the competitive disadvantages that could result from disclosure. If Congress removes or amends the FOIA exemption from the program, it should be clear that sub-grantee information is proprietary and confidential, even if not so specifically marked, and should not be disclosed. Without such assurances, there is substantial risk that many entities may be deterred from participation in the BEAD program and ultimately undermine program objectives as a result.

**6. Are there other technical issues in the BEAD program that Congress should address before NTIA announces funding allocations by June 30, 2023?**

Congress should direct NTIA to work with industry and waive or exempt sub-grantees from complying with the most onerous provisions of 2 CFR Part 200. 2 CFR Part 200 establishes administrative requirements, cost principles, and audit requirements to non-Federal entities. By declaring that individual companies are sub-grantees, NTIA requires each to comply. As just one example, strict compliance with the procurement process that requires each subgrantee to conduct a competitive procurement process for parts of the work or supplies needed to meet the initial build is unreasonable, and would delay buildout and raise costs while introducing cost uncertainty and administrative burden.

Congress should also make clear that it is premature to determine the areas eligible for funding before the maps portraying where broadband is (and is not) currently available are updated and reflect reports and challenges against a "settled" fabric. The Federal Communications Commission ("FCC") released its initial National Broadband Map and is accepting challenges to the map from the public, local governments, and providers. Challenges may be submitted based on location (i.e., incorrect location address) and/or availability (i.e., the map incorrectly lists a certain provider or broadband technology as available). As the maps are challenged, a still-unknown number of servicable locations are being added, deleted, or modified. As described more fully in response to Question 2 on General Broadband Issues, *infra*, while challenges to the maps may be submitted on an ongoing basis, the next iteration of the map will only reflect challenges submitted through mid-January 2023. What this means is that the data against which challenges were submitted will, in some (if not many) instances, change after the period of time in which the FCC will consider challenges. In short, as much as it will represent significant effort and progress, the next iteration of the map will almost certainly still be inaccurate and incomplete. Congress should make clear that the funding allocations should not be rushed or take place before the servicable locations in the Fabric are finalized *and* stakeholders of all

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<sup>16</sup> 5 U.S.C. § 552(b)(4).

kinds have had an opportunity to report coverage on this Fabric and to challenge such data. This iterative process is precisely what was contemplated by the Broadband DATA Act, and the FCC should be given the appropriate and necessary time to develop a more accurate depiction of availability rather than being forced to help meet a deployment program allocation deadline of June 30, 2023 that was set before this process was underway.

Moreover, Congressional guidance with respect to low-cost options and affordability in the BEAD program would be appropriate and welcome. NTIA directs that any broadband project funded through the BEAD program will need to address a middle-class affordability plan and a low-cost broadband service option. While NTIA offers some guidance, it remains unclear the degree to which the requirement may result in rate prescription by various states. The BEAD program should consider Lifeline and Affordable Connectivity Programs (“ACP”) and its requirements should reflect what is already in the market and/or required by the government. Unnecessarily confusing and complex state requirements may discourage participation in the BEAD program, especially in high-poverty unserved areas and high-cost rural areas where the business cases can be more difficult to justify investment and sustain ongoing operations.

Finally, more specific guidance from Congress with respect to any wholesale or open access requirements could be useful as well. The very reason that BEAD funding is being made available is to stimulate network deployment in areas where the business case for doing so is lacking otherwise. If the terms of open access are unclear or too favorable for those looking to lease access without undertaking the effort to construct themselves, this may deter participation in the program and potentially even undermine the sustainability of the network itself as the initial business case that could be made for deployment erodes due to the terms of such open access.

**General Broadband Issues:**

- 1. As noted above, there are over 130 programs supporting broadband access across 15 agencies:**
  - a. To date, which of these programs do you believe has had the most success in delivering broadband services to truly unserved areas?**

Success in broadband programs should be measured by results rather than promises. A number of programs in recent years have offered the promise of better broadband, with announcements asserting that hundreds or thousands, or tens or hundreds of thousands, of Americans will be connected to broadband at some point in the future due to Program X or Initiative Y. Some of these programs will undoubtedly deliver on that promise in coming years, at least in part and in certain places. But NTCA submits that the best proofs of concept can be found – and the best lessons drawn for future program design – by looking at which programs have *in fact already delivered* on the promise of broadband access.

South Dakota itself offers an instructive and compelling example of what has worked in delivering widespread access to robust broadband services in deeply rural areas. In South Dakota, community-based providers – small private companies and cooperatives – provide reliable voice and high-speed broadband services to over 80% of the state’s geography. A mix of local presence and commitment,

entrepreneurial spirit, private capital, public capital through RUS financing programs, and ongoing support through the high-cost USF programs overseen by the FCC have enabled these community-based providers to deploy cutting-edge networks in the most rural parts of South Dakota, offering robust broadband services at affordable rates. Indeed, based upon publicly available Form 477 data, NTCA estimates that of the South Dakota customers served by these small “hometown” providers, nearly 83% can receive 100 Mbps broadband, and more than half can receive Gigabit-level service.

This is a remarkable accomplishment given the sparsely populated nature of the areas these companies serve – the most rural parts of one of the most rural states in the country. As noted above, much of this can of course be attributed to these providers’ dedication to the communities in which they live and serve, but this level of achievement across such a widespread rural area would not have been possible without the coordinated efforts of the RUS and the FCC’s high-cost universal service programs as well. These programs offer a proven platform for success in rural broadband as demonstrated by facts on the ground in South Dakota and many other areas that NTCA members serve, and they represent a model framework for tackling rural broadband challenges going forward.

To judge program success, there is a critical need to consider *both* programs that finance construction of networks *and* programs that sustain networks and keep services high-quality and affordable as provided over those networks. These are complementary but distinct functions; to be sure, there is a need to coordinate them to achieve the best possible outcomes and avoid inefficient duplication of efforts, but it should be clear that *these functions are not the same thing*. While grant and loan programs like those available through RUS, NTIA, and the U.S. Department of Treasury (“Treasury”) have provided (or soon will provide) capital to cover the substantial upfront costs of network deployment, the high-cost USF program does *not* provide such capital. Instead, the USF helps make the business case for construction and sustains ongoing operations at affordable rates – enabling providers to justify obtaining loans or grants or to use their own resources as capital to build networks with the knowledge that they can then recover that investment without charging rural consumers unreasonably high and unaffordable rates for services. More specifically, USF support by mandate of Congress aims to ensure “reasonably comparable” services are available at “reasonably comparable” rates. *See* 47 U.S.C. § 254(b)(3).

It is understandable that newer programs with substantial sums allocated for broadband deployment often attract the most attention and generate the most excitement, given the nation’s ongoing need to ensure that every American has internet access. And, ranging from traditional RUS lending programs through ReConnect and from recent American Rescue Plan Act grant programs to the upcoming BEAD effort, these capital-focused programs are essential to help stimulate broadband deployment. In the end, however, it must not be forgotten that, in rural spaces like South Dakota and across the country, the FCC’s high-cost USF program has been perhaps the most critical linchpin in not only *getting* Americans connected in the first instance but also *keeping* them connected. In this regard, if one program were to be identified as having had the most success in delivering broadband services to truly unserved areas – and then, importantly, in *keeping* such areas served thereafter at affordable rates – the FCC’s high-cost USF program stands alone. In short, USF makes the business case for the use of capital to deploy broadband networks in rural America where such investment would not be feasible but for such support. It is also worth noting the substantial accountability and transparency measures already resident within the USF mechanisms, including performance testing, location-based deployment reporting, and audits.

Finally, NTCA observes that part of the reason that so many broadband programs exist is precisely because Congress has far too often in the past sought to create new programs from whole cloth rather than examining which programs have worked best in the past and seeking to leverage and build upon those initiatives instead. As noted above, South Dakota itself and many other rural areas like it offer a compelling testament to the success of long-standing programs such as the FCC's universal service fund and RUS financing programs in delivering and sustaining broadband. NTCA would recommend to Congress that in the future it approach proposals for new broadband programs with a thoughtful eye toward how well-functioning existing programs might first be leveraged and expanded to achieve even better results or reach remaining unserved areas not covered by those programs today.

**b. Should Congress consider eliminating any of these programs?**

There continues to be substantial interest in and need for capital-focused programs that promote broadband deployment. It may be worth reviewing individual programs that are under-utilized and to identify agencies that are particularly effective at administering such efforts, but this should be a carefully designed process rather than one that simply discards some initiatives as appearing on their face as “duplicative” of others. As discussed in more detail below, however, there is significant need to promote and demand better coordination among these various loan and grant programs. Moreover, as discussed above, it is important that Congress not lose sight of the essential nature of the federal high-cost USF programs to the ultimate long-term success of these various broadband deployment efforts – in areas where it is difficult to justify use of capital for investment in broadband networks, the often-overlooked USF programs are critical to the sustainability of these networks and the services offered atop them.

To this end, the one recommendation that NTCA would make with respect to “elimination” would be for policymakers to cease viewing and treating the USF as a “grant” program that should be distributed through auction for purposes of reaching unserved areas. The USF programs do not provide upfront capital for deployment; rather, they provide ongoing support revenue streams that help offset the high cost of service in sparsely populated rural areas. Consistent with each program having its own distinct focus and function, policymakers should leverage loan and grant programs for the purpose of stimulating network construction in targeted unserved areas, with USF then being used to sustain networks and services in high-cost deeply rural areas over the lives of those networks.

**c. Should Congress merge and combine any of these programs? If so, which programs would be best suited to be merged?**

Consistent with recent legislation introduced by Senator Thune and several colleagues in the U.S. Senate, NTCA recommends that various grant programs within RUS – specifically, the broadband loan and grant program and the ReConnect program – be reviewed for merger and combination. Streamlining the oversight and administration of these various programs as they are operated within the same agency would likely provide great efficiencies and help them focus more directly on areas most in need.

**2. What specific reforms and constraints should Congress consider to ensure federal funds are not being awarded where providers are receiving other federal or state broadband funding support?**

Congress' oversight authority is important in this regard and should be centered on program coordination at both the state and federal level. This coordination is critical to target broadband funding only to where it is needed and thereby avoid any overbuilding or unnecessary funding duplication that wastes limited resources and undermines public confidence in vital programs. In addition to the information below, NTCA would refer in this answer to its response to Questions 6 and 7 below with respect to interagency coordination and transparency, as these too will factor into ensuring sufficiently that funds are directed to where they are needed most.

As an initial matter, the starting point for successful program coordination is broadband availability maps that are as accurate as they are granular. Fortunately, Congress took a monumental step in this regard via the Broadband DATA Act,<sup>17</sup> as it directed the FCC to move towards a more granular level of detail from providers with respect to where, and at what level of performance, broadband service is available. Just as important as the granular nature of these maps, the challenge and data validation processes included in that statute will be critical to accuracy, as these will produce an underlying data set of locations (the Broadband Serviceable Location Fabric (the "Fabric")) that portrays every location where service could be installed and demand greater accuracy in claims to serve such locations.

Going forward, Congress should urge the FCC to take care that the Fabric and availability challenge processes, now underway, all work in concert with one another to achieve the level of accuracy that the Broadband DATA Act demands. Specifically, even as these challenge processes were properly designed by statute to produce such accuracy, as they have unfolded thus far, they force providers of all kinds to "take aim at a moving target." This is because, as the Fabric is challenged, a still-unknown number of locations are being added, deleted, or modified as Broadband Serviceable Locations. Even in sparsely populated rural areas in any given State, these corrections to the Fabric could number in the thousands or tens of thousands. What this means is that data previously reported against the "pre-production" version of the Fabric may be inaccurate (and thus worthy of challenge) not only because the reports themselves were wrong in the first place, but also because the Fabric will by purposeful design have changed since the data were first reported. As a result, there is no "settled" Fabric against which providers can report availability and then all stakeholders can use to participate in the challenge processes. Congress should ensure that the FCC and NTIA give this process contemplated by the Broadband DATA Act time to complete, rather than racing toward arbitrary deadlines for allocation and distribution of funds that may have sounded prudent initially but now appear rushed given the magnitude of changes to come to the Fabric and the data reported against it.

To be clear, nothing above is intended to assert that the challenge processes will not yield a much better map in the end. To the contrary, these are the very processes contemplated by Congress and the FCC is faithfully executing them. This is also not to say that the Fabric or the map will ever be static, as there will always be changes in the marketplace and the service topography. However,

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<sup>17</sup> Broadband Deployment Accuracy and Technology Availability Act, Pub. L. No. 116-130, 134 Stat. 228 (2020) (codified at 47 U.S.C. §§ 641-646) ("Broadband DATA Act").

Congress should make clear that it would be premature to consider the map complete until such time as the Fabric is at least “settled” following initial clean-up and after stakeholders have had the opportunity both to report against and challenge data reported with respect to that settled Fabric rather than merely against the pre-production version. Thus, this is a matter of proper *sequencing* of the challenge processes. For NTCA members specifically, this will ensure that funding is not directed to areas where they have already leveraged universal service funding or other programs to serve their rural communities.

That said, the completion of these mapping challenge processes is only the first step. Going forward, it is critical that every state and federal agency also take steps to factor other funding programs’ binding commitments into their funding awards. Here again, the oversight role of the Congress is important, as it can guarantee that each agency is faithful to the concept of program coordination and working with, and not in competition with, other funding programs. While the IJA captures most of the attention at this point, with BEAD representing the single largest one-time investment in broadband infrastructure, multiple other existing programs have worked over time to accelerate and sustain broadband access for millions of Americans. New and existing broadband programs at the FCC, NTIA, the United States Department of Agriculture (“USDA”), Treasury, and in various states have, or will through recently issued/soon to be issued funding commitments, made great progress in reaching those Americans without the access they need in a modern economy. NTCA is aware of certain programs that already appear to be working at cross-purposes, with grant awards being given where self-certification asserts that an area is lacking in broadband access even as fiber-based Gigabit-level services either already are available or will be deployed in the near future due to the FCC’s USF program. Such outcomes are not only wasteful, but they give rise to questions about the integrity of the programs – putting their good work at risk for communities in the need in the future. Agencies must therefore always keep coordination top of mind to build upon existing initiatives and network investments and reach as many unserved consumers as possible, rather than turning individual mechanisms into competing initiatives. Further specific thoughts with respect to effective coordination among these entities are discussed in response to Questions 6 and 7 below.

**3. Should Congress take additional action in response to concerns that broadband funding may be used to overbuild existing service? If so, what reforms and constraints should be implemented?**

One significant step that Congress can take with respect to program coordination is to urge the FCC to take immediate action to enhance and extend the Alternative Connect America Model (“A-CAM”) and update the Connect America Fund-Broadband Loop Support (“CAF-BLS”) mechanisms. Timely action by the FCC to reform these vital mechanisms is important for several reasons. Members of Congress have already written to the FCC on a bipartisan basis to encourage prompt attention to updating these programs as soon as possible so that they can, in turn, be factored into decision-making by other programs still being implemented.<sup>18</sup>

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<sup>18</sup> Letter from 14 Members of the US Senate to The Honorable Jessica Rosenworcel, Chairwoman, FCC (Oct. 4, 2022).

While A-CAM and CAF-BLS have been incredibly successful in building and sustaining high-quality and affordable broadband to rural areas all over the nation, their work is far from done. Moving forward with updating these mechanisms will result in substantially improved broadband services for millions of rural Americans at levels at least equal to, if not in excess of, those anticipated under grant programs. Moreover, and of broader significance, these USF programs are critical as well to ensure that access to advanced broadband services remains reliable and affordable.

Just as importantly, and directly relevant to the instant question, updating these mechanisms will, in turn, allow other grant programs such as BEAD to focus their own funding efforts on other areas in need. In this sense, program coordination is not just about maps and ensuring funding programs do not overlap, but also about leveraging existing successful programs and enabling them to keep up their good work and in fact do more while looking to other mechanisms to serve others in need. By reinforcing the FCC's successful USF mechanisms, BEAD can focus on other areas in need of broadband infrastructure investment.

**4. Should Congress take additional action in response to concerns that broadband funding may be conditioned upon recipients imposing some form of rate regulation of broadband services, whether or not such requirements are explicitly denominated "rate regulation"? If so, what reforms and constraints should be implemented?**

NTCA submits that the Congress and agencies should refrain from imposing rate regulation, whether explicitly denominated as "rate regulation," or not, on end-user services offered via federally supported networks. Several reasons inform NTCA's position: (i) broadband internet access service is classified as a non-common carrier "information" service under Title I of the Communications Act of 1934, as opposed to common carrier telephone services as regulated pursuant to Title II of the Communications Act; (ii) rate regulation, whether explicitly denominated as such or not, would skew the marketplace by imposing disparate regulations on providers of identical services; and (iii) to the extent that Congress seeks to ensure affordable access to broadband services, existing provisions including the ACP and USF Lifeline programs provide a comprehensive multi-prong approach to ensure that prospective users are not locked out of the market.

It is instructive, if not dispositive, to note that participants in USF, USDA, or other federal programs that support the availability of broadband services have not been price regulated. At most, the federal USF program requires providers to ensure they offer at least some level of service meeting a federal rate comparability benchmark, but there are no specific requirements as to how the price is set, and thus providers are not exposed to other aspects of rate regulation (and, it should be noted, this benchmark for rural service is set *higher* than the urban average rate). The fact that these many programs have operated successfully to promote broadband access without rate regulation components indicates that rate regulation on BEAD supported networks is unwise and unwarranted.

Moreover, to the extent that specific segments of the market face particularly significant barriers to adoption and retention of broadband services, these concerns can and should be addressed through the ACP, which provides benefits of up to \$30 per month toward broadband internet access service (and up to \$75 per month on Tribal lands) for low-income subscribers.<sup>19</sup> Finally, BEAD-supported providers can participate likewise in USF programs to offer discounted Lifeline rates to low-income users.<sup>20</sup> In sum, even in the IJA itself and otherwise, the Federal government has established safeguards to help ensure that household income is not an insurmountable barrier to affordable broadband connectivity.

**5. Should Congress take additional action in response to concerns that broadband funding may be conditioned upon recipients imposing some form of “net neutrality” mandates upon broadband services, whether or not such mandates are explicitly denominated “net neutrality”? If so, what reforms and constraints should be implemented?**

NTCA submits that Congress should refrain from imposing any form of “net neutrality” mandates upon broadband services, regardless of whether such mandates are explicitly denominated as “net neutrality.” As explained below, the only aspect of broadband that may warrant a net neutrality-type of regulation is the underlying transmission and transport element in the network layer. In contrast, end-user services should continue to remain free of burdensome and unnecessary net neutrality requirements. In the first instance, net neutrality regulations are not necessary to protect consumers or the marketplace, and in fact could disrupt the ongoing and beneficial evolution of the broadband market. Second, net neutrality regulations imposed on only *some* providers (*i.e.*, BEAD recipients) but not others would disrupt the efficient operation of the marketplace by potentially barring BEAD recipients from comparable management of their networks. And, as noted above, although the FCC undertook steps to implement net neutrality requirements several years ago, those efforts were eventually reversed at the agency level, with the reversal affirmed on judicial appeal.<sup>21</sup>

Overall, net neutrality requirements aimed at end-user services are not only not necessary, but risk burdening the market with outdated regulatory models. The FCC itself has explained, “. . . Internet Service Providers (ISPs) that sell you Internet access are only one part of a complex ecosystem that also includes backbone providers, content delivery networks, and other Internet traffic actors.” The FCC further explained that beyond the end-user connection there are “. . . connection points between

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<sup>19</sup> See IJA § 60502(c); see also *Affordable Connectivity Program: Report and Order and Further Notice of Proposed Rulemaking*, FCC Docket Nos. 21-450, 20-445, FCC 22-2 (2022).

<sup>20</sup> See 47 CFR § 54.401 *et seq.*

<sup>21</sup> See, *Protecting and Promoting the Open Internet: Report and Order on Remand, Declaratory Ruling, and Order*, FCC Docket No. 14-28, FCC 15-24 (2015), *aff'd United States Telecom Association v. FCC*, 825 F.3d 674 (2016). The 2015 “net neutrality” order was rolled back in 2017, see, *Restoring Internet Freedom: Declaratory Ruling, Report and Order, and Order*, FCC Docket No. 17-108 (2017), *aff'd Mozilla v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

and among these groups . . . peering, transit, proxy services, interconnection, or traffic exchange.”<sup>22</sup> Congress should refrain from imposing unnecessary net neutrality obligations on providers of end-user broadband services that are merely one part of the larger online ecosystem that includes content and edge providers, middle mile providers, transit providers, backbone providers, and content delivery networks.<sup>23</sup> At most, *any* oversight of the broadband marketplace should be limited to clearly defined, light-touch regulations at the transport and transmission layer, *i.e.*, the “network layer” as opposed to the “service or application layer.” This would assure interconnection among networks and the exchange of data among them but would not disrupt the freely evolving market for content, edge, application, and service providers. But even here, attention to the network layer and to broader questions with respect to “net neutrality” should not implicate BEAD requirements but would instead be riper as candidates for comprehensive, marketplace-wide evaluation by Congress.

The retail broadband market has developed rapidly and efficiently in the absence of heavy-handed regulation. In fact, the abiding barrier to adoption remains affordability,<sup>24</sup> while the acknowledged barrier to deployment remains the cost of network infrastructure (mitigated by Federal programs including BEAD, USF, and various USDA programs). In sum, a so-called lack of net neutrality regulation has neither diminished nor damaged the market. Consumer-facing protections are already in place: FCC rules require providers to disclose information about network management practices and performance characteristics,<sup>25</sup> and recently adopted rules pursuant to congressional mandate contemplate “nutrition label”-like disclosures of prices and performance.<sup>26</sup> The marketplace has developed with exponential growth. In the absence of problems that may require regulatory intervention, net neutrality obligations should not attach narrowly to broadband funding. An admonition from the D.C. Circuit to another federal agency is apt here:

FERC staked its rationale in part on a record of abuse, but that abuse is non-existent. Professing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decision making.<sup>27</sup>

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<sup>22</sup> *Internet Traffic Exchange: Time to Look Under the Hood*, Julius Knapp and Walter Johnston, Office of Engineering and Technology, Federal Communications Commission (Jun. 18, 2014) (available at: <https://www.fcc.gov/news-events/blog/2014/06/18/internet-traffic-exchange-time-look-under-hood>).

<sup>23</sup> For additional background, please see *Protecting and Promoting the Open Internet: Comments of NTCA-The Rural Broadband Association*, FCC Docket No. 14-28 (Jul. 14, 2014).

<sup>24</sup> *See, i.e.*, Joshua Seidemann, *Rural Imperatives in Broadband Adoption and Digital Inclusion*, Smart Rural Community (2021) (available at: <https://www.ntca.org/sites/default/files/documents/2022-03/src-whitepaper-broadband-adoption-and-digital-inclusion.pdf>).

<sup>25</sup> *See* 47 CFR § 8.1, *et seq.*

<sup>26</sup> *See Empowering Broadband Consumers Through Transparency: Report and Order and Further Notice of Proposed Rulemaking*, FCC Docket No. 22-2, FCC 22-86 (2022).

<sup>27</sup> *National Fuel Gas Supply Corporation v. Federal Energy Regulatory Commission*, 458 F.3d 831 (D.C. Cir. 2006) (rejecting agency order for failure to rely upon actual instances of harm).

In sum there is no market failure that requires Congressional intervention, and the imposition of net neutrality requirements, whether denominated as such or not in the context of one-off funding programs, would simply impose inefficient, unnecessary, and disparate treatment of similar providers in the marketplace.

**6. How effective have the Memoranda of Understanding between (1) the FCC, USDA, and NTIA, and (2) the FCC, USDA, NTIA, and Treasury been with respect to broadband coordination efforts? Are there additional reforms federal agencies should implement to better coordinate on broadband efforts?**

In the Broadband Interagency Coordination Act of 2020 (“BICA”), Congress directed and established parameters for greater collaboration among those federal agencies most actively involved in financing or supporting broadband. BICA requires that the agreement to formalize such coordination at a minimum include provisions for the sharing of data on funded projects and other available information regarding existing broadband services in given areas. In turn, the interagency agreements entered into between the FCC, USDA, NTIA, and Treasury affirm that the agencies will share relevant information and use such information for the purpose of coordination in distributing funds as contemplated by BICA.

The measures memorialized in the interagency agreements provide a useful compass for coordination in the administration of various federal broadband funding programs. NTCA recommends, however, that future iterations of these interagency agreements go beyond capturing the basic constructs and principles of BICA and instead spell out in greater operational detail how information will be shared among the agencies and used by them. To be clear, there is no need to go into extensive detail with respect to the act of sharing data; to the contrary, it is important that the agencies retain a degree of flexibility to ensure timely, effective, and thorough interaction among their respective staffs in specific cases and in response to specific inquiries. But some greater level of visibility into how the agencies will systematically share information – and how interested stakeholders of all kinds might have access as well to certain data in the interest of transparency and further enhancing coordination – would be appropriate and useful in subsequent versions of the interagency agreement. For example, NTCA recommends the following framework for inclusion in the interagency agreement going forward, outlining a baseline means by which data will be systematically shared and made available so that both the agencies *and* the public can easily see both where these various programs are working to improve and sustain broadband access, as well as any gaps in potential coordination:

1. The agencies should develop and post on their respective websites a common tracking chart listing all programs that have enforceable commitments to deliver broadband services that meet certain performance parameters. The tracking chart should indicate the levels of performance required under each such program, the technologies that will be used to achieve them in each case, and the timeframes for performance of those obligations. Each agency should commit to consult this tracking chart in making funding decisions, in addition to making any other inquiries or sharing of data between them.

2. The agencies should develop and post on their respective websites a common map depicting the areas in which the enforceable commitments apply under the programs overseen by these agencies. Such an “enforceable commitment map” would serve as a useful complement to the map being prepared by the Commission pursuant to the Broadband Data Collection, which will show where services are already available – put another way, the combination of these maps would show both where broadband *is* and where it *is required to be* by a date certain. Each agency (and any states that use funds through such agencies) should commit to consult this enforceable commitment map in making funding decisions, in addition to making any other inquiries or sharing of data between them.
3. The tracking chart referenced above should include a specific and clear indication of any program that does *not* respect enforceable commitments in other programs (both with respect to other agencies’ programs and even within an agency’s own programs) when awarding funds. In other words, agencies should be required to flag where their program rules do not observe commitments made under other programs.
4. The FCC should make efforts to capture not only commitments by other federal agencies on its map, but also any broadband commitments arising out of state grant programs, so that these commitments would be rightly recognized and respected.

Relatively simple measures such as these would add an appropriate and reasonable level of detail to the interagency agreements by revealing baseline information on various federal broadband funding programs, ensuring such information will be shared systematically without the need for specific inquiry, and making such information available publicly for all stakeholders ranging from congressional officials to agency representatives and broadband service providers to consumer interest organizations. At the same time, the level of information contemplated here should not be overwhelming for the agencies to gather or publish since it involves data regarding programs they oversee in the ordinary course of their business, nor would this approach tie the agencies’ hands by precluding further collaboration or sharing of different or additional information upon specific request as contemplated by BICA and the current provisions of the interagency agreement.

Finally, NTCA has long recommended a simple corollary rule with respect to the interplay of various loan and grant programs and federal high-cost USF initiatives, recognizing as noted above that capital financing programs on the one hand and the FCC’s USF efforts on the other *perform distinct but complementary functions*. To ensure that these programs are in fact complementary and do not conflict, NTCA has urged adoption of a rule that would ensure that USF support is given where deemed necessary to sustain operations and keep rates affordable: (a) *only* to the party that secures a loan or grant from another federal agency to build a network there; or (b) to the *only* provider of service otherwise in that area if that provider uses its own funds or other private capital (*e.g.*, private loans) for deployment. Relatedly, no grants should be provided to one provider for deployment in an area where *another* provider is already receiving USF support to deploy service. Such a common-sense framework would help sustain and keep affordable services provided atop those networks that are initially built leveraging programs like ReConnect or BEAD, while ensuring that USF and these deployment programs do not work at cross-purposes by supporting “dueling operations” in deeply rural areas where even a single provider could not justify investment or operations in the absence of federal intervention.

**7. Should Congress take steps to increase the transparency of agencies when allocating and disbursing broadband funds? If so, what steps should Congress take?**

To promote transparency and accountability, Congress should direct the various agencies involved in disbursing broadband funds to take the simple steps noted in response to the preceding question.

**8. What, if any, permitting regulations at the federal level are impeding broadband deployment?**

Working with federal agencies to navigate the environmental, historic preservation, and Tribal consultation processes and receive the permits necessary to begin network construction<sup>28</sup> is a major impediment to deploying broadband infrastructure in rural America. Members recount delays of a year or more in obtaining necessary permission for construction of such infrastructure. Even worse, the process can be met with such lengthy delays even if a project only touches federal lands for a short distance as part of a larger deployment of fiber or when a such facilities are placed into previously disturbed rights-of-way (“RoWs”). Unfortunately, these rural operators often have no choice but to, for example, install fiber under a road touching Bureau of Land Management or Forest Service land, as rerouting even that small portion of the project is impossible due to the substantial distances involved, impassible terrain, or the inability to obtain easements on adjacent privately held land (if any exists).

These review processes and the delays involved have very real and costly consequences that can ultimately undermine broadband funding programs. Engaging experts (in everything from environmental law to historic preservation) is expensive, and these costs must be incurred even when fiber is installed in a previously disturbed RoW. As to the delays, rural operators already confront, among other things: (a) difficult terrain such as mountains, rivers, lakes, forested areas or rocky ground; (b) low population densities that mean costs must be recovered from small customer bases; and (c) recently, labor shortages of trained technicians and supply chain issues that limit access to, and drive up the price of, everything from fiber to consumer premises equipment. With respect to permitting, delays of just a few months can have profound consequences as construction seasons are already short due to frozen ground, making every month count when costs are increasing and deadlines for program compliance are mounting. Indeed, as BEAD funding is distributed to providers that must make service available to consumers within a set time, these delays could mean that much of this time is lost while “stuck in neutral” waiting for a permit – a fact pattern seen previously in certain USDA programs like ReConnect.

Based on member feedback, the delays involved in getting permits from federal agencies often, but not always, stem from two separate sources: (1) staff shortages at federal agencies that mean only a handful of personnel are responsible for reviewing hundreds of permit applications; or (2) inconsistent processes from agency to agency, and indeed, even from office to office with a single agency. With

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<sup>28</sup> It should be noted that these review processes are triggered not only when infrastructure is placed on federal lands, but when also when a project is considered a federal undertaking. Thus, for example, a ReConnect award is subject to such reviews even when the project does not touch any federally owned or controlled property.

respect to staffing, the U.S. Forest Service last year adopted (and the Bureau of Land Management is currently considering<sup>29</sup>) proposals to increase fees paid under their “communications use” programs and under the guise of “improving the efficiency” of the application process, including hiring additional staff. Yet, it remains unclear whether such fees will be used *exclusively* and *entirely* for such purposes. At the very least, Congress should make clear that these intended efforts to improve efficiency truly speed up the process.

NTCA members also report that, despite the passage of the MOBILE NOW Act, the attempt to move to a “common application form” has not produced the intended efficiency gains or brought the clarity to the process necessary to avoid delay. Processes for filing applications – specifically the underlying documentation that must accompany an application form, and steps necessary to have one deemed “complete” – vary from agency to agency, and even from office to office within an agency (*e.g.*, the process in one BLM office in a state can be different from that in a BLM office in the same state). The more harmonized forms and processes can be, the more efficient and effective deployment can be in crossing federal lands.

Finally, NTCA member feedback suggests that the 270-day processing period set forth in Section 606 of the MOBILE NOW Act<sup>30</sup> has not been implemented in the manner likely intended. More specifically, members have reported multiple requests for additional documentation coming after the filing of an application – such that it can take several months before an application is deemed “complete” before triggering the 270-day “shot clock.” In these cases, a shot clock is of little value when it takes months to even trigger its start and it can be reset based upon even the most mundane or minor of clarification requests.

To be clear, NTCA recognizes that staffing shortages may limit the ability of any federal agency to process applications in a 270-day period. Congress should at the very least direct agencies (such as BLM and the Forest Service) to utilize fee increases specifically on the additional staff needed to meet the 270-day deadline. Additional funding above and beyond that obtained from increased fees as mentioned above could provide the resources to make the MOBILE NOW Act more effective.

In addition to making the MOBILE NOW Act more effective, Congress should enact – or encourage federal agencies to enact – streamlining processes with respect to the National Environmental Protection Act. Specifically, NTCA members frequently encounter having to undergo full environmental reviews for installing fiber in previously disturbed RoWs – a typical example is installing fiber next to a highway that has recently been built/widened. A categorical exclusion for such projects from environmental and other reviews would be a significant step forward in streamlining these processes.

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<sup>29</sup> Update of the Communications Uses Program, Cost Recovery Fee Schedules, and Section 512 of FLPMA for Rights-of-Way, Notice, RIN 1004-AE60, U.S. Department of Interior, Bureau of Land Management (rel. Nov. 7, 2022).

<sup>30</sup> Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348 (2018).

**9. Does the FCC presently possess sufficient authority to preempt state and local requirements that may unreasonably impede the deployment of broadband networks? If not, what steps should Congress consider to address the unreasonable impediments?**

The FCC has sufficient authority to preempt state and local requirements that unreasonably impede the deployment of broadband networks. The FCC possesses defined authority to regulate landline and mobile telephone service, radio transmissions, and cable TV. But the Communications Act (the “Act”) also gives the FCC “ancillary jurisdiction” over communications services that are related to areas of the agency’s primary jurisdiction. In addition, Section 253 of the Act authorizes the preemption of state or local laws that prohibit or have the effect of prohibiting the ability to provide telecommunications services.<sup>31</sup> This applies to all “commingled” facilities that can provide telecommunications services, including systems that utilize their facilities to provide telecommunications services (such as regulated voice telephony, special access, or business data services) along with broadband, cable and/or VoIP services.<sup>32</sup>

To be sure, there are limits to the FCC’s authority. For example, the FCC’s authority to preempt state laws governing the placement or construction of wireless facilities is limited to the extent that those state laws would either directly or effectively prohibit the provision of wireless services.<sup>33</sup> Overall, however, the FCC has taken a nuanced yet broad view of its authority. For example, the FCC invoked its preemption authority even where a state’s agreement with a developer was neither statute nor regulation but still prevented access by fiber providers to freeway RoWs.<sup>34</sup> The FCC similarly invalidated local requirements that sought to compel both a pole owner, which did not provide communications services, and its subsidiary communications service provider to pay separate (and duplicative) RoW fees.<sup>35</sup>

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<sup>31</sup> 47 U.S.C. § 253(a).

<sup>32</sup> See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Third Report and Order and Declaratory Ruling, FCC 18-111 (rel. Aug. 3, 2018) (“OTMR Order”), ¶ 36, fn 84 (stating that “neither commingling of services nor the identity of the entity engaged in the deployment activity changes the applicability of Section 253(a)...where the facilities are being used for the provisioning of services within the scope of the relevant statutory provisions.”).

<sup>33</sup> 47 U.S.C. § 332(c)(7).

<sup>34</sup> *Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in a State Freeway Rights-of-Way: Memorandum Opinion and Order*, 14 FCC Rcd 21697 (1999). The FCC found that the language of the statute proscribing any “State or local statute or regulation, or other State or local legal requirement” included requirements arising from sources other than statutes or regulations. *Id.*, at para. 3, *citing* 47 U.S.C. § 253(a). The FCC found this includes actions *permitted* by the State that would have the effect of creating a barrier.

<sup>35</sup> *Missouri Network Alliance LLC d/b/a Bluebird Network and Uniti Leasing MW LLC: Declaratory Ruling*, Docket No. 20-46, 35 FCC Rcd 12811 (2020).

In sum, the FCC enjoys reasonable and sufficient preemption authority. Even if that authority is not unfettered, the body of relevant administrative and judicial case law indicates that the FCC can take steps consistent with its mandates to promote broadband deployment where necessary.

Finally, while not something that falls within the FCC’s preemption authority, some are sure to assert that the Section 214 eligible telecommunications carrier (“ETC”) designation process<sup>36</sup> is an unnecessary impediment to participation in high-cost universal service programs. These complaints should be dismissed. As an initial matter, despite the alleged “barriers” of the ETC process, entities of all kinds from large national providers to small local businesses have successfully navigated obtaining ETC designation – such widespread participation in the USF programs belies any claims that this process is somehow an insurmountable or burdensome gating factor. Moreover, the ETC designation process is ultimately aimed at ensuring accountability for the use of scarce ratepayer resources. In fact, this process has exposed operators not properly vetted via the FCC’s “short-form” process, with states (including South Dakota) using the ETC review process to identify entities that lacked the necessary managerial, technical, financial, and/or operational ability to deliver on the promises made in seeking USF support. In this sense, the ETC designation process has proven its value in protecting consumers, and those unwilling to abide by this simple transparent process should eschew receipt of universal service support.

#### **10. What specific steps can Congress take to reduce costs to broadband providers when deploying new networks?<sup>37</sup>**

In addition to other recommendations contained elsewhere herein, to reduce broadband providers’ deployment costs, NTCA suggests that Congress reintroduce and pass the Broadband Grant Tax Treatment Act.<sup>38</sup> Even as Congress has appropriated billions of dollars to make robust broadband service to unserved and underserved areas, this grant funding is unfortunately *taxable* for most provider recipients. This extracts a cost from those receiving a grant before even a dollar has been used to put facilities in the ground or serve even a single customer and in fact could dramatically reduce the number of consumers obtaining a connection they have long been without.

Moreover, Congress should take action to sustain favorable tax treatment for accelerated or “bonus” depreciation. First created in 2001 to stimulate investment, bonus depreciation has helped unleash deployment of infrastructure and operational assets in a variety of industries, including but not limited to broadband and telecommunications. While in recent years businesses have been able to deduct immediately the cost of capital investments in a single year due to this provision, it is scheduled to decrease to 80% next year and then steadily decline until it expires in 2027. At a time when Congress is calling for providers to invest in broadband infrastructure, the loss of this tax treatment may delay or deter such deployment efforts and undermine the use of resources to focus upon service delivery and further upgrades and expansion. To remedy such concerns, NTCA recommends that Congress

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<sup>36</sup> 47 U.S.C. § 214.

<sup>37</sup> See also response to Question 8.

<sup>38</sup> Broadband Grant Tax Treatment Act, S. 5021, 117th Congress (2022); Broadband Grant Tax Treatment Act, H.R. 9449, 117th Congress (2022).

reintroduce and pass the Accelerate Long-Term Investment Growth Now (ALIGN) Act<sup>39</sup> to extend permanently bonus depreciation by allowing businesses to fully expense assets in the year acquired.

Furthermore, supply chain issues that show few signs of abating have produced delays in broadband providers' access to everything from routers, antennas, fiber, network terminals, and customer premises equipment. In a recent survey, nearly 85% of NTCA members reported experiencing an inability or delay in procuring supplies for network deployment; of those encountering such concerns, 86% reported problems obtaining customer premises equipment and 80% faced delays in securing fiber and network electronics.<sup>40</sup> These delays not only undermine funding initiatives by delaying consumers' ultimate access to new or improved service, but they also increase costs, as these critical inputs are now more expensive and thus may force providers to scale back the size of deployment plans. In addition to providing reasonable relief from strict and inflexible Build America, Buy America requirements as described in response to Question 4 in the first section above, Congress should encourage federal agencies to work with (and should itself further incentivize, to the extent necessary) manufacturers and distributors to ramp production of supplies necessary to meet the coming demand for broadband equipment that will manifest when more than \$40 billion flows into the market in relatively short order through the BEAD program. As NTCA recounted in a letter several months ago to the leaders of the House and Senate Commerce Committees:

While offering an exciting opportunity to reach more Americans than ever before with robust broadband connectivity, the BEAD program will only realize its full potential if work begins now to clear bottlenecks and encourage increased production. For example, Congress should encourage the U.S. Department of Commerce, the U.S. Department of Agriculture, and other agencies to provide greater flexibility and detailed guidance under Build America, Buy America Requirements within their funding programs – this is especially important for smaller providers who require reasonable certainty when deciding to expend resources to apply and have limited resources and capability to pursue individual waivers. We further urge Congress to encourage the Department of Commerce to do everything in its power, and for Congress to consider what additional policies it can enact or additional resources it can provide (such as tax incentives or dedicated funding), to promote investment in domestic production and manufacturing of critical communication supplies. A comprehensive approach must also examine and address small provider concerns about the diversion of supplies<sup>41</sup>

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<sup>39</sup> Accelerate Long-term Investment Growth Now Act, S. 1166, 117th Congress (2021); Accelerate Long-term Investment Growth Now Act, H.R. 2558, 117th Congress (2021).

<sup>40</sup> NTCA Survey Report at 16.

<sup>41</sup> Letter from Shirley Bloomfield, Chief Executive Officer, NTCA, to Sens. Maria Cantwell and Roger Wicker and Reps. Frank Pallone, Jr., and Cathy McMorris Rodgers (Aug. 4, 2022) (available at: <https://www.ntca.org/sites/default/files/documents/2022-08/NTCA%20Letter%20to%20House%20and%20Senate%20Commerce%20Committees%20Supply%20Chains%20.pdf>).

Workforce shortages also impose costs on broadband providers, in terms of the additional costs that come with hiring outside contractors to make up for the lack of trained in-house staff. Opportunity costs exists here as well, as providers may simply lack the staff necessary to roll out new products and services or expand into un/underserved areas. Skilled, affordable labor to engineer, install, and operate broadband networks is in short supply in rural areas in particular. Here, Congress could provide scholarships for students, funding for rural based technical educational institutions, and incentives for companies to hire graduates of these programs.

Finally, the regulatory compliance standards of current federal broadband grants are high, thus increasing the costs of deployment (especially significant for smaller providers) and providing a disincentive to even apply for the funding. Many NTCA members already operate in deeply rural areas where it is uneconomic to serve without support. These companies are already leveraged with debt obligations for the robust networks they have built to date. While these companies are best suited to deploy reliable broadband service to unserved areas eligible for BEAD funding, they can ill-afford to take on new debt to fund buildouts in high-cost unserved areas with little prospect ever of returning their investment. Adding significantly to the cost of such projects very possibly, if not likely, will deter the very companies we want and need to answer the BEAD call.

For example, the BEAD program’s “matching” requirement may be a deterrent to smaller providers, as obtaining or using their own resources for matching funds for a grant to extend broadband service to additional areas may not be possible. As NTCA has previously proposed,<sup>42</sup> NTIA should waive these provisions for operators: (1) with fewer than 200,000 current subscribers in a state; (2) that directly or through a corporate affiliate have reported on FCC Form 477 the delivery of a minimum 100/20 Mbps broadband service continuously and reliably to at least one census block in any high-cost area of the state in which they are seeking a BEAD grant for at least the three calendar years immediately preceding their grant application; and (3) that propose to serve a completely unserved high-cost area should receive a reduction or outright waiver.

#### **11. Would updating pole attachment regulations spur more rural broadband deployment? If so, what actions should be taken?**

For NTCA members, obtaining access to utility poles owned by other parties is a frustrating, expensive, and time-consuming process. It should be noted at the outset that these providers, and likely many others, prefer to “bury” their fiber where they can do so to minimize weather damage and other accidental damage to aerial fiber that can come from sharing a common-use facility such as a pole. Unfortunately, certain terrain (for example, the granite that dots the landscape of several states), as well as areas of the nation where accessing underground RoWs is difficult or cost-prohibitive, necessitate a resort to “aerial” fiber.

For providers seeking to expand their networks into unserved or underserved areas, topping the list of pain points with respect to pole access is the “make-ready” process, under which other operators’ (telecom, cable, electric) facilities must be moved on each pole to make room for a new attacher. This

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<sup>42</sup> Comments of NTCA, Infrastructure Investment and Jobs Act, Implementation Docket No. 220105–0002 RIN 0660–ZA33 (Feb. 4, 2022), p. 22-23.

process is not only expensive, but time-consuming. Even as the FCC has taken steps to streamline this process via its “one-touch-made-ready” (“OTMR”) provisions,<sup>43</sup> these provisions have not overcome the concerns. This is because, while these provisions are intended to expedite the process by allowing a new attacher to perform preparation work on other entities’ poles, a number of NTCA members have found that workforce limitations mean that finding those experienced in moving communications facilities on poles, which typically have electrical facilities on them as well, limit their ability to take advantage of these provisions.

Even where the OTMR rules can be used to expedite the process, and where recent Commission action to clarify certain of its cost allocation rules has been welcome, the limited applicability of Section 224 of the Communications Act (which governs pole attachments) is problematic. Put squarely, there are a wide number of poles in a variety of states that are not governed by Section 224 or the ensuing rules. As just one example, poles in the states in which NTCA members report facing the most difficulty and expense are often regulated at the state level. This so-called “reverse preemption” provision means that any FCC rules adopted pursuant to Section 224 are not applicable in states with their own pole attachment regulations.<sup>44</sup> Taking measures to apply Section 224 as widely as possible on a consistent basis would help promote deployment equally across the nation and in every rural area.

Finally, Congress should encourage the FCC to expedite its pole access complaint process. The time and expense associated with pursuit of a pole access complaint can be significant and daunting. This serves as an effective barrier to any operator’s pursuit of a remedy under Section 224 – in fact, the burdens of this process create an incentive to “give in” to unreasonable rates, terms, and conditions for access to utility-owned poles in order to avoid the delays in construction that will come to pass from pursuing a complaint.

## **12. How are federal broadband programs addressing cybersecurity challenges? Should Congress consider reforms to improve cybersecurity?**

Cybersecurity is an ongoing concern that is being addressed cooperatively by industry and the government in a dynamic and ever-evolving environment. Various federal agencies involved in critical infrastructure, broadband deployment and/or oversight have adopted, or are in the process of adopting, cybersecurity guidelines or requirements. There are a variety of current FCC cybersecurity regulations and the Cybersecurity and Infrastructure Security Agency (“CISA”) has established guidelines and resources for industry, while it is the process of implementing breach reporting requirements.<sup>45</sup> The BEAD program specifically requires eligible entities to consider the

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<sup>43</sup> *OTMR Order*.

<sup>44</sup> 47 U.S.C. § 224.

<sup>45</sup> For example, Section 201(b) of the Act (47 USC 201(b)) requires that carriers’ practices be just and reasonable, including practices related to privacy, data protection, and cybersecurity. Section 222 restricts carriers’ use and disclosure of their customers’ and certain other entities’ “proprietary” information and requires that telecommunications carriers protect the confidentiality of that information. In addition, the Commission’s rules require carriers and interconnected VoIP providers to take reasonable measures to safeguard certain sensitive data known as “customer proprietary network information” (“CPNI”), to notify

cybersecurity of subgrantees. States and territories must review the Cybersecurity and Supply Chain Risk Management Plans from prospective subgrantees before allocating any BEAD program funds to ensure they meet the NTIA grant requirement. Subgrantees must attest that the proper plans, based on guidance from the National Institute of Standards and Technology, are in place and must make their Cybersecurity and Supply Chain Risk Management plans available to NTIA upon request.

Even absent additional governmental intervention, broadband providers have every incentive to adopt cybersecurity measures to protect their network, assets, and customers even as they work closely with government partners to establish guidelines that remain effective, current and scalable. NTCA has established CyberShare: The Small Broadband Provider ISAC. This Information Sharing and Analysis Center (“ISAC”) is open to all small broadband providers and disseminates information to facilitate communication among participants to help them recognize, analyze, and respond to vulnerabilities, threats, and other risks. NTCA also participates on the executive committee of the Communications Sector Coordinating Council, the Communications ISAC, and participates on a variety of groups working closely with government to enhance the resiliency of the sector.

Cybersecurity is dynamic with fast moving targets. Congress has been active to safeguard critical infrastructure.<sup>46</sup> However, additional action on the mechanics of cybersecurity is unnecessary and unlikely to improve the cyber posture of companies. It also risks becoming outdated before rules or regulations can be implemented. Congress could help reduce the economic burden of cybersecurity compliance, while still protecting the national interest in critical infrastructure, by taking action to ensure that governmental agencies are working together and coordinating to share information and not adopting duplicative, conflicting, or burdensome and unnecessary rules and regulations. Finally, it should be recognized that a balance is important in terms of disclosure or “standard playbooks” for cybersecurity – while providers should be given guidance on how best to approach these issues, a roadmap that is too detailed or prescriptive might undermine security rather than enhancing it.

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consumers and law enforcement of data breaches involving CPNI, and to file annual certifications documenting their compliance with the CPNI rules (codified at 47 CFR § 64.2001 *et seq.*). Additionally, the FCC is considering measures to protect secure internet routing. *Secure Internet Routing*, Notice of Inquiry, PS 22-90 (rel. February 28, 2022). The FCC has also indicated interest in leveraging its authority to authorize radiofrequency equipment for import, marketing, and sale in the U.S. to address the security risks associated with Internet of Things (IoT) devices. In a Notice of Proposed Rulemaking and Inquiry, the FCC sought comment on how it could encourage manufacturers to build security into their products, including by permitting voluntary certifications in the equipment authorization process. *Protecting Against National Security Threats to the Communications Supply Chain through the Equipment Authorization Program*, ET Docket No 21-323, *Protecting Against National Security Threats to the Communications Supply Chain through the Competitive Bidding Program*, EA Docket No. 21-233 (rel. June 17, 2021). For its part, CISA issued a Request for Information (87 FR 55833) and announced “public listening sessions” soliciting input in advance of formal rulemaking under the Cyber Incident Reporting for Critical Infrastructure Act of 2022.

<sup>46</sup> See, e.g., Cyber Incident Reporting Act of 2022, Pub. L. No. 117-103, 13 Stat 49. (2022), Secure and Trusted Communications Networks Act of 2019, Pub. L. No. 116-124, 134 Stat. 1182 (2020).

**13. Are there other broadband policy issues that Congress should consider reforming during the 118<sup>th</sup> Congress?**

NTCA encourages Congress to remain mindful of the potential concerns raised by several currently pending federal lawsuits challenging the constitutionality and legality of the congressional delegation of authority to the FCC to collect contributions in support of its critical USF mission. To the extent that any of these challenges were successful, the FCC's ability to carry out the congressionally mandated purpose of universal service will be at risk – with rural consumers and the community-based providers that serve them, schools, libraries, low-income consumers, and rural health care providers all suffering catastrophic loss of access to support mechanisms that, as described elsewhere herein, are critical to connectivity in South Dakota and across the country. If a court decision undermines these essential mechanisms, Congress will need to act quickly to ensure that services will not fail and that rates will not increase exponentially for rural communities and users of all kinds across the nation.

In any event, whether spurred or not by the exigent circumstances of a catastrophic court ruling that calls into question the sustainability of universal service (and the smaller providers like those in South Dakota and all over the country who deliver on that mission), Congress should consider ways of updating the existing USF contribution mechanism. Even as our nation's communications have largely moved to broadband, and even as some of the largest corporations in our nation's economy depend upon broadband networks for conduct of their online business and effectively use these networks for free delivery of their products and services, the current base of contributions is drawn from a dwindling base of legacy telecommunications services. Those that make the most use of and benefit most from our nation's interconnected broadband networks should contribute their fair share to the national goal of ensuring every American has access to robust and affordable broadband. NTCA therefore encourages Congress to work with the FCC to examine and ultimately adopt reforms that will result in every user and beneficiary of broadband access to contribute their fair share to ongoing achievement of this universal service mission.

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We again express our gratitude for your long-standing leadership when it comes to promoting broadband access in rural America, and your interest in the most recent letter in examining how best to address persistent digital divides. We look forward to working with you in the months and years ahead to ensure that every American can get and stay connected to robust and affordable broadband.

Sincerely,



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