

February 4, 2022

National Telecommunications and Information Administration  
U.S. Department of Commerce  
1401 Constitution Avenue NW  
Washington, DC 20230

**Re: NTIA Request for Comment on Broadband Programs**

INCOMPAS, the Internet and competitive networks association, hereby files its comments in response to NTIA's [Request for Comment](#) on the implementation of three broadband programs authorized by the bipartisan Infrastructure Investment and Jobs Act ("IIJA"): the Broadband Equity, Access and Deployment ("BEAD") program, the Enabling Middle Mile Broadband Infrastructure Program, and the State Digital Equity Planning Grant Program (collectively, "Broadband Programs"). The \$48 billion investment contemplated by these programs is a once-in-a-lifetime infusion of capital that can help ensure everyone across the nation, including consumers and businesses, have access to robust, affordable future-proof broadband networks that promote learning, create jobs and attract investment. INCOMPAS is the nation's leading advocate for competition and innovation. Our members have been at the forefront of investing in and delivering broadband infrastructure throughout the U.S. in the middle and last mile. They have brought the fastest networks to market, offering consumers and businesses better service and pricing. With their experience building fiber, fixed wireless, and mobile networks in urban, suburban, and rural America, they know both the challenges and opportunities in delivering robust broadband network capability. Our comments below reflect the input our member companies have provided us based on their own experiences and success.

Simply put, our members have proven that competition works and monopolies fail. Markets with multiple providers, wholesale access and new fiber builders have faster speeds and the lowest prices. Access to competition helps families save and small businesses grow, and we urge NTIA to build on competition laws and results as it formulates the rules and policies for these broadband infrastructure programs.

As we explain further below in response to the questions NTIA poses on its implementation of the Broadband Programs, it is critically important that Federal, State, and Local governments must embrace three principals for these programs to succeed. First, competition. The IIJA contemplates competitive grant opportunities that permit many types of organizations to compete for program funding. Our members have found that in other funding programs that offer competitive providers an opportunity to participate, the funding program is more efficient and leads to better networks and service.

We urge NTIA to clearly set forth that the Broadband Programs must be awarded through a competitive process and must permit competitive broadband and infrastructure providers, as well as others, to participate and that does not tilt the playing-field in a way that discourages participation by private sector entities. Moreover, competition should not end once the grant has been awarded. Competition is the law,

and INCOMPAS offers tangible ways in our comments below that will enable broadband choice for consumers and businesses which will drive further investment, innovation and better service. Second, deploying for the future so that the networks can serve both high-speed fixed and 5G networks is critical. This means that we need a focus on deploying fiber as far as technically and geographically possible. We believe that Treasury's final guidance on the American Rescue Plan struck the right balance by encouraging recipients to prioritize investments in fiber infrastructure wherever feasible and also requiring recipients "to design projects to, upon completion, reliably meet or exceed symmetrical 100 Mbps download and upload speeds" in the last mile.<sup>1</sup> And in those situations where it is not practicable to do so because of the excessive cost of the project or geography or topography of the area to be served by the project, to reliably meet or exceed 100/20 Mbps and to be scalable to a minimum of symmetrical 100 Mbps download and upload speeds. NTIA should follow Treasury's example and set fiber and high-speed goals. Not only will this serve our nation's long-term needs, but it will also set us on a comparable path of other countries who have set fiber and 1 Gbps goals. INCOMPAS offers to NTIA its report released last summer that reports on the fiber and broadband speed goals set by other nations.<sup>2</sup> This report further demonstrates the need for the U.S. to set high goals.

Third, INCOMPAS' members who are focused on building middle and last mile broadband infrastructure have faced significant delays, excessive permitting and rights-of-way fees, and denials from some utilities that do not want a broadband competitor to access their poles and create competition in the marketplace. As we explain further below, there is a significant risk that Broadband Program Projects are delayed, and funds will be wasted on excessive fees charged by ROW owners. NTIA should address these issues head on, and below we offer suggestions on how it can effectively do so.

Competition laws that promote faster deployment, increased speeds and ongoing affordability solutions have a proven record of success in past NTIA programs and have been embraced by other federal agencies, including the Department of Treasury, Department of Transportation and the Department of Agriculture. In addition, the 2021 White House Executive Order on Competition should serve as a guide for NTIA in this proceeding as well. Ultimately, competition is the key to unlocking both innovation and private investment, elements that are essential to the goal of connecting all Americans and replacing old, slow and obsolete network infrastructure that is holding back investment, education and the jobs of the future from being made in the USA.

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<sup>1</sup> Coronavirus State & Local Fiscal Recovery Funds: Overview of the Final Rule, at 39, *available at* <https://home.treasury.gov/system/files/136/SLFRF-Final-Rule-Overview.pdf>.

<sup>2</sup> See INCOMPAS/BroadLand Report, The Race to Faster Broadband Speeds: A Look at the Speed Goals of Other Nations Around the World, *available at* [FINAL 1 Gigabit and Fiber Goals in Other Nations 4 \(incompas.org\)](https://incompas.org/2021/07/20/2021-07-20-FINAL-1-Gigabit-and-Fiber-Goals-in-Other-Nations-4).

## General questions

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

1. *What are the most important steps NTIA can take to ensure that the Bipartisan Infrastructure Law's broadband programs meet their goals with respect to access, adoption, affordability, digital equity, and digital inclusion?*

NTIA is already engaging in a collaborative approach to bring interested parties together to educate and fully discuss the implementation of the IIJA. INCOMPAS is encouraged by this effort to inform stakeholders, as well as to be informed by stakeholders. We are seeing that some States are proposing their own requirements that are at odds with or directly in conflict with the IIJA and existing federal regulations. Thus, INCOMPAS would encourage the NTIA to continue its educational efforts at all levels of government, with executive and legislative branches in the States and Territories and provide information about the IIJA and make clear that its terms prevail over conflicting State/Local laws. Congress' terms in the IIJA were carefully negotiated in a bipartisan effort to help ensure that broadband goals are met, and INCOMPAS believes adhering to the requirements that are clearly stated in the IIJA will help NTIA meet those goals.

INCOMPAS also believes that competition is key to these goals and sets forth below a number of suggestions to enable and promote competition in the Broadband Programs. For all of the Broadband Programs, organizations that are qualified to participate, should make a demonstration that they can fulfill the requirements of the program they seek to participate in. It is important that NTIA set forth the legal, technical, and financial criteria for each Broadband Program. For the BEAD and Middle Mile Programs, in particular, it is important that entities have a demonstrated experience in deploying and operating broadband infrastructure. For those in the BEAD program, experience offering broadband internet access service or partnering with entities who do so should be shown. Such entities must also be able to financially and technically deliver on the project in a timely fashion. NTIA should set a reasonable standard for such showings that the States/Localities should use.

To ensure timely implementation of these programs, NTIA may also consider organizations that are already on the federal contracting schedule ("GSA List") for becoming eligible to participate in any State program that will be submitted for reimbursement. This would help ensure that any contracting organization or provider is not precluded from the bid process where they are already pre-certified by the State in which they are partnering with the entity.

Finally, in circumstances where the bipartisan IIJA does not, by itself, ensure that funded network facilities will face competition, NTIA should fill the gap by exercising the authority granted by Congress. For example, as discussed below in response to Question #24, the BEAD program will not achieve the objective of ensuring the availability of affordable, high-quality broadband service in unserved and underserved areas unless NTIA exercises its authority to adopt rules promoting competition. The networks funded by the BEAD Program will likely be the only broadband facilities in the unserved and underserved areas targeted by that program, and the high entry barriers in those areas make it unlikely that another service provider will deploy network facilities. Customers served by networks funded by the BEAD Program will therefore have no choice of providers. This absence of competition poses a serious threat to ensuring affordable and high-quality services. Nor do the terms of the statute address this problem. It is therefore important that NTIA adopt a regulation requiring that States condition the availability of BEAD Program funding on subgrantees' agreement to offer broadband services to wholesale customers at a reasonable rate and on a nondiscriminatory basis. Competitive providers will

utilize wholesale service made available by this requirement to offer services at lower prices and at higher quality than would otherwise be available.

*3. Transparency and public accountability are critical to the success of the Bipartisan Infrastructure Law's broadband programs. What types of data should NTIA require funding recipients to collect and maintain to facilitate assessment of the Bipartisan Infrastructure Law programs' impact, evaluate targets, promote accountability, and/or coordinate with other federal and state programs? Are there existing data collection processes or templates that could be used as a model? How should this information be reported and analyzed, and what standards, if any, should NTIA, grant recipients, and/or sub-grantees apply in determining whether funds are being used lawfully and effectively?*

INCOMPAS will first focus its comments on the pre-funding stage. It is very important for the various stakeholders that are administering funds for broadband projects and broadband mapping to coordinate and collaborate with each other for efficiency for the agencies and industry. The IJA requires that the BEAD program rely on data that is compliant with the Broadband DATA Act, including the FCC's updated broadband maps. INCOMPAS believes that it is very important for NTIA to work with the FCC to get the maps updated as quickly as possible so that the BEAD program can proceed. Providers have limited resources (especially smaller companies) and should not be asked by multiple agencies or governments to provide the same information repeatedly. As such, there should be a focused effort on the FCC maps.

The FCC has a detailed process to create a broadband map for all of the U.S. NTIA should encourage States to avoid duplicating collection and mapping efforts for grant awards under the BEAD program. Rather, States should rely on the forthcoming FCC maps. In the event a State wishes to create its own map, NTIA should direct States to follow the U.S. Code and Federal Acquisition Regulations' neutrality provisions that govern the FCC's vendor selection process. Neutrality in vendor selection is key to any State-level mapping effort that a State intends to rely on as part of its BEAD program funding plan.

The Broadband DATA Act was designed to improve the accuracy of the FCC's broadband availability maps by strengthening the processes by which data is collected and giving States an opportunity to participate in the data verification process. The IJA's requirement that the BEAD program utilize data that is compliant with the Broadband DATA Act's new standards demonstrates the federal commitment to accurately mapping broadband coverage to best determine areas in need. The Broadband DATA Act codified many aspects of the FCC's Digital Opportunity Data Collection, an effort to address the underlying issues that led to prior inaccurate broadband map data. The Broadband DATA Act requires the FCC to collect and disseminate granular broadband service availability data from wired, fixed wireless, satellite, and mobile broadband providers. The FCC is required to establish the Broadband Serviceable Location Fabric (the "Fabric") to serve as the medium for reporting broadband availability data. The Fabric is a dataset of geocoded information for all broadband service locations, atop which broadband maps are overlaid. The Act permits the FCC to consider whether to collect verified coverage data from State, Local, and Tribal governments, as well as from other entities, and the Act sets strong parameters for service availability data collected from broadband providers to ensure accuracy. The Act instructs that the FCC also must provide data collection and submission assistance to Indian tribes; small service providers; consumers; and State, Local, and Tribal governments. The Act directs the FCC to create a process for consumers; State, Local, and Tribal governments; and other groups to challenge FCC maps with their independent data and requires the FCC to determine how to structure that process without making it

overly burdensome on challengers. In addition, the FCC is to conduct regular audits of information submitted by providers and develop a process whereby entities or individuals may submit information about the deployment and availability of broadband service to verify and supplement information submitted by providers. The Commission is required to strengthen enforcement against providers that knowingly or recklessly submit materially inaccurate broadband data. This overhaul of federal broadband data collection and verification processes was designed to ensure more accurate broadband data mapping.

States should avoid duplicating these efforts and rely on the forthcoming federal maps and data to ensure the most effective distribution of BEAD program grants. First, because the IIJA requires that the BEAD program rely on data that is compliant with the Broadband DATA Act, it is not clear how States would have the resources necessary to duplicate the process described above. The Broadband DATA Act also requires the Commission to create, after consultation with the Federal Geographic Data Committee, three different maps: (1) the “Broadband Map,” which depicts availability of broadband internet access service in the U.S. (mobile and fixed) based on provider data; (2) a “Fixed Service Map” that depicts availability of broadband service based on fixed standards; and (3) a “Mobile Broadband Map” that depicts the coverage availability of mobile broadband based on mobile standards. The Broadband DATA Act requires the Commission to use the maps both to determine availability of broadband service and when making any new award of funding for deployment of broadband service. The maps are to be updated at least biannually with data submitted by providers and periodically based on updates/corrections. Since these maps will be built upon the newly collected and verified broadband availability data, and there will be a process for States to assist the FCC in determining the maps accuracy, States should rely on the federal maps to ensure the most effective distribution of BEAD program grants rather than trying to duplicate the detailed data collection process on their own.

If a State chooses to create its own map, however, the NTIA should require the State to adopt the vendor safeguards outlined in both the U.S. Code and Federal Acquisition Regulations. Broadband mapping is governed by 47 U.S.C. § 642, which defines the requirements for the outside vendor who will design the Fabric, and the Federal Acquisition Regulations’ neutrality provisions. Together, these provisions impose the following requirements on selection of a mapping vendor:

- The vendor is required to have “expertise with respect to geographic information systems”.<sup>3</sup>
- The vendor must be selected through a competitive bid process that is transparent and open.<sup>4</sup>
- Bidders that seek to win the contract to must certify their compliance with the Commission’s neutrality requirements in Commission rule 52.12.<sup>5</sup>
  - The vendor may not be an affiliate of any telecommunications service provider(s) or an affiliate of any interconnected VoIP provider.
  - The vendor, and any affiliate thereof, may not issue a majority of its debt to, nor may it derive a majority of its revenues from, any telecommunications service provider.
  - The vendor may be determined to be or not to be subject to undue influence by parties with a vested interest in the outcome of mapping administration and activities.

NTIA therefore should direct States that choose to duplicate mapping efforts in their administration of the BEAD program to abide by the vendor requirements outlined in the U.S. Code and Federal Acquisition

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<sup>3</sup> 47 U.S.C. § 642(b)(1)(A)(ii)(I).

<sup>4</sup> 47 U.S.C. § 642(b)(1)(A)(ii)(III)(aa).

<sup>5</sup> FAR 52.212-1 and FAR 52.212-2 (as revised on June 24, 2021).

Regulations to ensure qualified bidders, a transparent competitive bidding process, and selection of an unbiased vendor to perform mapping. However, if any information is required, it should also be limited in scope and should be an “ask once by one agency” request. Complying with multiple requests by federal agencies and State and Local governments will be a sizable financial burden, and likely require INCOMPAS’ members to engage costly temporary employees or full-time employees. Just as the government has limited resources, so does the industry. Agencies should better coordinate their efforts to avoid duplication.

To the extent that States may collect information that goes beyond requesting the locations where broadband internet access service is being provided (which is what the Broadband DATA Act requires and that the BEAD program must adhere to for funding unserved/underserved locations), States should limit the information they collect to facilities that have available dark fiber capacity or can add dark fiber capacity upon placement of customer orders and not require additional confidential information such as splice points, ILAs, laterals, etc. To the extent that additional information may be needed about network availability, Federal, State and Local agencies should coordinate their requests, and be mindful of confidential information that will need to be protected because it is sensitive information.

Finally, to ensure that the Broadband Programs are coordinated with other funding programs and are efficient, NTIA should identify the areas that qualify for BEAD and Middle Mile grants, allowing stakeholders to offer an opportunity to demonstrate that those areas are served or will be soon due to other funding programs or private sector investment. Such stakeholders include industry, other federal agencies such as FCC, USDA, and States that are using American Rescue Plan funding or CARES Act funding to deploy broadband infrastructure, and in December 2020, Congress passed the Broadband Interagency Coordination Act, which required the FCC, USDA, and NTIA to enter into an agreement within to provide for sharing information about existing or planned projects that have or will receive funding through the FCC’s USF programs. We applaud this effort, and NTIA should ask the States and Territories to provide information about the broadband projects being funded by the American Rescue Plan or CARES Act.

*4. NTIA has an interest in ensuring that the Bipartisan Infrastructure Law is implemented in a way that promotes the efficient use of federal funds. How should NTIA and grant recipients verify that funding is used in a way that complements other federal and state broadband programs?*

INCOMPAS believes greater collaboration and communication will be necessary between the States and NTIA in reporting the status of the awarded funds and compliance with the grant awards. One suggestion would be requiring a quarterly report from the State to NTIA that shows an update on the status of total funds awarded to each grant recipient, identification of each grant recipients, and the specific projects being awarded, including the geographic areas that will be built.

There also needs to be a mechanism in place that ensures that grant conditions are being met for those NTIA funds being awarded. NTIA should clearly set forth what the requirements are for States to confirm compliance, including the timeframes for which they should do so. States should then confirm with NTIA-standardized criteria that recipients are in compliance at the time intervals set by NTIA. This could be a mechanism whereby the States could confirm compliance without the States pushing down the requirements to providers such that it imposes significant efforts on the part of providers to supply States with information and reports.

Whatever enforcement mechanisms there are, must be fair and allow for cure periods, and these should be standardized across States so there is not a lot of discrepancies between States. Force majeure exceptions should apply, and there should be an offset for delays caused by State actors. The offset should not be day for day but reflective of timing to re-engage contractors and resume work if State actions are attributable to such delays. If States are not in compliance then funding may be delayed until it is in compliance.

Finally, INCOMPAS' members indicate that sometimes grants are transferred prior to a project's completion. As such, there should be a grant enforcing mechanism for transferees. Accordingly, State and Territories should be notified of such transfers, and Transferees must be responsible for fulfilling the grant's conditions. NTIA should also clearly state that States must enforce the grants' requirements upon its recipients. Recipients should be held accountable and if certain conditions are not met as part of the award agreement, States should be required to enforce this on recipients.

Examples of service requirements as mentioned in IJA include providing broadband service at a speed of not less than 100 megabits per second for downloads and 20 megabits per second for uploads; with a latency that is sufficiently low to allow reasonably foreseeable, real-time, interactive applications; and with network outages that do not exceed, on average, 48 hours over any 365-day period. If these conditions are not met within a certain timeframe of the project agreement (to be established by the State), there should be a penalty with funding being returned or transferred back to the State or NTIA.

*5. In implementing the Bipartisan Infrastructure Law's programs, NTIA will offer technical assistance to states, localities, prospective sub-grantees, and other interested parties. What kinds of technical assistance would be most valuable? How might technical assistance evolve over the duration of the grant program implementation?*

NTIA should begin now by making initial outreach and contact with State and Local officials. INCOMPAS believes it is important for NTIA to begin setting up introductions or follow-up meetings with States' broadband offices, their directors, and/or staff to ask questions, develop working relationships, and to help coordinate on potential projects and rollout plans. Because each State varies based on their own broadband offices and resources, these meetings will ultimately help NTIA determine what additional technical assistance is required.

Such technical assistance could cover education on what IJA requires and that State law cannot supersede it. INCOMPAS' members have also raised with us potential State legislation that directly conflicts with the requirements of the IJA. It is important that NTIA clearly state that State legislation cannot supersede federal requirements, and the potential risk for the State is that they will miss the significant investment opportunity to deliver robust broadband capabilities to their constituents.

In addition, NTIA should facilitate more communication and transparency on the application and review processes to ensure there is cooperation and no unnecessary overlap in efforts. Also, it would be beneficial for NTIA to provide the public with additional information and resources for grant writing, standardize application forms, and continue to update staff contacts in State broadband offices for potential applicants. As funding is allocated and awarded, NTIA should communicate to State and Local governments any reporting requirements with specific timelines and/or deadlines and any other necessary information for collecting data from prospective awardees.

*6. The Bipartisan Infrastructure Law requires states and territories to competitively select subgrantees to deploy broadband, carry out digital equity programs, and accomplish other tasks.*

*How should NTIA assess a particular state or territory's subgrant award process? What criteria, if any, should NTIA apply to evaluate such processes? What process steps, if any, should NTIA require (e.g., Request for Proposal)? Are there specific types of competitive subgrant processes that should be presumed eligible (e.g., publicly released requests for proposals and reverse auctions)?*

NTIA must ensure that States and Territories use a competitive process as required by the IJA. NTIA should clearly state that a competitive process is required that permits eligible entities to apply, including competitive providers. Note that the law specifically states that certain entities must not be excluded, and NTIA's rules should also reflect this. States "may not exclude cooperatives, nonprofit organizations, public-private partnerships, private companies, public or private utilities, public utility districts, or local governments from eligibility for such grant funds."

Vendors that can show they are on the federal schedule of contractors ("GSA list") should automatically be deemed qualified to participate in any IJA funded program. It also is important that NTIA set forth that vendors must be financially and technically qualified and the specifics of those requirements. Sticking to requirements that are applicable in other areas of government funding should be sufficient but requiring bonds or other securities would be costly and burdensome to providers.

A competitive process should also be publicly available, with clear rules from the beginning that also are published and in compliance with NTIA's requirements. Our members have seen from previous federal funding programs, that some States are issuing broadband grants without rules which is now requiring more oversight of projects. NTIA should establish deadlines for when States/Territories issue their competitive rules, application windows, and for releasing grant application requirements. INCOMPAS has generally been supportive of federal reverse auctions, but we are concerned that State/Territories may not have the resources to conduct reverse auctions in an efficient and productive timeframe. Although such auctions serve to reduce pricing in many cases, in this application process, reverse auctions are likely to stifle competition among smaller providers who may drop out of the process as revenues diminish. NTIA may want to permit them only where States have successfully used them in other grant programs.

*7. NTIA views the participation of a variety of provider types as important to achieving the overall goals of the Bipartisan Infrastructure Law broadband programs. How can NTIA ensure that all potential subrecipients, including small and medium providers, cooperatives, non-profits, municipalities, electric utilities, and larger for-profit companies alike have meaningful and robust opportunities to partner and compete for funding under the programs?*

INCOMPAS' members have been successful entering the market in many different types of communities and situations. They have built rural areas where no providers were offering service with no public sector support or funding. They have partnered with towns and cities to deliver fiber-based connectivity for the first time that has transformed communities. INCOMPAS believes that there is no need to preference certain types of entities in the grant process. Rather, transparent deployment and service requirements stated in the grant process will allow all entities to compete that could deliver such service and that taxpayers benefit from a more efficient program when there is competition for it.

INCOMPAS' members are concerned that in the NTIA listening sessions some participants have suggested that non-profit or co-operative organizations should be prioritized over others, asserting that such organizations "have less pressure to turn a profit and have a commitment to serve entire communities." There is no correlation between profit-making and the ability to deliver on a project, and it

is subjective and wrong-headed to think profit-making organizations are not committed to communities. INCOMPAS' members live in the communities they serve, and many of them entered the broadband business specifically to address the needs of their communities when no other entity stepped up.

Unfortunately, the one issue INCOMPAS has with the Treasury Department is that it took the approach of encouraging States "to prioritize support for broadband networks owned, operated by, or affiliated with local governments, nonprofits, and co-operatives" rather than an open, competitive process.

INCOMPAS agrees on the ability of entities to form fair and meaningful partnerships, and we support States/Territories for fully vetting and reviewing subrecipients to ensure that they have the technical and financial and experience to deliver on the grant projects. Nonetheless, INCOMPAS believes that potential recipients should not be discriminated against for being a private sector company. Prioritizing one class of recipient over others is not in the public interest and prevents all applicants from having meaningful and robust opportunities to compete for funding. Recipients should be judged on their ability to meet the requirements of the grant and their proposals. Their failure to do so in other prior funding programs also are relevant for judging their commitment to do so in the IJBA Broadband Programs. But prioritization of certain types of entities (i.e., non-profits and co-ops) should be strictly forbidden for the following reasons:

First, it is inconsistent with the legislation. As we noted above, it states that States "may not exclude co-operatives, nonprofit organizations, public-private partnerships, private companies, public or private utilities, public utility districts, or local governments from eligibility for such grant funds."<sup>6</sup> Prioritizing non-profits/co-ops over others would exclude others from being considered. Second, the program (and taxpayers) would lose the efficiency of a level-competitive playing field for the grants that help enable more robust capacity and connectivity at the most effective price for the program (and taxpayers). Third and our last point, in other programs INCOMPAS' members have seen that some entities have been given the benefit of being treated as a non-profit when they should not qualify as such, making an unfair process even more unfair.

*8. States and regions across the country face a variety of barriers to achieving the goal of universal, affordable, reliable, high-speed broadband and broadband needs, which vary from place to place. These challenges range from economic and financial circumstances to unique geographic conditions, topologies, or other challenges that will impact the likelihood of success of this program. In implementing the Bipartisan Infrastructure Law's broadband programs, how can NTIA best address such circumstances?*

INCOMPAS' members consistently face delays in permitting and gaining access to the public rights-of-way, but we need new fast networks, fast. Speed to market is critical to meet needs as quickly as possible. It is necessary to have State and Local review guidelines in place that enable faster processing that will allow the deployment of broadband infrastructure more quickly, including small cells and other wireless equipment and fiber that is used by both fixed and mobile providers to connect their networks. INCOMPAS believes it is critical that States and Localities be educated about the various deployment barriers broadband providers and infrastructure builders encounter, including the ability to access rights-of-way in a timely and cost-effective manner.

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<sup>6</sup> Section 60102(e)(1)(a)(iii).

As part of allocating these funds, NTIA should encourage local authorities to begin reviewing their permitting processes and determine whether they have the resources they need to issue permits quickly. The processes currently followed in certain States create a significant impediment to deployment efforts and existing processes constitute a barrier to entry so NTIA should work with utility commissions and State governments to encourage local jurisdictions to expedite permitting, allow for batch permitting, and keep permitting and franchise fees low and require that these fees be publicly disclosed, competitively and technology neutral, and non-discriminatory based on actual and direct costs. It is also critical for NTIA to encourage cities to evaluate their fees for reasonableness so that project dollars are used efficiently and effectively and will enable more fiber miles to be built. NTIA should allow a percentage of a State's allocation to be specifically used to hire full time employees for the express purpose of permitting approvals. INCOMPAS' members also mention the locates process, and the burden this creates for deploying networks. Recognizing the costly delays associated with locates including the ticketing system, marking areas, and gaining access, INCOMPAS suggests that NTIA ask States to evaluate their locates process to address this barrier to deployment and to help optimize projects for speed and efficiency as part of this new funding.

Another challenge our members often face is accessing the public rights-of-way. Increasing broadband providers' access to public rights-of-way will help spur faster and more efficient deployments to unserved areas- benefitting consumers and businesses waiting for access to next-generation networks. NTIA must work with State and Local governments to extend rights-of-way protections to entities that own and/or manage the rights-of-way that providers must access to build networks, including those entities that own or manage poles, highways, and railroads. INCOMPAS' members have faced prohibitions for accessing the pole infrastructure of utility cooperatives who use their monopoly position to deny access to competitors which has disadvantaged rural areas from receiving broadband from a competitive provider. NTIA should make clear that any grants for projects are conditioned upon those entities not denying competitors reasonable, fair, and non-discriminatory access to their owned and managed utility poles and conduit. Entities receiving federal grants should not be permitted to engage in anti-competitive activity by excluding competitors from their service territories by denying them access to their poles and conduit that competitors must access in order to provide a competitive alternative.

INCOMPAS urges NTIA to begin the process of including these issues into its discussions in the interagency process. INCOMPAS' members are seeing significant delays and increase in costs prior to the public sector financing that's now available, and they are concerned that with the additional financial boost afforded by Congress, further delays are likely as those who manage/own the rights-of-way are ill-prepared for the increased demand for requests to access the rights-of-way. Agencies at the Federal, State, and Local level all need to prepare now and begin discussions of how to avoid costly delays. INCOMPAS recommends identifying where there are current gaps, including training employees, reviewing processes that can be expedited by investing in technological upgrades, and coordinating between agencies/managers of rights-of-way as soon as possible.

Below are a few examples of the problems that INCOMPAS' members are encountering:

### **Unreasonable Fee Examples**

- For ROW Fees (Wireline), Northeast- \$58.44 per linear foot per year and \$3.98 per linear foot per year
- For ROW Permit Process, Midwest- \$4 million total liability insurance per permit is required
- For Franchise Agreement, Northwest- municipalities requiring 5% of gross revenue, 7% of local access revenues for ILECs and requiring insurance: \$2 million per occurrence, \$4 million in aggregate

- Franchise Bond Fee, South- \$1,000,000

### **Railroad Fee Examples**

Member interactions with railroads since 2019-2021:

- Railroad demanding \$2.35M a year for 24.7 miles - up from the last annual payment of \$207k, to date INCOMPAS member has spent \$500k battling this in court.
- Railroad's standard fees are \$18k for underground and \$15k for aerial. They often impose these fees for public rights-of-way despite not having authority to do so.
- Railroad demanding \$26k for a public rights-of-way crossing (against the law) in rural Midwest. INCOMPAS member has already spent \$2k in legal fees.
- Railroad demanding \$86k for a 3/4 mile longitudinal build out in the Northeast for an E-Rate project, to date INCOMPAS member has spent \$20k gaining condemnation rights.
- Railroad demanding \$35k for 30 feet on an existing member's power line (over-lashing) in the South. INCOMPAS member already has an agreement but is being forced to double pay.

As discussed in our response to Question #1, competition is an effective mechanism for achieving the objectives of the bipartisan IJA. It should play a key role in addressing the diverse circumstances in which networks will be deployed. The competition made possible by the wholesale condition discussed in response to Question #24 would help to ensure that "States and regions across the country [that] face a variety of barriers to achieving the goal of universal, affordable, reliable, high-speed broadband and broadband needs" can achieve these objectives. Competitors relying on wholesale service as an input would have the incentive to design competitive service offerings to meet the needs of customers in each relevant state and region. For example, competitors could tailor service offerings to address the specific factors, such as language, culture, and education on Tribal lands, that limit broadband adoption in particular areas. Importantly, this would occur without the need for burdensome or costly regulations.

*9. Several Bipartisan Infrastructure Law broadband programs provide that, absent a waiver, a grant or subgrant recipient must contribute its own funding, or funding obtained from a non-federal source, to "match" funding provided by the BIL program. Under what circumstances, if any, should NTIA agree to waive these matching fund requirements, and what criteria should it assess (in accordance with any criteria established by the statute) when considering waiver requests?*

INCOMPAS believes waivers should be more common than not, but they should be restricted to areas that are high-cost underserved or unserved, or to entities that have not previously received funding from any federal source to serve that area. For example, any company that received high-cost USF funding from the FCC or the State equivalent should not be eligible for such a waiver.

Granting waivers will promote construction and down-stream services to other areas in need. Many of those areas require lengthy construction that can only be justified by reasonable returns from other sources – granting waivers should facilitate those types of builds.

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

*10. The COVID-19 pandemic has disrupted global supply chains and impacted employment patterns. What is the likely impact of current workforce and supply chain constraints on the speed with which states, service providers, and others achieve the Bipartisan Infrastructure Law's network deployment objectives? Are the areas unserved or underserved by broadband networks, which will see substantial new deployments under the Bipartisan Infrastructure Law's broadband provisions, likely to face particularly significant workforce or supply-chain constraints? What steps, if any, should NTIA take to mitigate the impact of workforce or supply-chain limitations?*

There is a need for training and overall workforce development to be included in the funding as there is already a shortage of available technicians. To address this concern, the FCC, Department of Labor, Department of Education, and NTIA recently announced<sup>7</sup> in January that there will be a cross-agency working group that will collaborate to identify the current and future needs of the telecommunications industry workforce, including the safety of that workforce. NTIA should use those recommendations as determined by the Telecommunications Workforce Working Group. Another option would be for NTIA to work with States and their broadband offices to reward additional funds through community-anchor institutions who partner with and choose financially and technically-capable providers with deployment experience. Those entities that can offer or work with apprenticeship training programs should be considered.

Also, NTIA should encourage States to consider those entities who have experience serving businesses, community anchor institutions, and/or residences in the BEAD program. To help with workforce constraints, they should be willing to hire within the community and support the local economy in the BEAD program.

*12. What steps, if any, should NTIA take to ensure maximum use of American-made network components and that supply shortages are addressed in ways that create high quality jobs for all Americans? What impact, if any, will application of the "Buy American" requirements in the Bipartisan Infrastructure Law have on supply-chain and workforce challenges and on the speed with which the nation can reach the goal of 100% broadband connectivity?*

NTIA must work with broadband providers to better understand the full extent of supply shortages across the country. Further, INCOMPAS' members believe it may be very hard or impossible to meet the "Buy American" requirements from IJJA and should not penalize applicants who are unable to meet the criteria. Being forced to meet the requirements will significantly increase the cost and significantly hinder the speed of building networks to serve unserved rural America. To address this issue, INCOMPAS supports the recent letter<sup>8</sup> led by other industry trade groups including CTIA, NCTA, NTCA, and USTelecom who

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<sup>7</sup> See FCC, Department of Labor, Department of Education, and NTIA Announce Members of Telecommunications Workforce Working Group (January 14, 2022) available at: <https://docs.fcc.gov/public/attachments/DOC-379257A1.pdf>.

<sup>8</sup> See Coalition Letter on IJJA and Buy American (as of January 31, 2022), available at <https://tiaonline.org/wp-content/uploads/2022/01/Industry-Letter-on-IJJA-and-Buy-American-v7.4-FINAL.pdf>.

advocate for a waiver from the “Buy American” rule for information communication technology products. As the letter mentions, NTIA and other agencies have previously granted waivers for a similar requirement which was included in the 2009 American Recovery and Reinvestment Act, and this precedent should once again be followed in granting waivers as “a necessary precondition to effective and efficient investment in broadband.”

NTIA should also make it clear that providers can place additional fibers, at their own cost, in builds funded by IJA and ensure State and Local governments do not place restrictions on such overbuilds or detract from providers that plan to place additional fibers. Doing so enhances participation and competition and enables broadband goals by permitting providers with own-cost fibers to sell at competitive rates to wireless and webscale customers on the same routes.

To encourage recipients to seek out ways to purchase from U.S. manufacturers as much as possible, NTIA could help by promoting American manufacturers that are current working with U.S. companies and provide a resource on its BroadbandUSA website that lists these companies for interested providers to look up and reference as a guide. With the ongoing concerns of supply and workforce shortages, this provides NTIA with a great opportunity to learn from and work with U.S. companies. NTIA could also create an open forum or discussion platform on its BroadbandUSA website that allows companies to share ideas, network, and to build relationships for solving these problems at the State and Local level that will help ultimately stimulate our nation’s economy.

### **Broadband Equity, Access and Deployment (BEAD) Program**

The BEAD Program, has the potential to transform the lives of millions of Americans by funding broadband networks that enable families and small businesses to participate fully in the Nation’s economy, political discourse, and culture. No other infrastructure program can have this far-reaching effect. But the BEAD Program will only achieve the goals established by Congress if NTIA adopts the right framework for the distribution and use of Program funding.

Section 60102(b)(1) states that NTIA “shall establish a grant program, to be known as the ‘Broadband Equity, Access, and Deployment Program’, under which [NTIA] makes grants to eligible entities, in accordance with this section, to bridge the digital divide.” In addition to the many provisions of the Act that direct NTIA to take specific action in carrying out this mandate, Section 60102(i) grants NTIA rulemaking authority:

The Assistant Secretary may issue such regulations or other guidance, forms, instructions, and publications as may be necessary or appropriate to carry out the programs, projects, or activities authorized under this section, including to ensure that those programs, projects, or activities are completed in a timely and effective manner.

The “necessary or appropriate” provision is informed by the “Findings” set forth in Section 60101. Those are as follows:

- “Access to affordable, reliable, high-speed broadband is essential to full participation in modern life in the United States;”

- “The persistent ‘digital divide’ in the United States is a barrier to the economic competitiveness of the United States and equitable distribution of essential public services, including health care and education.”
- “The digital divide disproportionately affects communities of color, lower-income areas, and rural areas, and the benefits of broadband should be broadly enjoyed by all.”
- “In many communities across the country, increased competition among broadband providers has the potential to offer consumers more affordable, high-quality options for broadband service;” and
- “The 2019 novel coronavirus pandemic has underscored the critical importance of affordable, high-speed broadband for individuals, families, and communities to be able to work, learn, and connect remotely while supporting social distancing.”

The specific mandates in the IJA promote these objectives, but where those mandates are insufficient by themselves, it is “necessary” and “appropriate” for NTIA to adopt rules designed to address the concerns and goals set forth in the Findings and to bridge the digital divide.

Specifically, NTIA must ensure that funded networks are used to make affordable and reliable high-speed broadband available to (1) “communities of color, lower-income areas, and rural areas;” (2) small business customers whose connectivity is essential to promoting “the economic competitiveness of the United States;” and (3) institutions that provide “essential public services, including health care and education.” In expanding the availability of broadband to consumers, businesses, and community institutions, NTIA must also ensure that it promotes “increased competition among broadband providers.” It is competition that drives additional innovation, investment, and affordability. Finally, funded networks must be designed to support the full range of current and future applications needed for work, education, and robust connectivity throughout the areas served.

The other terms of the Act provide further guidance as to the way NTIA rules should promote these objectives. The overall structure of the Act is that NTIA establishes criteria for State eligibility for and use of funding consistent with the specific requirements of the Act, and NTIA oversees the States’ distribution of funding to subgrantees to ensure States and subgrantees comply with Program requirements. Key components of this structure include (1) conditioning States’ and subgrantees’ eligibility for funding on requirements defined in the Act and by NTIA; (2) rescinding funding where a State or subgrantee fails to comply with requirements defined in the Act and by NTIA; (3) publication of a subgrantee’s service offerings, such as the “low-cost broadband service option;” and (4) robust reporting requirements to ensure that States and subgrantees comply with relevant requirements. NTIA should use these mechanisms in designing and enforcing Program requirements, including its regulations, while at the same time providing States with substantial flexibility to design and oversee deployment of broadband networks funded by the BEAD Program.

Moreover, Congress expects that NTIA will coordinate its implementation and enforcement of the Act with the FCC and the U.S. Department of Agriculture (“USDA”). Section 60102(m) states as follows:

It is the sense of Congress that Federal agencies responsible for supporting broadband deployment, including the Commission, the Department of Commerce, and the Department of Agriculture, to the extent possible, should align the goals, application and reporting processes, and project requirements with respect to broadband deployment supported by those agencies.

Thus, where possible, NTIA should ensure that the BEAD Program regulations are consistent with those established for broadband subsidy programs administered by other agencies.

### ***Ensuring Publicly Funded Broadband Networks that Sustain and Scale***

13. *NTIA is committed to ensuring that networks built using taxpayer funds are capable of meeting Americans' evolving digital needs, including broadband speeds and other essential network features. What guidance or requirements, if any, should NTIA consider with respect to network reliability and availability, cybersecurity, resiliency, latency, or other service quality features and metrics? What criteria should NTIA establish to assess grant recipients' plans to ensure that service providers maintain and/or exceed thresholds for reliability, quality of service, sustainability, upgradability and other required service characteristics?*

INCOMPAS believes it is critical that this infrastructure investment be made in robust and reliable networks that can offer greater connectivity today and higher speeds in the future, and projects must be able to scale to meet consumer and business demand over time. Indeed, it is important to deploy for today and the future so that the networks can serve both high-speed fixed and 5G networks. This means that we need a focus on deploying fiber as far as technically and geographically possible for this once in a lifetime investment.

The Treasury Department's final guidance on the American Rescue Plan struck the right balance by encouraging recipients to prioritize investments in fiber infrastructure wherever feasible and also requiring recipients "to design projects to, upon completion, reliably meet or exceed symmetrical 100 Mbps download and upload speeds" in the last mile.<sup>9</sup> And in those situations where it is not practicable to do so because of the excessive cost of the project or geography or topography of the area to be served by the project, to reliably meet or exceed 100/20 Mbps and to be scalable to a minimum of symmetrical 100 Mbps download and upload speeds. NTIA should follow Treasury's example and set fiber and high-speed goals. Not only will this serve our nation's long-term needs, but it will also set us on a comparable path of other countries who have set fiber and 1 Gbps goals. INCOMPAS offers to NTIA its report released last summer that reports on the fiber and broadband speed goals set by other nations.<sup>10</sup> This report further demonstrates the need for the U.S. to set high goals.

In terms of ensuring that grantees continue to scale and meet community needs, INCOMPAS believes that its recommendations to enable and promote competition in these areas will help ensure such needs are being met long-term.

14. *NTIA is committed to ensuring that networks constructed using taxpayer funds are designed to provide robust and sustainable service at affordable prices over the long term. What criteria should NTIA require states to consider to ensure that projects will provide sustainable service,*

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<sup>9</sup> Coronavirus State & Local Fiscal Recovery Funds: Overview of the Final Rule, at 39, available at <https://home.treasury.gov/system/files/136/SLFRF-Final-Rule-Overview.pdf>.

<sup>10</sup> See INCOMPAS/BroadLand Report, The Race to Faster Broadband Speeds: A Look at the Speed Goals of Other Nations Around the World, available at [FINAL 1 Gigabit and Fiber Goals in Other Nations 4 \(incompas.org\)](https://incompas.org/FINAL_1_Gigabit_and_Fiber_Goals_in_Other_Nations_4).

*will best serve unserved and underserved communities, will provide accessible and affordable broadband in historically disconnected communities, and will benefit from ongoing investment from the network provider over time?*

One of the best ways to enable and promote affordability and encourage network upgrades that will continue to meet customer needs is to ensure that there is competition in the marketplace and that customers have choice. Please see our full response to enable and promote competition in Question 24.

*15. In its effort to ensure that BEAD-funded networks can scale to meet Americans' evolving needs, and to ensure the public achieves the greatest benefit from the federal investment, NTIA seeks to understand reasonably foreseeable use cases for America's broadband infrastructure over the next five, ten, and twenty years. What sort of speeds, throughput, latencies, or other metrics will be required to fully connect all Americans to meaningful use over the next five, ten, and twenty years? How can the BEAD program meet our nation's broadband network connectivity needs in the future and what other benefits can Americans expect from this program and the networks it will help fund in other industries and across the economy? How can existing infrastructure be leveraged to facilitate and amplify these benefits? What are the best sources of evidence for these questions and for predicted future uses of broadband?*

As we stated previously in our comments, we believe that the Treasury Department struck an appropriate balance in its guidance on speeds, capability, and fiber deployment, and we support NTIA taking that same approach here. INCOMPAS embraced a 1 gigabit fixed connectivity BIAS standard a number of years ago because our members were deploying those speeds on their networks. Today, we are seeing our members deploy up to 10 Gbps capabilities in the last mile. In urban and suburban areas, most consumers who are purchasing from a large incumbent cable ISP are taking at least 100/20 Mbps service in their homes,<sup>11</sup> and that is the level of service (or higher) most advertised by the major incumbent ISPs.<sup>12</sup> In fact, Ookla finds that the average U.S. fixed internet download speed is now 211.41 Mbps and upload speed is 77.80 Mbps, and more consumers are moving to higher speeds and broadband services that offer symmetrical upload because of the shift to uses that are based on creation rather than consumption.<sup>13</sup> In contrast, INCOMPAS' members are offering symmetrical speed to homes, and consumers are taking at least 100/100 Mbps and beginning to move to 1 Gigabit symmetrical and higher. With two-way video needs for work, education, and healthcare increasing significantly, and uploading data related to these endeavors, INCOMPAS' members are seeing the demand for higher symmetrical services. Thus, this

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<sup>11</sup> FCC subscriber data collected before the pandemic shows that about 60% of fixed broadband was for 100 Mbps download or higher service. See FCC Fourteenth Broadband Deployment Report, Fig. 11 (2021) available at <https://docs.fcc.gov/public/attachments/FCC-21-18A1.pdf>.

<sup>12</sup> Using the Federal Communication Commission's (FCC) Broadband Speed Guide, a household with two telecommuters and two to three remote learners today are estimated to need 100 Mbps download to work simultaneously. Federal Communications Commission, Broadband Speed Guide, available at <https://www.fcc.gov/consumers/guides/broadband-speed-guide>. It is not surprising that Americans are buying higher speeds, and ISPs are responding.

<sup>13</sup> See Ookla Speedtest, United States's Mobile and Fixed Broadband Internet Speeds, available at <https://www.speedtest.net/global-index/united-states> (as of December 2021).

federal funding should be used for technologies that can meet the long-term needs of communities without additional capex funding in the future.

Symmetrical internet is critical for students, businesses, telecommuters, and content creators. This is because these types of Internet users often upload PDFs, large graphic files, and videos to the internet so that they can share them with clients, coworkers, teachers, and students. Uploading files that are 1 gigabyte in size can take significantly longer with only 10 Mbps upload—15 minutes as compared to 1.5 minutes at 100 Mbps.<sup>14</sup> And with more people working and schooling from home and the number of devices connected to the Internet increasing, upload speed is critical to meeting the economic needs of the nation. Moreover, the nation’s leading ISPs and their trade associations recognize that 90% of Americans have access to networks providing downstream speeds of at least 100 Mbps;<sup>15</sup> we should be certain that all Americans have **at least** such access, but much more will be needed over time as more devices are connected and more content moves online.

There should be a recognition that online demand is increasing.<sup>16</sup> Accordingly, no community should be left off or expected to thrive if it only has a network that does not meet today’s current average usage or future use. It is imperative that this once in a lifetime investment should set every community on a path to secure their economic future to a broadband network capable of meeting their long-term needs. In terms of predicted needs, OpenVault finds that today’s average use is 207 Mbps/16 Mbps. If we apply 21% annual growth, that will mean 2026 average usage will be over 500Mbps down and 40Mbps up.<sup>17</sup> Thus, INCOMPAS supports NTIA’s goal that infrastructure should be scalable over time and that speeds should *at the very least* increase to keep pace with average usage patterns, but INCOMPAS urges the NTIA to set high goals for this program that go beyond mere averages. This is why we believe that U.S. Treasury’s approach strikes the right balance between encouraging capital investment in sustainable, future-proof infrastructure wherever possible.

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<sup>14</sup> *What is Symmetrical Internet?* (March 2020): What Is Symmetrical Internet and Is it Worth It? | Reviews.org, available at <https://www.reviews.org/internet-service/what-is-symmetrical-internet/>.

<sup>15</sup> New National Coalition: It’s Time To Ensure All Americans Can Connect To The Internet; America’s Broadband Future Will Advocate for Effective Solutions to Comprehensively Address the Digital Divide, News Release, May 14, 2021, available at <https://americasbroadbandfuture.org/2021/05/press-release-5-14-2021-2/>.

<sup>16</sup> See Cisco’s Annual Internet Report (March 2020) (explaining that the “number of devices connected to IP networks will be more than three times the global population by 2023.”), available at <https://www.cisco.com/c/en/us/solutions/collateral/executive-perspectives/annual-internet-report/white-paper-c11-741490.html>; see also PEW, *How Much Broadband Speeds Do Americans Need?* (Nov. 30, 2020) (“[t]he pandemic has resulted in 18% growth in in-home data use, comparing March 2019 to March 2020. The typical U.S. household has 11 internet-connected devices, and research indicates that this trend will likely grow.”), available at <https://www.pewtrusts.org/en/research-and-analysis/articles/2020/11/30/how-much-broadband-speed-do-americans-need>.

<sup>17</sup> See Electronic Frontier Foundation, *The Future Is in Symmetrical, High-Speed Internet Speeds* (July 2, 2021), available at <https://www.eff.org/deeplinks/2021/07/future-symmetrical-high-speed-internet-speeds>.

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

*16. Broadband deployment projects can take months or years to complete. As a result, there are numerous areas where an entity has made commitments to deploy service – using its own funding, government funding, or a combination of the two – but in which service has not yet been deployed. How should NTIA treat prior buildout commitments that are not reflected in the updated FCC maps because the projects themselves are not yet complete? What risks should be mitigated in considering these areas as “served” in the goal to connect all Americans to reliable, affordable, high-speed broadband?*

We agree that IJA deployment funding needs to be used to address the needs of areas that are not obtaining funding through other programs. As part of the FCC’s broadband mapping process, it could ask providers who have obtained funding through CARES, American Rescue Plan, or USF, or other broadband programs to identify those locations that will be built, the technology that is being deployed, and the speeds that will be delivered. These areas could be identified on a layer of the FCC’s map and excluded from IJA funding if 100/100 Mbps connectivity is going to be delivered.

*18. The Bipartisan Infrastructure Law provides that BEAD funding can be used in a variety of specific ways, including the provision of service to unserved and underserved areas, connection of community anchor institutions, data collection, installation of service within multi-family residential buildings, and broadband adoption programs. The law also permits the Assistant Secretary to designate other eligible uses that facilitate the program’s goals. What additional uses, if any, should NTIA deem eligible for BEAD funding?*

As we indicated in our response to Question #8, NTIA and the States need to begin preparing localities and other ROW owners/managers for these builds that will require the issuance of permits/franchises and the need for attachments to poles and access to conduit. Where cities and towns need financial assistance to purchase and implement technology upgrades for speeding permitting processes, such as offering batch permit processing, or they need to hire temporary staff to handle the number of requests, NTIA should allow such reasonable costs to be covered by IJA funding.

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

*22. The Bipartisan Infrastructure Law requires that BEAD funding recipients offer at least one low cost broadband option and directs NTIA to determine which subscribers are eligible for that low cost option. BIL § 60102(h)(5)(A). How should NTIA define the term “eligible subscriber?” In other words, what factors should qualify an individual or household for a low-cost broadband option?*

Where possible, NTIA should ensure that the BEAD program regulations are consistent with those already established for broadband subsidy programs administered by other agencies. NTIA should review and use eligibility standards from other programs such as the FCC’s Affordable Connectivity Program (ACP). The ACP already has criteria in place, and it is likely that broadband internet access service providers participating in the IJA funding already will be participating in the ACP, so it will be much

easier for these providers to comply with using these same standards. NTIA could also consider participation in the ACP as sufficient to meet the low-income requirement, but if it chooses not to do so, then it should allow for flexibility by the provider to offer a service plan for low-income consumers that is less than the retail rate of the most popular tier of service offered by the provider.

*23. Under the Bipartisan Infrastructure Law, states and territories are charged with developing low cost broadband service options in consultation with NTIA and broadband providers interested in receiving funding within the state. BIL § 60102(h)(5)(B). What factors should NTIA consider in guiding the states in design of these programs to achieve this goal? Should NTIA define a baseline standard for the “low-cost broadband service option” to encourage states/territories to adopt similar or identical definitions and to reduce the administrative costs associated with requiring providers to offer disparate plans in each state and territory? What are the benefits and risks, if any, of such an approach?*

NTIA should define a baseline standard for the “low-cost broadband service option” to encourage States and Territories to adopt similar or identical definitions and to reduce the administrative costs on broadband providers who may have multi-state service. NTIA should use ACP eligibility as the baseline and allow for flexibility by the provider to offer a service plan for low-income consumers that is less than the retail rate of the most popular tier of service offered by the provider.

*24. Affordability is a key objective of the Bipartisan Infrastructure Law’s broadband programs. What factors should be considered in the deployment of BEAD funds to help drive affordability beyond the low-cost option?*

The text of the BEAD program reflects Congress’ recognition that competition is the key to addressing affordability. As explained, the Findings in Section 60101 articulate Congress’ expectation that NTIA will promote “increased competition among broadband providers” funded by the BEAD Program as a central means of bridging the digital divide. But such competition will not develop if NTIA simply implements the terms of the Act without adopting supplemental regulations. That approach would simply create new broadband monopolies. NTIA can avoid this outcome by adopting a regulation requiring that States condition the availability of Program funding on each subgrantee’s agreement to offer broadband services at “a reasonable, wholesale rate on a nondiscriminatory basis.” This wholesale condition is consistent with a requirement recently adopted by USDA for the ReConnect program, and it would cause BEAD Program funding to bridge the digital divide far more effectively than would otherwise be the case.

Under Section 60102(h)(1)(A)(i), BEAD Program funding is to be used for subsidizing deployment of broadband networks in unserved areas first, and then, once deployment in those areas has been funded, in underserved areas. There is little chance that networks deployed in these areas will face competition. The entry barriers associated with building broadband networks in areas targeted by the Program are extremely high (so high that no one has deployed networks in those areas in most cases), and it is not realistic to expect competitive providers to enter and compete with networks that are reliant on Program funds to deploy. New networks deployed with Program funding are therefore unlikely to face competitive pressure to bridge the digital divide by setting prices at the most affordable level, by tailoring their offerings to the specific needs of consumers and businesses in their areas, or to innovate. Attempts to mandate this conduct by enforcing behavioral requirements against network operators would be costly

and likely unsuccessful. The result will be that fewer consumers and small businesses will purchase or fully utilize services offered by networks funded by the Program than would be the case if the networks faced competition. For these end users, the digital divide will persist.

The terms of the Act, by themselves, do not adequately address this problem. Section 60102(h)(4)(B) requires that subgrantees offer a single “low-cost broadband service option” to “eligible subscribers,” but most subscribers of residential and business broadband services provided via networks funded by the Program will likely be ineligible for this service option. Even the low-cost broadband option would not be subject to the discipline of competition.

In addition, Section 60102(h)(4)(H) states that if a subgrantee “is no longer able to provide broadband service to the locations covered by [a funding grant] at any time, [it] shall sell the network capacity at a reasonable, wholesale rate on a nondiscriminatory basis to other broadband service providers or public sector entities.” But the wholesale obligation does not apply outside of these circumstances.

As USDA recently recognized, the appropriate way to promote competition in an area served by a single broadband provider paid for with taxpayers’ money is to adopt regulations promoting resale competition. In establishing the eligibility criteria for the ReConnect Loan and Grant Program, USDA included in its selection criteria consideration of whether an applicant “commit[s] to offering wholesale broadband services at rates and terms that are reasonable and nondiscriminatory.”<sup>18</sup> Applicants for loans and grants that make this commitment score higher and are more likely to receive funding under the ReConnect program. NTIA followed a similar approach in implementing the Broadband Technology Opportunities Program (“BTOP”), adopted as part of the American Recovery and Reinvestment Act of 2009.<sup>19</sup>

Promoting competition through wholesale conditions like the ReConnect and BTOP provisions is consistent with decades of telecommunications competition policy. This policy is based on the recognition that, absent a requirement that they offer their services at wholesale to potential competitors, dominant firms will refuse to do so, and consumers will be harmed by the absence of competition. Thus, Sections 251(b)(1) and 251(c)(4) of the Communications Act require, respectively, that all local exchange carriers and all incumbent local exchange carriers offer their telecommunications services at wholesale to

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<sup>18</sup> See *ReConnect Loan and Grant Program, Evaluation Criteria* at <https://www.usda.gov/reconnect/evaluation-criteria>.

<sup>19</sup> See Department of Agriculture and Department of Commerce Broadband Technologies Opportunities Program, *Notice of Funds Availability and Solicitation of Applications*, 74 FR 33104, 33120 (July 9, 2009) (stating that, for broadband infrastructure last mile projects, “[a]dditional consideration will be given to applicants that commit to offering wholesale access to project facilities at reasonable rates and terms”); see *id.* at 33121 (establishing the same preference for middle mile projects that offered “wholesale access network components and services such as wavelengths and fibers at reasonable rates and terms”); BroadbandUSA Fact Sheet, Broadband Technology Opportunities Program Nondiscrimination and Opportunities Obligations, at 2 (describing requirements applicable to wholesale services offered by BTOP grantees) *available at* [https://www2.ntia.doc.gov/files/Interconnection\\_Nondiscrimination\\_11\\_10\\_10\\_FINAL.pdf](https://www2.ntia.doc.gov/files/Interconnection_Nondiscrimination_11_10_10_FINAL.pdf).

potential competitors.<sup>20</sup> Moreover, the FCC has for decades mandated resale for a wide range of wireline services<sup>21</sup> and wireless services<sup>22</sup> in markets characterized by market power and high entry barriers.

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<sup>20</sup> See 47 U.S.C. §§ 251(b)(1), 251(c)(4). Section 252(d)(3) of the Communications Act grants States the authority to set the discount wholesale rates required by Section 251(c)(4). See 47 U.S.C. § 252(d)(3). The FCC under Chairman Ajit Pai forbore from enforcing Section 251(c)(4) because the legacy telephone services to which it primarily applied are being replaced by other technologies. [Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services, Report and Order](#), 35 FCC Rcd 12425 (2019); [Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. 160\(c\) to Accelerate Investment in Broadband and Next-Generation Networks, Memorandum Opinion and Order](#), 34 FCC Rcd 6503, ¶¶ 11, 18, 20, 25-26, 62 (2019) (describing consumer migration from circuit-switched, TDM-based telephone service to VoIP as well as other services such as mobile wireless telephone service and describing pricing discipline effect of VoIP (and other services) on circuit-switched, TDM-based telephone service). Those forbearance orders did not address resale of broadband service, and the logic of those orders, namely that *ex ante* wholesale rate regulation should not apply to a legacy service that is being replaced by newer services, is not relevant to broadband service.

<sup>21</sup> See, e.g., [Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Report and Order](#), 60 FCC2d 261, ¶ 88 (1976) (“*Resale and Shared Use Order*”) (prohibiting tariff restrictions on resale and shared use of private line service because permitting resale and shared use would result in, among other things, greater competition, prices closer to cost, more innovation and investment); [Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, Report and Order](#), 83 FCC 2d 167, ¶ 41 (1980) (establishing a blanket prohibition on tariff provisions restricting the resale based on the conclusion that “resale and shared use of domestic public switched network services can reasonably be anticipated to produce numerous salutary benefits which are clearly in the public interest” including “increased entry and competition by new entrants; numerous new and specialized service offerings by telecommunications managers, OCCs, and other entities; a greater possibility of innovation by equipment system manufacturers, with less waste of available communications facilities through improved management techniques such as queuing.”).

<sup>22</sup> See, e.g., [An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission’s Rules Relative to Cellular Communications Systems, Report and Order](#), 86 FCC2d 469, ¶¶ 103-107 (1981) (mandating resale for the two cellular licensees in each market in order to promote competition in the “secondary market” for the resale distribution of cellular service.); [Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, First Report and Order](#) 11 FCC Rcd 18455, ¶ 27 (1996) (“Given the imperfectly competitive, duopoly cellular market that available communications facilities through improved management techniques such as queuing.”).

<sup>22</sup> See, e.g., [An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission’s Rules Relative to Cellular Communications Systems, Report and Order](#), 86 FCC2d 469, ¶¶ 103-107 (1981) (mandating resale for the two cellular licensees in each market in order to promote competition in the “secondary market” for the resale distribution of cellular service.); [Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, First Report and Order](#) 11 FCC Rcd 18455, ¶ 27 (1996) (“Given the imperfectly competitive, duopoly cellular market that exists” due to assignment of two cellular licenses per market, “we do not believe that market forces alone provide sufficient incentive for carriers to allow their facilities-based competitors to resell service where economically efficient.”) modified in part on reconsideration [Interconnection and Resale Obligations Pertaining to Commercial](#)

NTIA should therefore adopt a regulation pursuant to its authority under Section 60102(i) requiring that States condition Program funding on a subgrantee's agreement to offer broadband service to wholesale customers. To remain consistent with the wholesale requirement in Section 60102(h)(4)(H), subgrantees should be required to sell broadband service "at a reasonable, wholesale rate on a nondiscriminatory basis." States should be given flexibility to determine the manner in which they comply with this requirement, but to increase predictability and promote administrative efficiency, States should also be offered the option of complying with a safe harbor specified in the rule. That safe harbor can be defined in several different ways, but the most efficient and effective approach would be to deem a State in compliance if it requires that subgrantees offer broadband services to wholesale customers at a discount off of retail rates that is equal to or greater than the discount previously established by the state under the avoided-cost resale requirement in Sections 251(c)(4) and 252(d)(3) of the Communications Act. This approach makes sense because the States have already set those discounts using a methodology designed to reflect costs of providing services at wholesale set forth in Section 252(d)(3) and the FCC's implementing rules. A State would merely apply the existing wholesale discount to BEAD subgrantees. Moreover, any State would be free to adopt a different approach, so long as it ensures that subgrantees offer broadband service to wholesale customers at "a reasonable, wholesale rate on a nondiscriminatory basis."

A wholesale condition would make the BEAD Program far more effective at bridging the digital divide by ensuring the availability of affordable broadband services. Many competitive providers would use services made available under a wholesale condition to offer a choice in broadband service where otherwise there would be none. These resale competitors would tailor their offerings to the needs of customers who might not otherwise purchase broadband or utilize it effectively. For example, competitors might offer pricing plans suited to the needs of underserved demographic groups, offer innovative education and support services, or combine resold broadband with other services in ways that would otherwise be unavailable. By targeting otherwise neglected consumers with lower priced and higher-quality services, resale competitors would bring "the benefits of broadband" to "communities of color, lower-income areas, and rural areas." These benefits resemble the benefits that resellers of wireless service, such as TracFone, delivered to underserved consumers for many years and that resellers of basic local telephone service have delivered to multi-location businesses.<sup>23</sup>

Given its beneficial effect on bridging the digital divide, there is no question that NTIA has the authority to adopt a wholesale condition. Again, Section 60102(i) gives NTIA the authority to adopt "regulations" that are "necessary or appropriate to carry out the programs, projects, or activities authorized" under the Program. Section 60102(b)(1) states that the purpose of the Program is to bridge the digital divide, and Section 60101 makes clear that Congress expects NTIA to achieve this objective by, among other things, promoting broadband competition. It would be hard to find a requirement that fits more squarely within these statutory mandates than a wholesale condition.

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*Mobile Radio Services et al.*, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 16340 (1999).

<sup>23</sup> See Declaration of Larry G. Antonellis (Aug. 6, 2018), attached as Attachment A to Opposition of Granite to USTelecom's Forbearance Petition, WC Docket No. 18-141 (Aug. 6, 2018) (describing ways in which resale of monopoly ILEC telephone service has led to offering of one-stop-shop offerings that have benefited multi-location customers).

In addition, it would be “necessary or appropriate” for NTIA to ensure that the wholesale condition applies to basic business broadband service (i.e., not just residential service) by clarifying that the definition of broadband in the Program includes basic business broadband services. Section 60102(a)(2)(B) defines the terms “broadband” and “broadband service” as incorporating the FCC definition, namely “mass market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints” or “any service that the Commission finds to be providing a functional equivalent” of such service.<sup>24</sup> While the term “mass market” is not defined in the FCC’s rules, the FCC has elsewhere clarified that the term means “services marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers such as schools and libraries.”<sup>25</sup> It would make sense to incorporate this clarification into the definition of broadband service in the Program. Doing so would cause Program regulations to apply to funded networks to the extent they are used to provide standard business broadband services marketed, for example, to small businesses, home offices, and other business locations with relatively simple business broadband needs. This would be consistent with the Finding in Section 60101 that “the 2019 novel coronavirus pandemic has underscored the critical importance of affordable, high-speed broadband for individuals, families, and communities to be able to work, learn, and connect remotely while supporting social distancing.” The availability of affordable, high-quality basic business broadband service enables people to work at home while social distancing. This need is not going away any time soon. Moreover, even after the pandemic ends, the availability of affordable, high-quality basic business broadband will remain essential for people who work either part of the time or full time from home and to promote economic growth.

Adoption and enforcement of a wholesale condition would be simple and would consume few administrative resources. NTIA could announce the requirement in the Notice of Opportunity pursuant to Section 60102(e) and require that States describe how they will comply with the condition in the applicable forms and templates released with the Notice of Opportunity. Each State should also be required to include in its contracts with subgrantees a commitment by the subgrantee that it will comply with the wholesale condition and that the subgrantee’s failure to comply with the wholesale condition will result in the recovery of Program funds from the subgrantee pursuant to Section 60102(g)(2)(B). Among other things, the contracts should require subgrantees to publicize their wholesale rates. Subgrantees should be required to explain in their semi-annual reports how they are complying with the wholesale condition. Similarly, States should be required to certify in their Initial and Final Proposals as well as in their Initial, Semi-Annual, and Final Reports to NTIA that they and their subgrantees are in compliance with the wholesale condition. NTIA should reserve the authority under Section 60102(g)(3)(B) to “deobligate” Program funds awarded to a State that fails to implement and enforce the wholesale condition.

The wholesale condition would be nothing like the complex TELRIC regulations adopted under the Section 251(c)(3) and 252 of the Communications Act. There would be no need for rate proceedings, and subgrantees would be free to set retail prices as they please. The only requirement would be to offer broadband provided via facilities funded by taxpayer money to wholesale customers on reasonable and

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<sup>24</sup> See 47 C.F.R. § 8.1(b).

<sup>25</sup> *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, n.58 (2018) reversed in part on other grounds *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

nondiscriminatory terms. By affording States a safe harbor for compliance as discussed above the wholesale condition would limit even further the administrative resources needed to administer the wholesale condition.

Finally, the wholesale condition would not run afoul of the prohibition against regulation of rates charged for broadband service in the Act. Section 60102(h)(5)(D) states that nothing in the Act may be construed to give NTIA the authority “to regulate the rates charged for broadband service.” At the same time, as mentioned, Section 60102(h)(4)(H) requires that subgrantees that can no longer provide broadband service “sell the network capacity at a reasonable, wholesale rate on a nondiscriminatory basis,” and Section 60102(h)(4)(B) requires that subgrantees offer a single “low-cost broadband service option,” although it leaves compliance to the States subject to NTIA review. These requirements must not violate the prohibition against NTIA regulation of rates charged for broadband service, because otherwise NTIA would not be able to enforce them. It follows that a wholesale condition cannot violate Section 60102(h)(5)(D) if it merely (1) conditions availability of funding on each subgrantee’s agreement to offer broadband service “at a reasonable, wholesale rate on a nondiscriminatory basis” consistent with Section 60102(h)(4)(H) and (2) leaves compliance to the States subject to NTIA review consistent with Section 60102(h)(4)(B).

### **Implementation of Middle Mile Broadband Infrastructure (MMBI) Grant Program**

*32. Middle-mile infrastructure is essential to American connectivity. Lack of affordable middle-mile access can have a substantial impact on the retail prices charged for broadband services. How should the Assistant Secretary ensure that middle-mile investments are appropriately targeted to areas where middle-mile service is non-existent or relatively expensive? To what extent should middle-mile grants be targeted to areas in which middle-mile facilities exist but cannot economically be utilized by providers that do not own them? Should NTIA target middle-mile funds to areas where interconnection and backhaul costs are impacted by a lack of competition or other high-cost factors?*

NTIA should prioritize areas that are unserved and need middle mile to support the last-mile projects that the BEAD will finance and other unserved areas that last mile broadband providers have identified and have been confirmed as unserved middle mile areas. Then, consider investing in those areas where middle mile backhaul is more expensive. Also, NTIA should consider where middle mile would boost capacity to an area that it is underserved. Before any funds are awarded, unserved areas to be funded should be fully noticed so that all interested parties, including States, Localities, and industry can weigh in on the need for middle mile to be built in that area.

INCOMPAS also recognizes that some flexibility may be necessary from NTIA in determining which technologies will be most cost effective and efficient for implementing this middle-mile infrastructure. However, fiber is typically the technology of choice in the middle mile given its ability to provide service to multiple ISPs, fixed and mobile, enterprise customers, and others like Local governments. Setting an expectation that this funding is being used based on an assessment of long-term needs is important and these grants should also be competitively awarded to experienced middle mile providers who are willing to work with State and Local officials to plan new, reliable and fast networks to ensure there is wholesale availability to any ISP, enterprise users, and other similarly situated customers at reasonable rates, and that the long-term connectivity needs will be met.

*33. The Bipartisan Infrastructure Law's provisions regarding the Middle Mile Broadband Infrastructure Grant Program set out a range of considerations governing NTIA's assessment of proposals seeking middle-mile funding, including improving affordability, redundancy and resiliency in existing markets, leveraging existing rights-of-way, assets, and infrastructure, and facilitating the development of carrier-neutral interconnection points. See BIL § 60401(e), (b)(2), (d)(2). How should NTIA implement these requirements, and the others listed in the legislation, in prioritizing middle-mile grant applications?*

If a broad goal of the broadband funding is to increase broadband access, grant recipients should demonstrate that they have used as many of those considerations in their projects. The more those considerations are included in their project, the more their application may be weighted.

NTIA should also make it clear that providers can place additional fibers, at their own cost, in builds funded by IJA and ensure State and Local governments do not place restrictions on such overbuilds or detract from providers that plan to place additional fibers. Doing so enhances participation and competition and enables broadband goals by permitting providers with own-cost fibers to sell at competitive rates to wireless and webscale customers on the same routes. This will facilitate middle mile construction if other revenue opportunities are present.

*34. What requirements, if any, should NTIA impose on federally funded middle-mile projects with respect to the placement of splice points and access to those splice points? Should NTIA impose other requirements regarding the location or locations at which a middle-mile grantee must allow interconnection by other providers?*

Every middle mile deployment would be different, so it would be difficult to impose a set of standard requirements, but splice points could be determined at locations where access to providers of unserved or underserved areas must have access. That has to be balanced with the need of providers of middle mile facilities to manage the network and ensure that multitudes of splice points do not impact the functionality of the network or the SLAs requirements imposed by NTIA or State and Local governments.

*35. How can the Middle Mile Broadband Infrastructure program leverage existing middle-mile facilities, access to rights of way, poles, conduit, and other infrastructure and capabilities that are owned, operated, or maintained by traditional and non-traditional providers (public and investor owned utilities, grid operators, co-ops, academic institutions, cloud service providers, and others) to accelerate the deployment of affordable, accessible, high-speed broadband service to all Americans? What technical assistance or guidance should NTIA provide to encourage applications for this program? Are there examples of successful deployments and/or benefits provided by non-traditional providers to highlight?*

As part of the Middle Mile Broadband Infrastructure program requirements, NTIA should encourage increasing broadband providers' access to public rights-of-way, accelerating approval of permits, and asking State and Local governments, utilities, and railroads to charge fees that are based only on their actual, objectively reasonable costs. INCOMPAS believes fees must be publicly disclosed, competitively neutral, technology neutral, nondiscriminatory and based on their actual, objectively reasonable costs for accessing the ROW, poles, and conduit for networks. Fees must be no higher than the fees charged to

similarly situated competitors in similar situations. This is particularly important for publicly-financed infrastructure builds—the investment in the infrastructure versus above cost fees would be a waste of taxpayer funds.

New construction technologies that speed deployment should be permitted and to allow for simpler, more transparent and fair engineering standards to be established by utility commissions and/or State and Local governments. With NTIA’s funding being allocated for infrastructure and broadband investment, can also use these funds to help incentivize local jurisdictions to streamline permitting and/or franchise requirements to speed broadband deployment. Implement certain timing standards and flexibility on waivers for how long State and Local governments have for processing applications and permits in gaining access to public rights-of-way and for deploying broadband to their communities. Each of these taken into further consideration will help spur faster and more efficient deployments- benefitting consumers and businesses waiting for access to next-generation networks.

*36. As network demand grows, capacity needs in the middle mile and network core grow as well. What scalability requirements, if any, should NTIA place on middle-mile grant recipients?*

Investing in fiber should be a critical component in meeting this increasing demand on our nation’s networks. Every technology in the broadband ecosystem needs access to fiber—including fixed broadband, cable, cellular (mobile & 5G), and satellite. Building more fiber helps all, and fiber densification throughout the U.S. is critical for winning the race to 5G. For middle mile builds, this would mean providing excess dark fiber capable of supporting estimated increased use for considerable periods of time, and a few extra strands of dark fiber can provide a lot of broadband.

## **Conclusion**

We offer these comments in support of ensuring that the new NTIA Broadband Programs will lead to investment in broadband infrastructure in areas that are unserved or underserved; that will enable and promote competition that leads to faster speeds, better service, and more affordable pricing; and that will meet the needs of the communities in the long-term. INCOMPAS looks forward to working together with NTIA on the Broadband Programs, and if there is any other opportunity to help contribute and provide your staff with feedback, please let us know. Thank you for your consideration of our comments.

Sincerely,

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