



February 3, 2022

**VIA ELECTRONIC SUBMISSION**

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

*RE: Notice and Request for Comment, Infrastructure Investment and Jobs Act Implementation  
Docket No. NTIA-2021-0002*

Dear Administrator Davidson:

NATOA, the National Association of Telecommunications Officers and Advisors, appreciates the opportunity to comment in response to the NTIA’s Notice and Request for Comment (“Notice”) regarding the implementation of several broadband grant programs established in the Infrastructure Investment and Jobs Act (“Infrastructure Act” or “Act”). NATOA is the premier professional association of individuals and organizations responsible for—or advising those responsible for—communications policies and services in local governments throughout the country.

NATOA members, and the local governments they work for and represent, are essential partners in the effort to meet their communities’ communications needs, and today no need is greater than ensuring equitable access to affordable, high-quality broadband. The barriers that create the digital divide vary, as NTIA recognizes, “rang[ing] from economic and financial circumstances to unique geographic conditions, topologies, or other challenges ... .”<sup>1</sup> We urge NTIA to ensure that any Notice of Funding Opportunity (“NOFO”) and other rules or requirements yield grant programs that address the digital divide in *all* communities. To achieve this goal, NTIA should stand up grant programs that promote all permissible uses of funding and recognize affordability as a significant contributor to the digital divide and an integral part of the grant programs. NTIA also should ensure that eligible entities respect the significant role local governments play in broadband access and deployment by clearly implementing and enforcing Congress’s directive that eligible entities coordinate with local governments and subgrantees respect all applicable local laws and regulations.

---

<sup>1</sup> Notice Question 8.

## *Summary of Comments*

NATOA has identified several key points on which we urge NTIA to focus, as discussed in more detail below. Our key points relate back to Congress's recognition that the digital divide disproportionately affects communities of color, lower-income areas and rural areas and that there are different solutions to closing the digital divide for these populations.<sup>2</sup> There is no one-size-fits-all model NTIA or eligible entities can use ensure everyone, everywhere has access to affordable, high-quality broadband. We believe Congress provided NTIA with the flexibility to implement the various grant programs in a manner that reflects this underlying premise, and we urge NTIA to ensure its NOFOs and other program rules reflect the need for a variety of solutions to be implemented by a diverse group of stakeholders, including local governments.

NATOA's key points primarily relate to the Broadband Equity, Access and Deployment (BEAD) Program, though there is overlap with two other grant programs on which NTIA seeks comments, the Middle Mile Program and Digital Equity Planning Grant Program. Our key points are:

1. Congress established a range of uses for BEAD program funds and NTIA should stress that funding is and should be made available to address broadband needs in rural and non-rural areas and for network deployment and non-deployment uses.
2. Affordability is a significant factor in the digital divide and must be a component of determining where grant funds are best allocated.
3. Congressionally mandated coordination between eligible entities and local governments is essential to ensuring funding is directed to those Congress recognized as disproportionately affected by the digital divide: communities of color, lower-income areas and rural areas.
4. The grant programs do not implicate, and NTIA should ensure compliance with, local authority to manage use of public rights of way, which authority is essential to ensuring network deployments protect public and worker safety and safeguard public property.

## *Comments Responsive to NTIA Questions<sup>3</sup>*

### **1. Ensuring Use of Funds to Address Broadband Needs in Rural and Non-Rural Areas and for Deployment and Non-Deployment Uses<sup>4</sup>**

As NTIA recognizes in the Notice, BEAD funding can be used for a variety of specific purposes, as well as any NTIA-designated uses that facilitate the program's goals.<sup>5</sup> Congress established a variety of permissible uses to ensure that eligible entities and subgrantees would be able to direct funds to the areas and populations disproportionately affected by the digital divide, which includes

---

<sup>2</sup> See Infrastructure Act Section 60601(3)-(4).

<sup>3</sup> NATOA's comments are responsive to many questions posed in the Notice. To avoid repetition, our comments are organized by our key points rather than by NTIA's questions. A footnote at the beginning of each section provides a (non-exclusive) list of the questions to which we believe that section responds.

<sup>4</sup> We believe the comments in this section are responsive to Notice Questions 1, 5, 6, 7, 8, 13, 14, 18, 24, and 27.

<sup>5</sup> Notice Question 18.

communities of color, lower-income areas and rural areas. We are concerned that media focus has been placed on the BEAD program’s available funding for network deployment to un- and underserved areas—defined in the Infrastructure Act in part by the speeds of available service—which may lead eligible entities or potential subgrantees to miss the critical opportunity to make use of BEAD funds for the other permissible uses that are not tied to un- and underserved areas as defined in the Act. We encourage NTIA to take the steps described below to facilitate funding of the variety of uses Congress intended.

#### *A. Fund All Use Categories*

The “Use of Funds” provision of the BEAD program, found at subsection (f),<sup>6</sup> includes six categories of permissible uses of funds, many of which are not limited to network deployment to un- and underserved locations as defined in the Act. NTIA should make clear that eligible entities’ grant programs must provide funding for all use categories, consistent with their action plan or other strategic plan for closing the digital divide for all areas of the state. NTIA should require that an eligible entities’ initial and final proposals demonstrate its grant program(s) will offer funding for each use category listed in subsection (f). NTIA should allow an eligible entity to avoid this obligation only if it documents that, after completing its broadband plan and engaging in the required coordination with local governments, it reasonably determined there is no need for funding for that particular use.

We recognize that the Digital Equity Grant Program will provide funds to address some non-deployment issues contributing to the digital divide. However, the BEAD program is an “Equity” and “Access” program, in addition to a “Deployment” program. NTIA should ensure eligible entities do not preclude or de-prioritize any of the uses of funds expressly allowed under subsection (f) and should resist any calls to do so based on the possibility of future Digital Equity Grants.

#### *B. Establish Additional Permissible Uses*

Subsection (f)(6) authorizes NTIA to allow any use it determines necessary “to facilitate the goals of the Program.” We urge NTIA to use its authority under this subsection to establish additional permissible uses that are more likely to address the needs of communities or populations that might not be unserved or underserved locations as defined in the Infrastructure Act, but nevertheless lack reliable access to affordable, high-quality broadband services.

The findings in Section 60101 of the Infrastructure Act specifically reference that the digital divide “disproportionately affects communities of color, lower-income areas, and rural areas,” and finds that “the benefits of broadband should be broadly enjoyed by all[.]” NTIA should address these goals by establishing additional uses directed toward communities of color and lower-income or rural areas where the digital divide is evident even though they are not in “unserved locations” or “underserved locations.”

---

<sup>6</sup> Infrastructure Act, Section 60102(f). Unless otherwise noted, as used in these comments, references to “subsections” refer to subsections of Section 60102 of the Act.

For example, NTIA could permit funds to be used for grant programs not listed in subsection (f)(1)-(5) where the eligible entity, after participating in the required coordination with local governments, determines the program will help address the digital divide in communities of color, lower-income areas and rural areas without regard to the definitions of “unserved locations” or “underserved locations.” This type of provision would allow local governments and other stakeholders to contribute plans and ideas that best target communities and households and enable effective, efficient use of grant funds. It would, as Congress intended, provide flexibility to allow eligible entities, with significant input from local governments and with NTIA’s oversight, to address the varied causes and solutions to the digital divide within the state.

### *C. Clarify Limited Application of Required Prioritization*

NTIA should clarify the limited scope of the required prioritization for un- and underserved locations. As mentioned above, it seems that much of the public discourse regarding the BEAD program implies that it is intended to reach areas that are entirely unserved, particularly those in rural areas. While this is certainly part of the BEAD program, as discussed above, Congress provided multiple uses for BEAD funds, and only tied a discrete network deployment use to the prioritization of un- and underserved locations (followed by eligible anchor institutions).

To be clear, we are not suggesting funds should be directed to areas that have multiple providers of affordable, high-quality broadband. Rather, we believe Congress intended the grants to reach those who are unserved in a broad sense of the word, and not strictly limited to those areas that do not meet speed or latency thresholds. Specifically, as explained in section 3 below, we urge NTIA to find that the defined terms “unserved location” and “underserved location” include an affordability component. Whether or not NTIA adopts that approach, it is important to make clear that the prioritization for un- and underserved locations does not apply to all permissible uses of funds. To find otherwise ignores the plain language of the statute and would fail to address the various causes of the digital divide Congress intended to address.

As mentioned above, the “Use of Funds” subsection includes six potential uses of funds for which an eligible entity may award subgrants, one of which is “unserved service projects and underserved service projects” as provided in subsection (f)(1). These projects are defined (among other things) as those serving “unserved locations” and “underserved locations,” which the Infrastructure Act defines as areas with a lack of access to reliable 25/3 and 100/20 service, respectively, and with latency sufficient to support real-time, interactive applications. Other uses of funds under subsection (f) are not tied to these definitions.

The Infrastructure Act’s prioritization in subsection (h) mirrors the limited use of un- and underserved locations in subsection (f). The required prioritization in subsection (h), among other things, prioritizes projects serving “unserved locations” and “underserved locations,” then eligible community anchor institutions, but this prioritization only applies to network deployment projects under subsection (f)(1). This prioritization is set forth in subsection (h)(1), which discusses “Order

of awards, priority” and applies only to “subgrants for the deployment of broadband networks using grant funds received under this section, as authorized under subsection (f)(1) ...”.

NTIA should affirm the plain language of the statute, which is that the prioritization set forth in subsection (h)(1) applies only to broadband network deployment conducted under subsection (f)(1). Any of the remaining five permissible uses of funds, including any NTIA establishes under (f)(6), are not required to prioritize using the criteria in (h)(1). This clarification would avoid confusion over the use of funds for the various subcategories by clearly stating that eligible entities and subgrantees can and should make use of the funds for all permissible uses and need not prioritize those uses based on the speeds of available services except with respect to network deployment under subsection (f)(1).

For example, subsection (f)(2) allows subgrants for “connecting eligible community anchor institutions.” Although eligible anchors are part of the prioritization under subsection (h)(1), as discussed above, subsection (h)(1) expressly applies only to network deployment projects under subsection (f)(1). That Congress established a separate use of subgrants for deploying to eligible anchors under subsection (f)(2) shows the intent to allow subgrants for deployment projects outside the context of subsection (f)(1) and the prioritization of subsection (h)(1).

Similarly, subsection (f)(4) allows funds to be used for “installing internet and Wi-Fi infrastructure or providing reduced-cost broadband within a multi-family residential building ...” with similar priorities for low-income locations and “unserved households.” Again, this subsection is not subject to the prioritization of subsection (h)(1). We urge NTIA to clarify that “installing internet ... infrastructure” can include extending a network to these buildings without regard to whether or not the building is an “unserved location” or “underserved location.”

#### *D. State Preemptions of Municipal Broadband Networks Cannot Apply*

Many states limit or preempt local governments from constructing and/or operating broadband networks, which limitations can impede the provision of much-needed networks and services to un- and underserved areas. In the BEAD program, these limitations conflict with the provision that precludes eligible entities from excluding local governments from consideration for subgrants for network deployment.<sup>7</sup> Congress’s clear intent to ensure local governments are eligible subgrantees is meaningless if a state limits or prohibits local governments from using the funds for deployment or to meet the other requirements of the subsection (h). We have several suggestions to address this issue.

First, NTIA should require states that are eligible entities to disclose in their letter of intent whether state law limits, precludes or interferes with local governments’ ability (or the ability of any entity listed in subsection (h)(1)(A)(iii)) to deploy broadband networks, provide broadband services or to comply with any subgrantee requirements provided in the Act, including subsection (h).

---

<sup>7</sup> See Section 60102(h)(1)(A)(iii).

Second, NTIA should make clear that the Infrastructure Act imposes a condition on eligible entities that accept funding: They may not enforce, with respect to use of BEAD funds, any state law that limits, precludes or interferes with local governments' ability (or the ability of any entity listed in subsection (h)(1)(A)(iii)) to deploy broadband networks, provide broadband services or to comply with any subgrantee requirements provided in the Act, including subsection (h).

Third, NTIA should require states to affirm that they accept this condition and, in administering BEAD funds, will waive and not enforce any state law that limits, precludes or interferes with local governments' ability (or the ability of any entity listed in subsection (h)(1)(A)(iii)) to deploy broadband networks, provide broadband services or to comply with any subgrantee requirements provided in the Act, including subsection (h). This affirmation could be required in the letter of intent and/or the initial and final proposals.

Finally, if a state refuses to provide the assurance described above or otherwise attempts to limit or preclude use of the funds by local governments or any entity listed in subsection (h)(1)(A)(iii), NTIA should set clear consequences. For example, NTIA could withhold all or a portion of the state's allocation to allow local governments to directly apply for such funds as provided in the contingency procedures in subsection (c)(5).

## **2. Affordability Must be a Component of Determining Where Grant Funds are Best Allocated<sup>8</sup>**

As NTIA recognizes in the Notice, affordability is a key issue in addressing the digital divide.<sup>9</sup> Congress also recognizes this in its findings related to the BEAD program and thus provided NTIA with authority to ensure affordability is a central element of the BEAD program.<sup>10</sup> We urge NTIA to use that authority to ensure the BEAD and other grant programs clearly promote subgrants to assist communities and households that are unserved because available broadband is unaffordable.

### *A. Affordability as a Component of "Reliable" Service*

As discussed above, the BEAD program provides funding for network deployment projects for un- and underserved locations. Those terms are defined as lacking access to "reliable broadband service" with, among other things, speeds of not less than 25/3 or 100/20, respectively. We urge NTIA to include an affordability component in the determination of whether a location has reliable broadband service. If one cannot reliably pay for available broadband services, that service is not reliably available.

Congress clearly intended affordability to be a key component of the BEAD program. For example, Congress requires any network deployment funded through the BEAD program include

---

<sup>8</sup> We believe the comments in this section are responsive to Notice Questions 1, 8, 14, 16, 22, 23, and 24.

<sup>9</sup> Notice Questions 8, 24.

<sup>10</sup> Section 60101(3) and (4).

a low-cost option.<sup>11</sup> In doing so, Congress recognized that deployment of new networks is not enough to ensure an area is served; affordability must be addressed as a component of new network deployment. Further, in the findings of the BEAD program, Congress found that “[i]n many communities across the country, increased competition among broadband providers has the potential to offer consumers more affordable, high-quality options for broadband service.”<sup>12</sup> In other words, Congress understood that being “unserved” is not just about whether one has access to a broadband network. If an existing network is not providing affordable, high-quality service, Congress recognized that new deployments to increase competition are likely to improve affordability and service quality. We urge NTIA to follow Congress’s lead by finding that “reliable” service, as used in the definitions of “unserved location” and “underserved location,” means that the service must be affordable for the particular household, building or community. If it is not, then that is an “unserved location” or “underserved location.”

To be clear, we do not suggest that network deployment is necessary to address affordability in all or even most circumstances. But where an eligible entity, in coordination with local governments, determines that network deployment is likely to provide affordable services to communities or populations that have been disproportionately impacted by the digital divide, that option should be available regardless of whether there is an existing, unaffordable service option that happens to meet certain speed thresholds.

#### *B. Clarity on Use of Funds for Multi-Family Buildings*

As discussed above, Subsection (f)(4) allows funds to be used for “installing internet and Wi-Fi infrastructure or providing reduced-cost broadband within a multi-family residential building ...” with priorities for low-income locations and “unserved households.” We urge NTIA to stress that this subcategory provides flexibility for providing internet and/or WiFi through a variety of means aimed at addressing affordability (*e.g.*, deployment of networks or equipment; affordability programs/free service). Again, funds can be used to serve these buildings whether or not there is existing services that meet the 25/3 or 100/20 thresholds that apply to uses under subsection (f)(1).

In addition, we note that the phrase “unserved households” is not defined in the Infrastructure Act. NTIA should clarify that because “unserved households” is undefined, the definition is not pegged to the 25/3 speed threshold or latency description in the definition of “unserved location.” NTIA should either establish a definition for “unserved households” or allow eligible entities, in coordination with local governments, to define this term in their initial and/or final proposals with an emphasis on, or at a minimum inclusion of, affordability.

#### *C. Affordability-Specific Uses*

As discussed above, subsection (f)(6) allows NTIA to include any use it determines necessary “to facilitate the goals of the Program.” The program goals unquestionably include affordability, and

---

<sup>11</sup> See Section 60102(h)(4)(B).

<sup>12</sup> Section 60101(4).

thus we urge NTIA to use its authority under this subsection to establish additional permissible uses that address affordability.<sup>13</sup> For example, should NTIA opt not to include an affordability component in the term “reliable” as used in the definitions of un- and underserved locations under subsection (f)(1), it could adopt a separate use category permitting use of funds for subgrants, including subgrants for network deployment, that are intended to make affordable broadband available to communities or populations, particularly communities of color, lower-income areas, and rural areas, that lack affordable broadband options without regard to whether or not they live in an unserved or underserved location, as defined in the Infrastructure Act.

### **3. Required Coordination Between States and Local Governments is Essential<sup>14</sup>**

The Infrastructure Act requires states to coordinate with local governments in various stages of the BEAD program and in developing State Digital Equity Plans. Robust coordination is essential in ensuring state plans and programs accurately identify and effectively address the varied causes of the digital divide in our communities. While some aspects of these requirements are specifically stated in the Act, Congress expected NTIA to provide more detailed guidance. We urge NTIA, as it did in the Notice, to emphasize the importance of coordination with local governments and provide details on the coordination efforts eligible entities must undertake, as well as the consequences for failing to meet those obligations.

#### *A. Require a Clear Process for Coordination*

The BEAD provisions of the Infrastructure Act specify that states must give local governments the opportunity to submit plans for consideration by the eligible entity and to comment on the initial and final proposals.<sup>15</sup> We suggest NTIA implement these provisions by requiring eligible entities to establish a process for providing all local governments within the state access to plans and proposals with sufficient time to review and provide comment before eligible entities submit them to NTIA. NTIA should provide clear details on the process eligible entities should use, including:

- Clearly established timelines that provide adequate time for local governments to review and provide comments on plans and proposals.
- A process for eligible entities to meet the “consideration” standard for plans submitted by local governments; for example, a written explanation of which plans or portions of plans were accepted and a reasonable basis, in writing, for those that were rejected.
- A clear description of how local governments’ comments on initial or final proposals were incorporated or, if rejected, a reasonable basis, in writing, for those that were rejected.

NTIA could extend these and other applicable standards to action plans contemplated in the BEAD program as well as coordination required for State Digital Equity Plans.

---

<sup>13</sup> See Section 60101(3) and (4).

<sup>14</sup> We believe the comments in this section are responsive to Notice Questions 1, 5, 6, 7, 8, 19, 20, and 31.

<sup>15</sup> See, e.g., Section 60102(e)(1)(D); (e)(3)(A)(ii); (e)(4)(A)(ii).



We also encourage NTIA to establish and publicize a process for local governments to contact NTIA with any concerns about at state's coordination efforts.

### *B. Ensure Local Government Input on All State Plans*

The BEAD program requires states to collaborate with local and regional entities in creating its five-year action plan. However, these action plans are only required of states that receive planning funds as outlined in the Infrastructure Act; states may submit a “comparable strategic plan” as part of its initial proposal instead of the action plan described in detail in the BEAD program.<sup>16</sup> Though we expect most states will accept the planning funds and be required to submit an action plan, we urge NTIA to make clear that a state that submits an alternative strategic plan pursuant to subsection (e)(3)(A)(i)(I)(bb) must demonstrate that, in formulating the plan, the state engaged in coordination with local governments in a manner comparable to that required for action plans.

### *C. Consequences and Contingency Procedures*

NTIA should include clear consequences for states that fail to engage in appropriate coordination at every required stage of the various grant processes. Because Congress recognized that coordination with local governments is essential in ensuring BEAD funds are distributed where they are most needed, NTIA can and should make clear that states may be denied funding if they fail to adequately coordinate.

The BEAD program provides that local governments may become “eligible entities” if a state fails to timely submit and receive approval of its letter of intent, initial proposal or final proposal—part of the “contingency procedures” of the program.<sup>17</sup> NTIA should make clear that it will reject any of these applications if a state has failed to adequately coordinate, which rejection will allow local governments to apply as eligible entities. Though the Infrastructure Act allows NTIA to provide eligible entities with an opportunity to resubmit an initial or final proposal that is incomplete or disapproved, to prevent endless resubmittals from thwarting local governments’ right to become eligible entities, NTIA should set a clear and short timeline for resubmittal, after which local governments’ right to become an eligible entity would be triggered.

We encourage NTIA to take seriously the possibility that states may not participate in the BEAD program or might fail to submit an acceptable initial or final proposal. Congress included the “contingency procedures” because it anticipated a state might decide to forego BEAD funding and did not want that decision to leave communities un- or underserved. NTIA must make clear when and how the contingency procedures are triggered, including when and how local governments will be notified of their opportunity to be eligible entities. NTIA also should provide a process for local governments that become eligible entities to modify any application or plan previously submitted by the state. A local government acting as an eligible entity may not be able to

---

<sup>16</sup> See Section 60102(e)(1)(D)(i); (e)(3)(A)(i)(I)(bb).

<sup>17</sup> See Section 60102(c)(5).

implement aspects of a state-prepared plan or proposal and thus need a process to ensure they are working from plans and proposals they are able to execute. Being tied to an infeasible state plan or proposal could effectively preclude localities from exercising their right to step in as eligible entities to address the digital divide in their communities.

#### **4. Protecting Local Rights of Way Management Authority<sup>18</sup>**

Local governments generally have established requirements relating to use of public rights of way and property by entities wishing to install utility or utility-type facilities on an essentially permanent basis. We are aware of unfounded suggestions that these requirements might interfere with broadband deployment, and we are concerned that some entities might attempt to use the grant programs as a vehicle for limiting local authority to maintain these requirements. We strongly urge NTIA to reject any suggestion that its rules or requirements for any grant programs allow or incentivize states to preclude or impose new limitations on local rights of way management authority or allow subgrantees to avoid otherwise applicable local requirements.

Local rights of way requirements are in place to protect the public interest, including public and worker safety during construction, quality workmanship resulting in reliable services and proper restoration of streets, sidewalks and other public property. These important safety tools are not interfering with broadband deployment. Any assertion that they are—that ensuring safe, quality work and responsible use of public assets contributes to the digital divide—is disingenuous. This premise led the FCC to curtail some local rights of way requirements, yet it did not result in the promised broadband deployment to un- and underserved areas, as illustrated by the very fact that the BEAD program and other grant programs are urgently needed.

Further, local governments' ability to comply with various federal and state laws could be compromised should NTIA or eligible entities attempt to make exceptions to applicable local laws for BEAD or other grant recipients. For example, the FCC found that local fees for use of certain public property for small wireless facilities must be non-discriminatory and comply with certain aesthetic requirements. Local governments must be able to apply these same requirements to BEAD-funded projects or they may be unable to demonstrate compliance with FCC orders.

For these reasons, NTIA must make clear that eligible entities may not directly or indirectly preclude or impose new limitations on local rights of way management authority in the process of or associated with the implementation of the broadband grant program. Congress was clear in the BEAD program that local governments must be included in the states' planning process and cannot be excluded from participation in the state programs for funding network deployment. It would be inconsistent with Congress's clear intent that the critical role of local governments in broadband deployment be respected if NTIA were to allow eligible entities to use the same grant program to directly or indirectly subvert or avoid local governments' role in managing the public property in which subgrantees will be installing grant-funded networks.

---

<sup>18</sup> We believe the comments in this section are responsive to Notice Questions 1, 5, 6, 7, 8, and 19.

Indeed, Congress made this intent clear. Subsection (g)(2)(A)(i) requires that eligible entities ensure any prospective subgrantee can comply with all applicable Federal, State and local laws. We urge NTIA to include in its templates for initial and final proposals an attestation from eligible entities that, with respect to applicable local laws, it will not directly or indirectly interfere with or limit the application of those laws to subgrantees or their projects. We further urge NTIA to make clear that compliance with local laws includes obtaining any required permits and applicable agreements such as franchises, licenses, or attachment agreements, and paying any applicable fees that apply to similar entities and projects.

***Conclusion***

We appreciate your consideration of our suggestions and concerns. We look forward to working with NTIA, eligible entities and subgrantees to ensure the Infrastructure Act's broadband grant programs fully, and finally, close the digital divide and achieve the promise of access to affordable, high-quality broadband for everyone, everywhere.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Nancy Werner', with a long horizontal flourish extending to the right.

Nancy Werner  
General Counsel