

August 8, 2023

**VIA ELECTRONIC MAIL**

**Comments on Connecting the Commonwealth: A Five-Year Strategy Toward Internet for All**

The Broadband Communications Association of Pennsylvania (“BCAP”) respectfully submits these comments on the Connecting the Commonwealth: A Five-Year Strategy Toward Internet for All (herein referred to as the “Draft Five-Year Plan”) developed by the Pennsylvania Broadband Development Authority (“Authority”).<sup>1</sup> The Draft Five-Year Plan is required for each Eligible Entity receiving Initial Planning Funds under the Broadband Equity, Access, and Deployment (“BEAD”) Program, authorized under the federal Infrastructure Investment and Jobs Act of 2021 (“IIJA” or “Infrastructure Act”).<sup>2</sup> The Draft Five-Year Plan is intended as an initial planning document regarding the Commonwealth’s broadband goals and priorities which will inform the Commonwealth’s further planning efforts and, in particular, its Initial and Final Proposals in connection with the BEAD Program.

BCAP is a member-driven organization based in Harrisburg that actively promotes broadband cable and telecommunications industry issues in Pennsylvania. BCAP — the nation’s first state cable association — represents cable operators, programmers, and equipment suppliers that collectively provide service to nearly three million Pennsylvania households and businesses. BCAP members actively participate in federal and state grant and related programs intended to encourage and promote the widespread deployment and adoption of broadband infrastructure and services. BCAP appreciates the opportunity to comment on the draft Five-Year Plan and looks forward to continued opportunities to work with the Authority in implementing the BEAD Program.

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BCAP appreciates the Draft Five-Year Plan’s acknowledgement that the BEAD Program specifically “prioritizes last-mile support for unserved and underserved communities.”<sup>3</sup> BCAP supports this prioritization, as required by the National Telecommunications and Information Administration’s (“NTIA’s”) BEAD Notice of Funding Opportunity (“BEAD NOFO”) and the IIJA,<sup>4</sup> and believes the BEAD Program offers a tremendous opportunity to close remaining broadband availability gaps in the Commonwealth. BCAP notes that the cable industry has an unparalleled record of deploying robust and resilient high-speed broadband networks throughout the Commonwealth and stands ready to apply for BEAD subgrants pursuant to fair and reasonable rules that leverage public money to help achieve the Commonwealth’s goal of universal high-speed broadband access.

Having a common understanding of locations that are truly unserved is critical to the BEAD Program’s success, particularly because of the finite resources available to address broadband deployment

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<sup>1</sup> See Pennsylvania Department of Community & Economic Development, Pennsylvania Broadband Authority, *Connecting the Commonwealth: A Five-Year Strategy Toward Internet for All* (July 2023), <https://dced.pa.gov/download/bead-five-year-action-plan/?wpdmdl=120962>.

<sup>2</sup> See IIJA Division F, Title I, Section 60102, Public Law 117-58, 135 Stat. 429 (Nov. 15, 2021).

<sup>3</sup> Draft Five-Year Plan at 1.

<sup>4</sup> NTIA, *Notice of Funding Opportunity: Broadband Equity, Access, and Deployment Program* at 34 (May 13, 2022), <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf> (“BEAD NOFO”).

issues. To achieve the Draft Five-Year Plan’s goals, the Authority’s BEAD Program rules must stretch the limited federal funding available as far as possible by targeting investments to those areas with the greatest need. In this regard, BCAP notes that the Draft Five-Year Plan indicates that the Authority has identified over 333,000 BEAD-eligible locations. In contrast, NTIA’s press release announcing the Commonwealth’s BEAD allocation indicated that fewer than 279,000 homes and small businesses in the Commonwealth lack access to a high-speed Internet connection.<sup>5</sup> BCAP urges the Authority to review the Draft Five-Year Plan’s estimation of locations lacking broadband access in light of NTIA’s BEAD Program methodology, which will properly orient the Commonwealth’s BEAD allocation toward addressing first the remaining unserved and then the remaining underserved locations in the Commonwealth, funding end-to-end fiber projects wherever feasible.<sup>6</sup>

To ensure the obstacles or barriers identified in the Draft Five-Year Plan do not detract from the BEAD Program’s successful implementation, and further address conditions that are unique to the Commonwealth, BCAP offers the following comments on specific aspects of the Draft Five-Year Plan:

1. Broad ISP Participation, Including from Providers with Robust Financial, Managerial, Operational, and Technical Expertise, Will Be Essential to Achieving BEAD Program Goals

BCAP appreciates the Draft Five-Year Plan’s acknowledgement that the Authority “partners with BCAP, a network of Pennsylvania cable operators, equipment suppliers, programmers, and other allied companies advocating for Pennsylvania’s digital future.”<sup>7</sup> Ensuring broad ISP participation from BCAP member companies is necessary to ensure that the Commonwealth’s BEAD Program is a success. Indeed, NTIA expressly contemplates that “invit[ing] participation in the [ISP selection] process by a *broad cross-section* of potential subgrantees” will help facilitate robust competition for BEAD subgrants.<sup>8</sup> This, in turn, will lead to a larger application pool that consists of a range of provider types, including experienced commercial ISPs, like BCAP members, with a history of successful partnerships with public entities within the Commonwealth.

Because the Commonwealth will have competitive options to choose from, the Commonwealth ultimately will be able to select the most qualified providers to meet the NOFO’s rigorous provider qualification, deployment, service quality, and affordability demands.<sup>9</sup> Greater ISP participation in the competitive bidding process will also bring the potential for higher matching funds, which, in NTIA’s words, “demonstrate commitment to a particular project and minimize BEAD funding outlay,” thereby “extend[ing] the reach of the BEAD program funding.”<sup>10</sup> Not only will this help to ensure that every unserved and underserved location in the Commonwealth has access to reliable, affordable, high-speed Internet, but incentivizing robust matching funds also will increase the chances that sufficient BEAD funds will remain to achieve the Commonwealth’s adoption-related goals of ensuring all Pennsylvanians have the “tools and skills to fully engage in today’s digital society and economy.”<sup>11</sup>

To that end, BCAP urges the Authority to ensure that applicants have the competence to carry out BEAD-funded activities in compliance with all applicable federal, state, and local laws, as well as the

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<sup>5</sup> [Biden-Harris Administration Announces \\$1.1 Billion to Pennsylvania for High-Speed Internet Infrastructure | Internet for All.](#)

<sup>6</sup> See, e.g., BEAD NOFO at note 6.

<sup>7</sup> Draft Five-Year Plan at 18.

<sup>8</sup> BEAD NOFO at 35 (emphasis added).

<sup>9</sup> See *id.* at 64-76.

<sup>10</sup> *Id.* at 20.

<sup>11</sup> Plan at 5.

managerial and financial capacity to meet the commitments of the subgrant and BEAD Program requirements. Additionally, the Commonwealth should ensure that applicants have the technical and operational capability to provide the services promised, in the manner contemplated by the subgrant award. By the same token, BCAP should be appropriately skeptical of directing the Commonwealth's finite BEAD funding allocation to experiment with high-risk broadband delivery models that do not have track records of success or to invest in inexperienced providers with business models that may fail after BEAD funding (which is for capital expenditures – not operational expenditures) has been drawn down. The stakes are too high for Pennsylvanians on the wrong side of the digital divide.

## 2. Leverage Providers' Existing Plans to Satisfy BEAD Affordability Requirements.

BCAP appreciates the Draft Five-Year Plan's focus on increasing participation in Affordable Connectivity Program ("ACP"), given that BCAP members have helped millions of families and seniors in need get and stay connected to the Internet, including through our participation in ACP and its predecessor, the Emergency Broadband Benefit program. As the Draft Five-Year Plan recognizes, the ACP is a federal program with limited funding available, projected to run out without further Congressional action.<sup>12</sup> To that end, BCAP strongly encourages the Authority to urge the federal government to provide consistent, uninterrupted funding for ACP.

BCAP also notes with appreciation the Authority's acknowledgement that "[m]any providers in Pennsylvania are participating in the [ACP] program, which can bring the total cost of Internet service to \$0 when applied to a plan priced at \$30 or below."<sup>13</sup> In the context of the BEAD Program, the Authority should therefore leverage providers' existing plans that already satisfy BEAD's affordability requirements. Specifically, many of the existing low-income programs referenced by the Authority satisfy both the Commonwealth's definition of the low-cost option and the NOFO's definition of "eligible subscriber."<sup>14</sup> Thus, the Authority can also most effectively and efficiently pursue the NOFO's affordability goals by adopting this approach to broadband affordability, which will allow the Commonwealth to "best effectuate the purposes of the [BEAD] [P]rogram" and "best serve the needs of [Pennsylvania] residents"<sup>15</sup> for the reasons discussed below. It will also ensure that the Authority does not disrupt the success of ISP's existing offerings by imposing rate regulation — which the IJA prohibits, limits flexibility, stagnates investment and may lead to low-income consumers getting inferior service over time.

*First*, as discussed above, BCAP member companies offer low-cost broadband plans that are specifically designed to connect low-income customers and already meet the IJA requirement.<sup>16</sup> By ensuring that low-cost broadband plans offered by BCAP member companies will meet the requirements of the NOFO's "low-cost broadband service option," the Authority will avoid unnecessary administrative

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<sup>12</sup> Draft Five-Year Plan at 43.

<sup>13</sup> Draft Five-Year Plan at 26.

<sup>14</sup> See BEAD NOFO at 12 (defining an "Eligible Subscriber" as any household seeking to subscribe to broadband internet access service that (1) qualifies for the ACP or any successor program, or (2) is a member of a household that has income at or below 200 percent of the Federal Poverty Guidelines or qualifies for various other government benefits such as the Supplemental Nutrition Assistance Program, Medicaid, Federal Public Housing Assistance, Supplemental Security Income, Veterans and Survivors Pension benefit, or Special Supplemental Nutrition Program for Women, Infants, and Children).

<sup>15</sup> BEAD NOFO at 66, 68.

<sup>16</sup> For example, Charter's Spectrum Internet 100 is a 100/10 Mbps service exclusively available to qualifying ACP-eligible households with offers starting at a promotional rate as low as \$29.99/month for qualifying customers including a modem and in-home WiFi at no additional charge.

burdens by efficiently utilizing providers' significant experience with such plans, including disclosures that are already being made to the FCC for ACP compliance.<sup>17</sup>

*Second*, when defining the “low-cost broadband service option,” the Authority should not expand “eligible subscriber” beyond the NOFO’s definition, which helpfully mirrors the definitions used by the ACP and other benefit programs.<sup>18</sup> Importantly, this assures that all households that qualify for ACP (or any successor program) can avail themselves of the low-cost option.<sup>19</sup> Adopting additional “eligible subscriber” criteria could add significant administrative burdens (including verification burdens the Commonwealth would have to shoulder); compromise consumers’ confidential information; and increase the likelihood of waste, fraud, and abuse.

*Third*, requiring providers to offer the same prices in BEAD areas as they provide elsewhere in the Commonwealth is the most effective and efficient way of ensuring middle-class affordability. Areas that will be served by BEAD-funded networks are often less dense, more rural, and more expensive to serve. So, the Authority should make consistency of broadband pricing and packages across BEAD-subsidized and unsubsidized areas an explicit goal of the Commonwealth’s middle-class affordability proposal. Specifically, the Authority should allow a subgrantee to satisfy the requirement by (i) offering standard pricing and service packages in project areas that are consistent with those the subgrantee makes generally available in other areas of the Commonwealth; and (ii) transparently disclosing prices and terms to all prospective subscribers in those areas.<sup>20</sup> Should a provider not have comparable services in the Commonwealth (*i.e.*, no unsubsidized areas) or prefer to demonstrate middle-class affordability an alternative way, they should be allowed to satisfy this requirement if its pricing in the BEAD-funded project

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<sup>17</sup> See generally *In re Affordable Connectivity Program*, Fourth Report & Order & Further Notice of Proposed Rulemaking, WC Docket No. 21-450, FCC 22-87 (rel. Nov. 23, 2022) (implementing ACP Transparency Data Collection rules for aggregating information related to the price and subscription rates of internet service offerings of ACP providers).

<sup>18</sup> See, e.g., *Affordable Connectivity Program Consumer FAQ*, FCC (updated Sept. 27, 2022), <https://www.fcc.gov/affordable-connectivity-program-consumer-faq> (“A household is eligible for the Affordable Connectivity Program if the household income is at or below 200% of the Federal Poverty Guidelines, or if a member of the household meets at least one of the criteria below: [p]articipates in certain assistance programs, such as SNAP, Medicaid, Housing Choice Voucher (HCV) Program (Section 8 Vouchers), Project-Based Rental Assistance (PBRA)/202/811, Public Housing, SSI, WIC, or Lifeline; [p]articipates in Tribal specific programs, such as Bureau of Indian Affairs General Assistance, Tribal TANF, Affordable Housing Programs for American Indians, Alaska Natives or Native Hawaiians, or Food Distribution Program on Indian Reservations; [p]articipates in the Free and Reduced-Price School Lunch Program or School Breakfast Program, including at U.S. Department of Agriculture (USDA) Community Eligibility Provision schools; [r]eceived a Federal Pell Grant during the current award year; or [m]eets the eligibility criteria for a participating provider’s existing low-income internet program.”).

<sup>19</sup> BEAD NOFO at 12-13.

<sup>20</sup> Some providers do not have comparable services in the Commonwealth (*i.e.*, no unsubsidized areas) or may prefer to demonstrate middle-class affordability in an alternative way. They should be allowed to satisfy this requirement if their pricing in the BEAD-funded project area is at or below the FCC’s annual broadband benchmark reflecting pricing in urban areas, as described in 47 C.F.R. § 54.313(a)(3). As part of their annual reporting requirements, high-cost recipients must provide, among other things, “[a] certification that the pricing of a service that meets the Authority’s broadband public interest obligations is no more than the *applicable benchmark to be announced annually in a public notice issued by the Wireline Competition Bureau*, or is no more than the non-promotional price charged for a comparable fixed wireline service in urban areas in the states or U.S. Territories where the eligible telecommunications carrier receives support.” 47 C.F.R. § 54.313(a)(3) (emphasis added).

area is at or below the FCC’s annual broadband benchmark reflecting pricing in urban areas, as described in 47 C.F.R. § 54.313(a)(3).<sup>21</sup>

Finally, BCAP notes that any restrictive price control should therefore be rejected as it would risk provider participation, thereby hindering the Authority’s ability to ensure that the Commonwealth’s BEAD allocation is used efficiently, and ultimately jeopardizing the Authority’s ability to extend service to the unserved and underserved locations in Pennsylvania. Thus, BCAP urges the Authority to reject NTIA’s *example* requirement that a low-cost broadband service option cost \$30 per month and the suggestion that BEAD recipients must offer low-cost, high-speed plans to all middle-class households. As previously discussed, the IJA contains a specific prohibition on rate regulation — which these provisions constitute — and, beyond that, such requirements also jeopardize the participation of providers. And indeed, such rate regulation is particularly unnecessary in light of the fact that the Authority has already acknowledged that “[m]any providers in Pennsylvania are participating in the [ACP] program, which can bring the total cost of internet service to \$0 when applied to a plan priced at \$30 or below.”<sup>22</sup>

### 3. Adopt BCAP’s Labor Recommendations.

Importantly, BCAP notes that in the context of the Commonwealth’s implementation of the Authority’s Broadband Infrastructure Program Guidelines, it specified the Commonwealth Prevailing Wage Act applies to projects awarded under that Program. BCAP recently wrote to the Pennsylvania Department of Labor and Industry, urging it to replicate many other jurisdictions across the country by creating specific classifications for teledata work, in particular, teledata lineman, cable splicers, and installers.<sup>23</sup> BCAP noted that the creation of such a classification will allow the Commonwealth and BCAP members performing work on the Commonwealth’s behalf to manage resources more effectively by saving time and paying wages appropriate to the construction work required, thereby allowing for a more expeditious expansion and enhancement of broadband infrastructure.

BCAP reiterates that request here, and specifically requests that the Authority support BCAP’s request to the Department of Labor and Industry to ensure that, in the context of the BEAD Program, the Authority permit flexibility on classifications to the maximum extent permissible by law. Beyond that, the IJA requires consideration of only two criteria related to an applicant’s workforce, which are also the only two mandatory factors in the BEAD NOFO: (i) the applicant’s demonstrated record of complying with federal labor and employment laws; and (ii) plans to continue to comply with said laws.<sup>24</sup> Beyond these requirements, the Authority need not — and should not — adopt any other commitments to satisfy the baseline requirements established by the IJA. Based on the experience of BCAP member companies serving the Commonwealth, BCAP believes that the Authority can best address labor considerations by leveraging subgrantees’ existing workforce training and development programs to effectuate NTIA’s directive of ensuring a diverse, highly skilled workforce.

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<sup>21</sup> As part of their annual reporting requirements, high-cost recipients must provide, among other things, “[a] certification that the pricing of a service that meets the Authority’s broadband public interest obligations is no more than the applicable benchmark to be announced annually in a public notice issued by the Wireline Competition Bureau, or is no more than the non-promotional price charged for a comparable fixed wireline service in urban areas in the states or U.S. Territories where the eligible telecommunications carrier receives support.” 47 C.F.R. § 54.313(a)(3).

<sup>22</sup> Draft Five-Year Plan at 26.

<sup>23</sup> Letter from Todd Eachus, President, Broadband Communications Association of Pennsylvania, to Secretary Nancy Walker, Pennsylvania Department of Labor and Industry (July 12, 2023).

<sup>24</sup> 47 U.S.C. § 1702(h)(1)(A)(iv)(IV).

For this reason, it is essential that beyond these requirements, the Authority avoid adopting additional regulations beyond the baseline requirements established by the IJJA. BCAP member companies are committed to providing a safe and healthy workplace in the Commonwealth. In the context of the BEAD Program, the established processes and best management practices of BCAP member companies meet or exceed regulatory requirements and are well-suited to demonstrate prospective subgrantees' employment and labor commitments. A flexible approach that offers multiple ways for applicants to satisfy the NOFO's workplace requirements will ensure that such policies are appropriately tailored to the specific laws and landscape of providers and workforce in the Commonwealth. With respect to worker-led health and safety committees, for example, the Authority can flexibly evaluate the applicant's reasonable and accessible method for employees to identify and escalate concerns and have them addressed.

BCAP additionally recommends that the Authority leverage subgrantees' existing workforce development programs to effectuate NTIA's directive of ensuring a diverse, highly skilled workforce. BCAP believes that attracting, developing, and retaining our highly skilled workforce is critical to successfully executing the business strategies of our member companies. This view is reflected in how our member companies value the fact that their employees should be experts in their field and pursue continuous growth and learning. With significant opportunities for job training and advancement, the employees of BCAP member companies develop the skills and expertise necessary to build a long and successful career across the country and in the Commonwealth. We recognize that having a highly-skilled and long-tenured workforce is an asset to our customers and allows our member companies to deliver better products and services in the Commonwealth.

Evaluating the provider's established and effective workplace practices, rather than imposing new mandates, will allow the Commonwealth to meet the BEAD Program requirements in a manner that is consistent with the Commonwealth's labor policies generally and most effectively supports efficient broadband deployment in the Commonwealth. Particularly if applicants are required to make organizational changes to their employment policies as a condition of applying for funding, many may choose to forgo BEAD opportunities altogether. Thus, the Authority must ensure that it does not disrupt or impose any unnecessary and burdensome additional labor requirements that would be a poor fit for many employers in the Commonwealth.

#### 4. Adopt BCAP's Volume I Challenge Process and Mapping Accuracy Recommendations.

BCAP appreciates the Draft Five-Year Plan's acknowledgement that "[t]o improve broadband service infrastructure and availability, the Commonwealth must first be confident that there is accurate data on existing broadband availability."<sup>25</sup> As part of the Authority's Initial Proposal, it must identify existing efforts by the federal government or the Commonwealth to deploy broadband, identify each unserved location and underserved location within the Commonwealth, and include a detailed plan as to how the Commonwealth will "ensure a transparent, evidence-based, and expeditious challenge process" for challenging the Commonwealth's determinations as to whether a particular location is unserved or underserved.<sup>26</sup> BCAP looks forward to engaging with the Authority as it develops its evidentiary requirements for its challenge process, and specifically urges the Authority to incorporate the following elements into its challenge processes to best ensure the Commonwealth efficiently and effectively utilizes its limited BEAD funding.

##### **a. Adopt a sufficient timeframe for the individual phases of the challenge process.**

BCAP urges the Authority to employ the flexibility provided by NTIA's guidance to adopt a

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<sup>25</sup> Draft Five-Year Plan at 22.

<sup>26</sup> 47 U.S.C. § 1702(h)(2)(A); BEAD NOFO at 31.

challenge process with sufficiently long timeframes to ensure that it efficiently and accurately identifies locations eligible for BEAD funding throughout the Commonwealth. Although NTIA’s guidance contains *suggested* minimum timing requirements to complete the individual phases of the challenge process, NTIA explicitly states that the Authority may “choose longer periods when determining the specific timeframes for the various components of the challenge process (e.g., challenge submission, rebuttal window).”<sup>27</sup> Indeed, NTIA’s finalized model challenge process now includes 30-day timelines for both the challenge submission phase and rebuttal window.<sup>28</sup>

Accordingly, BCAP urges the Authority to adhere to NTIA’s strong recommendation that the Authority adopt a sufficiently long challenge submission window and rebuttal period, and to adopt an overall timeframe of 120 days to conduct the challenge process. The BEAD challenge process will require providers to comprehensively review and respond to the Authority’s initial serviceability designations for every eligible location, likely as they are concurrently undertaking the same exercise in numerous other states. BCAP specifically urges the Authority to provide at least:

- 45 days for the challenge submissions; and
- 45 days for the rebuttal window.

Providing this 45-day timeframe for the submission and rebuttal windows, respectively, is realistic and necessary to formulate and respond to challenges, particularly for a challenge process of this scope. Indeed, this proposed timeframe for each of the challenge submission and rebuttal windows is already shorter than many existing state and federal broadband deployment programs, and is the minimum amount of time that the Authority should adopt. Although NTIA’s guidance specifically states that the Authority can (and should) begin the “final determination” phase of the challenge process on a rolling basis as soon as the rebuttal window opens, these proposed timeframes will still afford 30 days from the conclusion of the rebuttal window for the Authority to make the final determinations of the classification of challenged locations.

Shorter periods than those described above are simply too brief to allow for sufficient analysis and challenge of an entire statewide map of locations, and could result in the Authority receiving incomplete information, ultimately impeding the accuracy of resulting funding decisions. And such an abbreviated timeframe could undermine the goal of the IJA to direct BEAD funding to unserved and underserved areas.

**b. Establish a window to allow providers to submit evidence of enforceable commitments to deploy broadband within the Commonwealth and ensure that locations served with DSL are eligible for BEAD funding.**

BCAP appreciates the Authority’s commitment to ensuring that it accurately identifies every broadband serviceable location (“BSL”) in the Commonwealth eligible for funding. In the BEAD context, BCAP urges the Authority to generally follow NTIA’s guidance<sup>29</sup> regarding the approach to ensure that served locations are not eligible for BEAD funding. Specifically, NTIA’s guidance on the BEAD challenge process requires the Commonwealth to: (i) publish a set of eligible locations for BEAD funding, *i.e.*,

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<sup>27</sup> NTIA, *BEAD Challenge Process Policy Notice*, at 20 (June 28, 2023), [https://ntia.gov/sites/default/files/publications/beat\\_challenge\\_process\\_policy\\_notice\\_final.pdf](https://ntia.gov/sites/default/files/publications/beat_challenge_process_policy_notice_final.pdf) (“NTIA BEAD Challenge Process Policy Notice”).

<sup>28</sup> NTIA, *BEAD Model Challenge Process*, at 12 (June 28, 2023), [https://www.ntia.gov/sites/default/files/publications/beat\\_model\\_challenge\\_process.zip](https://www.ntia.gov/sites/default/files/publications/beat_model_challenge_process.zip) (“NTIA BEAD Model Challenge Process”).

<sup>29</sup> *BEAD Challenge Process Policy Notice* at 11-12.

whether each location is “unserved” or “underserved” based on the FCC’s National Broadband Map and its Broadband Funding Map;<sup>30</sup> and (ii) exclude from the map any location that is already subject to an enforceable federal, state, or local commitment to deploy qualifying broadband.<sup>31</sup>

BCAP also specifically urges the Authority to exercise its explicit flexibility under NTIA’s guidance to treat locations that the FCC’s BDC Map shows to be “served” exclusively by DSL technology as “underserved,” and therefore eligible for BEAD funding.<sup>32</sup> Indeed, the FCC’s own data demonstrates that “actual speeds experienced by the subscribers of most ISPs are close to or exceed the advertised speeds. DSL broadband ISPs, however, continue to advertise ‘up-to’ speeds that, on average, exceed the actual speeds experienced by their subscribers.”<sup>33</sup> As noted by NTIA, this targeted modification will also “better reflect the locations eligible for BEAD funding because it will facilitate the phase-out of legacy copper facilities and ensure the delivery of ‘future-proof’ broadband service.”<sup>34</sup>

Beyond that, NTIA’s guidance specifically requires the Commonwealth, prior to release of the Commonwealth’s initial eligible locations, to ensure that all of these commitments are adequately captured and accounted for by consulting at least the following data sets:

- (i) the FCC’s Broadband Funding Map;
- (ii) data sets from state broadband deployment programs that rely on funds from the Capital Projects Fund and the Commonwealth and Local Fiscal Recovery Funds administered by the U.S. Treasury; and
- (iii) Pennsylvania state and local data collections of existing enforceable commitments.<sup>35</sup>

In addition, BCAP urges the Authority to establish a 30-day period *prior* to the initiation of the challenge submission window to allow providers to submit evidence of such a commitment. While the Commonwealth will likely have all information related to awards issued by the Commonwealth from its state-administered broadband grant programs, there are other awards, particularly those granted directly to providers by local governments — primarily using direct funding received from the American Rescue Plan Act’s State and Local Fiscal Recovery Funds — that may not yet be identified on existing maps or otherwise

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<sup>30</sup> See BEAD NOFO at 16-17 (defining “unserved location” and “underserved location” based on the level of broadband access at the location as shown in the BDC Map); NTIA, INTERNET FOR ALL: Frequently Asked Questions and Answers Draft Version 2.0 for Broadband, Equity, Access, and Deployment (BEAD) Program at 4.11, [https://broadbandusa.ntia.doc.gov/sites/default/files/2022-09/BEAD-Frequently-AskedQuestions-%28FAQs%29\\_Version-2.0.pdf](https://broadbandusa.ntia.doc.gov/sites/default/files/2022-09/BEAD-Frequently-AskedQuestions-%28FAQs%29_Version-2.0.pdf) (“BEAD FAQ”) (explaining that the National Broadband Map is “the beginning...of the process for identifying the universe of unserved and underserved locations”).

<sup>31</sup> See BEAD Challenge Process Policy Notice at 10 (explaining that states “may not treat as ‘unserved’ or ‘underserved’ any location that is already subject to an enforceable federal, state, or local commitment to deploy qualifying broadband as of the date that the challenge process is concluded”); BEAD NOFO at 36 (“In identifying an Unserved Service Project or Underserved Service Project, an Eligible Entity may not treat as ‘unserved’ or ‘underserved’ any location that is already subject to an enforceable federal, state, or local commitment to deploy qualifying broadband as of the date that the challenge process described in Section IV.B.6 of this NOFO is concluded.”).

<sup>32</sup> See NTIA Volumes I and II Guidance at 19; NTIA BEAD Model Challenge Process at 8.

<sup>33</sup> FCC, *Twelfth Measuring Broadband America Fixed Broadband Report*, at 13 (Jan. 6, 2023).

<sup>34</sup> NTIA BEAD Model Challenge Process at 8.

<sup>35</sup> See *id.* at 14; BEAD Challenge Process Policy Notice at 5 (stating that the Authority must “develop a **transparent, evidenced-based, fair, and expeditious challenge process** for review that includes their proposed pre-challenge process location modifications (e.g., the proposed deduplication process)”) (emphasis in original).



known to the Commonwealth. Obtaining this information is necessary to satisfy NTIA’s requirement that the Commonwealth not include in its set of eligible locations any location that is already subject to an enforceable federal, state, or local commitment to deploy qualifying broadband (including specifically the Commonwealth and Local Fiscal Recovery Funds) as of the date that the challenge process is concluded.<sup>36</sup> Importantly, it will also help ensure the accuracy of the map and avoid challenges to the map in the future.

**c. Include an optional modification to treat locations served exclusively with fixed wireless as “underserved” and eligible for BEAD funding.**

NTIA’s guidance explicitly allows the Commonwealth to propose modifications to its set of locations that are eligible for BEAD funding, and the Authority should exercise that discretion to treat locations that have available qualifying broadband service (*i.e.*, a location that is “served”) delivered exclusively via fixed wireless as “underserved” and presumptively eligible for BEAD funding. NTIA specifically allows the Authority to propose any modifications to the classification of locations in the Commonwealth as “served,” “underserved,” or “unserved.”<sup>37</sup> NTIA has already determined that fixed wireless service using entirely unlicensed spectrum is not considered a reliable broadband service, and NTIA requires locations served exclusively by unlicensed fixed wireless to be treated as “unserved” for the purposes of the BEAD Program and eligible for funding.<sup>38</sup> In markets served exclusively by licensed fixed wireless service that were determined to be “served” and initially ineligible for BEAD funding, recent estimates suggest that these fixed wireless providers typically only have sufficient excess capacity to *actually* serve 10-15 percent of the homes and businesses in that market.<sup>39</sup> Thus, this targeted modification to make all locations served exclusively by fixed wireless service eligible for BEAD funding will ensure that as many Pennsylvanians as feasible will benefit from fiber projects, as required by the BEAD Program.

The BEAD Program will require the Commonwealth to fund end-to-end fiber projects wherever feasible<sup>40</sup> because “[o]nly end-to-end fiber will ‘ensure that the network built by the project can easily scale speeds over time to ... meet the evolving connectivity needs of households and businesses.’”<sup>41</sup> Indeed, multiple states have already proposed to treat all locations served exclusively by fixed wireless service as eligible for BEAD funding because it “does not believe that terrestrial fixed wireless technologies can reliably deliver the speed and latency requirements for a location to be considered ‘served’ under the IIA

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<sup>36</sup> Although the Authority *may* choose not to adopt NTIA’s model challenge process, the Commonwealth *must*, at a minimum, use the datasets described above and additionally certify to NTIA that the Commonwealth “has the technological capability to aggregate multiple data sources to identify accurately the broadband-serviceable locations (BSLs) subject to existing federal, state, and local commitments.” NTIA BEAD Challenge Process Notice at 12.

<sup>37</sup> See Model Challenge Process at 8.

<sup>38</sup> See BEAD NOFO at 28.

<sup>39</sup> See Jonathan Chaplin, *The Impact of Fixed Wireless on BEAD*, New Street Research at 2-5 (July 22, 2023) (stating that licensed fixed wireless service providers “have said that they can’t economically add capacity to their mobile network for [licensed fixed wireless (“FW”)] alone – they invest in capacity for mobile users, and where this results in pockets of excess capacity not needed by mobile users, they will sell FW subscriptions. The process of determining how many FW subscribers a carrier can support in a given cell site is complex (and the analysis must be done on a sector-by-sector basis): the carrier determines how much capacity they can deliver in the sector based primarily on how much spectrum they have; they determine how much capacity their mobile customers will likely consume; they then divide the residual capacity by what they assume a FW customer will consume, taking into consideration consumption patterns over the course of the day. When they reach their subscription limit, they stop selling subscriptions in the sector.”).

<sup>40</sup> See BEAD NOFO at fn. 6.

<sup>41</sup> BEAD NOFO at 42 (citing the Infrastructure Investment and Jobs Act of 2021, Division F, Title I, Section 60102(a)(1)(I), Public Law 117-58, 135 Stat. 1184 (November 15, 2021)).

(i.e., not less than 100 Mbps download and 20 Mbps upload and latency less than or equal to 100 milliseconds).<sup>42</sup> Therefore, consistent with BCAP’s suggestion that the Authority treat locations “served” via DSL as “underserved,” this modification will “better reflect the locations eligible for BEAD funding because it will ... ensure the delivery of ‘future-proof’ broadband service.”<sup>43</sup>

**d. Exclude optional speed tests from challenge process, which could inundate the Commonwealth with inaccurate challenges and compromise the Commonwealth’s ability to accurately determine the unserved and underserved locations in the Commonwealth.**

Although NTIA outlines examples of acceptable evidence for BEAD challenges and rebuttals, as well as a list of example challenge types, the Authority can and should use its discretion to *exclude* subscriber speed tests. Acknowledging that online speed tests, in general, often inaccurately measure network performance delivered, NTIA’s guidance *explicitly* clarifies that accepting speed tests is optional and subject to the affirmative decision of a state to include speed tests as an allowable challenge type.<sup>44</sup>

Due to the inherent difficulty in ensuring that a speed test contains accurate, verifiable information, NTIA’s model challenge process guidance requires subjecting the use of speed tests to significant and burdensome requirements to be considered a sufficient basis for a valid challenge. For example, speed test measurements must:

- (i) include information such as the time and date the speed test was conducted, the provider-assigned IP address, and identify the residential gateway conducting the test;
- (ii) be conducted only between the hours of 7 p.m. and 11 p.m. local time; *and*
- (iii) be conducted on three different days.<sup>45</sup>

Then, because speed test challenges cannot be submitted by an individual subscriber, it must be gathered and submitted by a different entity, such as a local government or nonprofit organization.<sup>46</sup> If speed test data that is gathered and submitted meets the above-mentioned requirements, a responding provider will then offer a countervailing speed test. After that, the Authority would have to evaluate all this evidence to make a final determination of the challenge, which is separate and apart from the difficulty of ascertaining whether a subscriber met the parameters required to ensure the challenge is valid and may be considered.

To be clear: These parameters are necessary to ensure the reliability of speed-test evidence; however, they illustrate the incredible complexity of allowing and fairly evaluating speed-test challenges, and it would be overly complex and burdensome — for providers, subscribers, and state reviewers — to ensure all of these requirements are met. For example, it may be difficult to ascertain whether a subscriber performed the speed test during the prescribed window of time, and conducted three speed tests on three

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<sup>42</sup> Vermont Draft Challenge Process Guidance: <https://publicservice.vermont.gov/sites/dps/files/documents/Vermont%20BEAD%20Initial%20Proposal%20Volume%201%20for%20public%20comment.pdf>; Ohio Draft Challenge Process Guidance: <20230721-DRAFT-Ohio-BEAD-Initial-Proposal-Volume-I-vf.pdf>.

<sup>43</sup> NTIA BEAD Model Challenge Process at 8.

<sup>44</sup> See *id.* at 8, 18-20. This is aligned with the FCC’s policy of using speed-test data only as a *supplemental* source of information, not the sole basis for a challenge.

<sup>45</sup> See *id.* at 19-20.

<sup>46</sup> See *id.* at 25.

different days, but no more than 60 days before the beginning of the challenge period,<sup>47</sup> and whether a challenge is being brought consistent with the requirement that “[o]nly locations with a subscribed-to service of 100/20 Mbps or above can challenge locations as underserved, while only locations with a service of 25/3 Mbps or above can challenge locations as unserved.”<sup>48</sup>

Fundamentally, accepting speed tests is also unnecessary to determine actual speeds offered to subscribers in Pennsylvania, particularly for cable and fiber providers, because the FCC has already recently confirmed that “actual speeds experienced by the subscribers of most ISPs are close to or exceed the advertised speeds.”<sup>49</sup> Further, the FCC concluded that the customers of cable companies such as BCAP members Comcast and Charter “experienced median download speeds that were very consistent; *i.e.*, they provided greater than 95% of the advertised speed during peak usage period to more than 80% of panelists for more than 80% of the time. In particular, Charter [and] Comcast ... provided 100% or greater than their advertised speed during the peak usage period to more than 80% of their panelists for more than 80% of the time.”<sup>50</sup> Thus, the FCC has already independently validated the fact that Charter, Comcast, and other cable and fiber providers, very consistently offer consumers actual speeds that meet or even exceed advertised speeds. The Authority should therefore not permit the use of speed tests within its challenge process, at least for cable and fiber providers, because such tests are unnecessary, often do not provide an accurate picture of system capabilities, would be overly burdensome for the Authority staff and service providers alike, and risk undermining Congressional intent by diverting resources away from challenges that are more likely to impact the Authority’s final determination of the remaining unserved and underserved locations in the Commonwealth.

In the alternative, if the Authority does not strike consumer speed tests as a basis for a challenge, it must, at a minimum, require that the submitting local government or nonprofit screen individual challenges to remove incomplete or frivolous challenges, and confirm that any submitted challenges are from residents of that locality or, in the case of a nonprofit, from members of the nonprofit or others with an established connection to the nonprofit. Then, the Authority must require the local government or nonprofit screening the individual challenges to only entertain consumer speed tests that have at least some indicia of reliability before being submitted to the Authority for comprehensive review and verification. In addition, the Authority should permit providers to rely on speed test results from the FCC’s Measuring Broadband America Reports as a source to rebut consumer speed test challenges. Clearly, though, the best approach is for the Authority to simply exclude the *optional* speed-test challenges.

**e. Exclude optional area and MDU challenges, which would add unnecessary complexity to the challenge process.**

BCAP urges the Authority to use its discretion to exclude the *optional* area and MDU challenges from its challenge process, which, as with speed test challenges, would undermine the Authority’s ability to expeditiously and accurately identify the unserved and underserved locations in the Commonwealth. BCAP strongly shares the Authority’s goal of accurately identifying each unserved and underserved location in the Commonwealth that will be eligible for BEAD funding. However, accepting area and MDU challenges would unnecessarily compromise the Authority’s ability to conduct its challenge process, as required by the IJA and the BEAD NOFO, in a fair and expeditious manner.<sup>51</sup>

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<sup>47</sup> NTIA BEAD Model Challenge Process at 18-19; Volume I Draft Guidance at 24.

<sup>48</sup> NTIA BEAD Challenge Process Policy Notice at 17 n.33; Volume I Draft Guidance at 19 n.12.

<sup>49</sup> FCC MBA Report at 13.

<sup>50</sup> *Id.* at 16.

<sup>51</sup> BEAD NOFO at 36, fn. 52.

Allowing area and MDU challenges would be counterproductive to the primary goal of accurately identifying unserved and underserved locations. As proposed, these challenges are simply not representative of the relevant service or offering within an entire census block group or MDU. For example, the fact that six or more BSLs using a particular technology (or in the case of an MDU challenge, at least three units or 10 percent of the unit count listed in the Fabric within the same BSL, whichever is larger) are subject to a challenge is not itself evidence that *every other* BSL within that census block group or MDU is not served. Nonetheless, these challenges would presumably: require the Authority to first validate each individual challenge that would trigger an area or MDU challenge; require a provider to then demonstrate to the Authority that they are meeting the technology requirement for *all* served locations within the area or all units within an MDU within the brief rebuttal period; *and then* require the Authority to review the provider's rebuttal at every location or unit within the MDU. This would force the Authority to expend valuable staff resources necessary to review rebuttal evidence at what could be an exponentially higher number of locations than were challenged in the first place, all within a very brief period.

Thus, allowing area and MDU challenges would likely inundate the Authority with an enormous amount of information to review in an extremely abbreviated time period, principally requiring the Authority to adjudicate challenges of locations that *were not even subject to challenge in the first place*. This would not only make area and MDU challenges an ineffective mechanism to accurately identify unserved and underserved locations in the Authority, but could also prevent the Authority from satisfying NTIA's requirement that it "review[s] all applicable challenge and rebuttal information in detail without bias, before deciding to sustain or reject a challenge."<sup>52</sup> Moreover, permitting such challenges without sufficient explanation regarding how area challenges need to be conducted for each challenge type would only create confusion and add unnecessary complexity to the challenge process. For these reasons, BCAP urges the Authority to exclude optional and MDU challenges from its challenge process.

**f. The Authority should make targeted changes to the evidentiary requirements suggested in NTIA's guidance.**

Although it is critical that challenges and rebuttals are supported with sufficient evidence to substantiate the claims, BCAP urges the Authority to make the following targeted changes to ensure that the Authority administers an administratively efficient and reliable challenge process.

- (i) ***Availability challenge evidence should not be overly prescriptive.*** BCAP is concerned that some of the forms of evidence for availability challenges allowed by NTIA are potentially too stale or superficial to provide sufficient evidence that broadband service is not available at a particular location. Although NTIA offers as an evidentiary example for an availability challenge "a letter or e-mail dated within the last 365 days that a provider failed to schedule a service installation date within 10 business days of a request,"<sup>53</sup> one year is too stale to credibly demonstrate that service in a particular location is unavailable given the significant amount of deployment that is presently occurring. Given the current rate of broadband deployment, service could very well have been established in the last six to eight months, and indeed, providers are required to submit updates to the FCC's Broadband Data Collection portal every six months. Accordingly, the Authority should limit availability challenges to evidence within the last six months.
- (ii) ***Planned service challenges should not be overly burdensome.*** BCAP is also concerned that the evidence providers must submit to demonstrate that broadband will be deployed at a particular location by June 30, 2024, without an enforceable commitment (or a provider is building out

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<sup>52</sup> NTIA BEAD Model Challenge Process at 12.

<sup>53</sup> *Id* at 17.

broadband offering performance beyond the requirements of an enforceable commitment)<sup>54</sup> is overly burdensome and unnecessary to demonstrate such a commitment. NTIA’s guidance generally requires the provider to submit construction contracts or similar evidence of ongoing deployment, along with evidence that all necessary permits have been applied for or obtained, which is overly burdensome for providers, who will likely be responding to challenges in multiple states simultaneously.<sup>55</sup> Accordingly, the Authority should allow providers to provide evidence of a construction contract, franchise agreement, rights-of-way license or pole attachment license for the build without the permitting evidence, which is sufficient to demonstrate an enforceable commitment while also easing the burden on staff reviewing the challenges.

- (iii) ***Availability challenge rebuttals should be flexible.*** The Authority should clarify that providers are not required to disclose customers’ bills. There is often more than one service provider at a customer location, and the lack of billing statements associated with that location from one provider may simply mean that the customer is using a different service provider or chose not to subscribe at all. Where a provider’s deployment to an area is recent, moreover, it may not yet have paying subscribers. Further, requiring information about the service status of a specific location may require cable providers to violate the statutory prohibition against disclosing “personally identifiable information” in most instances absent the express consent of the subscriber or a court order or administrative subpoena,<sup>56</sup> including the provider’s records reflecting customers’ service addresses as well as the type of service provided.

Instead, the Authority should clarify that providers may submit other forms of evidence to rebut availability challenges that readily meet NTIA’s rebuttal example of “evidence that service is now available as a standard installation,” including specifically evidence of a general mailing in the area offering service.<sup>57</sup> Additionally, for the avoidance of any doubt, the Authority should clarify that NTIA’s final guidance providing that “screenshot that shows service availability” means that screenshots showing service availability are acceptable rebuttal evidence for *all* availability challenges.<sup>58</sup> Moreover, rebuttal evidence of availability should not be limited to confirmation that service was provided to a BSL within the previous 12 months.<sup>59</sup> The ability of a cable network to serve a given location, once service is provided, typically does not change year-over-year, because the cable network does not have capacity constraints like other technologies such as fixed wireless access. Therefore, the Authority should allow evidence confirming that the provider has provided service to a BSL at any time in the past, barring more recent evidence to the contrary, to demonstrate availability.

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<sup>54</sup> *See id.* at 18.

<sup>55</sup> *See id.*

<sup>56</sup> 47 U.S.C. § 551(c); 18 U.S.C. §§ 2701, et. seq. Section 551 requires court orders with notice and opportunity to contest the *disclosure* (551(h)), or a subpoena, court order or warrant under the provisions in ECPA, 18 U.S.C. § 2703 (incorporated by 551(c)(2)(D)) “except that such disclosure shall not include records revealing cable subscriber selection of video programming from a cable operator.” 47 U.S.C. § 551(c)(2)(D). The requesting agency must, at a minimum, use an administrative subpoena to obtain any of the following categories of information about a broadband subscriber: (a) name; (b) address; (c) local and long distance telephone connection records, or records of session times and durations; (d) length of service (including start date) and types of service utilized; (e) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and (f) means and source of payment for such service. 18 U.S.C. § 2703(c)(2)(A)–(F).

<sup>57</sup> BEAD *Challenge* Process Policy Notice at 17.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

With these targeted modifications, the Authority can ensure that its challenge process is “transparent, evidence based, fair, and expeditious,” as required by the IJA.

**g. The Authority should adopt a post-application verification process.**

The Authority should adopt a post-application verification process, separate from the BEAD challenge process, which provides a unit of local government, nonprofit organization, or broadband service provider an opportunity,<sup>60</sup> within 30 days of publication of application submissions, to submit information on additional deployment and new non-BEAD grant funding awards not captured on the latest version of the Commonwealth BEAD map. NTIA’s guidance contemplates such a process as it requires states to conduct an additional “deduplication review process”<sup>61</sup> after the challenge process is complete. We believe that this process should occur prior to the time the Commonwealth selection process is finalized. Between the time the Authority initiates its BEAD challenge process and subgrantee selection, additional broadband facilities could get built and/or new broadband funding could get awarded. Taking these intervening developments into account ensures:

- (i) more funding availability for projects that address unserved and underserved locations;
- (ii) compliance with the BEAD Program’s prioritization scheme;<sup>62</sup> and
- (iii) compliance with the requirement not to treat as unserved or underserved locations with an enforceable commitment to deploy broadband.<sup>63</sup>

Accounting for these new developments before finalizing the selection process would still allow the Authority ample time to complete the subgrantee selection process and submit its Final Proposal within the one-year period that the NOFO provides.<sup>64</sup> BCAP urges the Authority to adopt a post-application verification process that provides the information necessary to accurately account for additional deployment and new non-BEAD Program grant funding awards that have not been captured on the latest version of the Commonwealth’s BEAD Program map.

**5. Support Reasonable Build America, Buy America Waivers to Address Supply Chain Issues.**

BCAP appreciates the Draft Five-Year Plan’s statement that “Supply limitations affected by external forces such as the Build America, Buy America Act [“BABA”] can be a significant factor in reducing supply for fiber and electronic components required for a broadband build.”<sup>65</sup> In the context of the BEAD Program, the unduly rigid application of BABA provisions risks undermining the Authority’s goal of quickly connecting unserved and underserved locations with high-speed Internet access to bridge the digital divide. BCAP appreciates the goal of BABA and efforts to use American enterprise to build the infrastructure of the future. But, entities awarded BEAD funding will deploy broadband infrastructure that contains dozens of network elements including, but not limited to: switching equipment; routing equipment; transport equipment; access equipment; billing/operations systems; and customers premises/end user

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<sup>60</sup> These *are* the same parties who are eligible to challenge the Authority’s eligibility determinations in its Initial Proposal. *See* BEAD NOFO at 34.

<sup>61</sup> NTIA BEAD Challenge *Process* Policy Notice at 11-13.

<sup>62</sup> 47 U.S.C. § 1702(h)(1)(A)(i).

<sup>63</sup> BEAD NOFO at 36.

<sup>64</sup> *See* BEAD NOFO at 2 (“*Final* Proposals will be due to NTIA no later than 365 days after the approval of the Initial Proposal by the Assistant Secretary.”).

<sup>65</sup> Draft Five-Year Plan at 49.

equipment and devices.

The devices used in each of these network elements, in turn, include hundreds of components, each with their own complex supply chains, which are sourced from around the world from trusted vendors and suppliers. For example, most network elements require advanced semiconductors that comprise over 50 percent of the network element costs and are not adequately able to all be sourced in the United States today. Even network elements that are assembled in the United States rely on foreign inputs from their global partners. There is likely no combination of network elements that could create a broadband network that meets the BABA requirements.

The real-world experience of BCAP member companies in deploying broadband networks has made clear that a strict American-made requirement for such networks is infeasible at this time and would deter rather than encourage the deployment of the facilities necessary for the nation to reach 100 percent broadband connectivity, particularly within the timeframe required by the IIJA. For example, routers, switches, ONUs, and gateways all have numerous components that are sourced almost exclusively from China or Taiwan. Even if manufacturers immediately start the process of shifting their operations to the United States, due to the number of components involved, it could take between three and five years to onshore all of these products. Fusion splicers and mechanical splicing tools have no known domestic source and, due to a limited market, onshoring may not be possible. And the onshoring of fiber optic taps, network access points, and terminals will take at least three years.

Accordingly, BCAP urges the Authority to address these issues and other unforeseen circumstances that may arise in sourcing needed materials by urging NTIA to grant reasonable grant of waivers of the BABA requirements. This will serve the interests of quick deployment, allow providers to formulate accurate and cost-efficient BEAD applications, and ensure a successful BEAD Program in the Commonwealth.

#### 6. Address Permitting Issues.

BCAP appreciates that NTIA has proposed steps to streamline compliance with the National Environmental Policy Act (“NEPA”) by proposing to establish Categorical Exclusions (“CEs”) and Extraordinary Circumstances (“ECs”) specific to NTIA’s grant programs.<sup>66</sup> However, as the Draft Five-Year Plan correctly notes,<sup>67</sup> imposing NEPA’s environmental review standards on BEAD recipients will have the effect of unduly delaying the construction of broadband networks by adding unnecessarily burdensome and time-consuming environmental review that is not required by the statute. To that end, BCAP urges the Authority to request NTIA to revise its guidance and find that NEPA does not apply to the BEAD Program. In the alternative, the Authority should urge NTIA to allow applicants to determine whether a proposed action qualifies for a CE. This would be consistent with the process the FCC uses, which allows actions to be categorically excluded, meaning the actions have been determined individually and cumulatively to have no significant effect on the quality of the human environment, provided that other rule-based criteria (similar to NTIA’s proposed ECs) are not triggered.<sup>68</sup>

The Authority should also urge NTIA to eliminate the requirement that applicants submit EAs and EISs to NTIA for review prior to submission of final Environmental Assessments (“EAs”) and Environmental Impact Statements (“EISs”) documents, which is unnecessary in light of ample guidance regarding the required contents of EAs and EISs and would significantly streamline the review period.

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<sup>66</sup> See National Environmental Policy Act Procedures and Categorical Exclusions, Docket No. 230306–0064, 88 Fed. Reg. 19089 (Mar. 30, 2023).

<sup>67</sup> Draft Five-Year Plan at 51.

<sup>68</sup> See 47 C.F.R. § 1.1306(a).

These steps would make significant progress in addressing federal permitting barriers. On the state and local side of permitting, BCAP supports policies that streamline permitting processes, reduce unnecessary steps, and avoid seeking to monetize the public rights of way by charging rents or fees in amounts greater than required to cover the permitting authorities' expenses in processing access. In addition, the real-world experience of BCAP member companies in building out service to rural areas in Pennsylvania has demonstrated that the need to replace a significant percentage of poles can and has operated as a barrier to broadband deployment.

7. Address Railroad Permits and Costs.

BCAP is supportive of the plan's identification of railroad crossings as a barrier to broadband deployment throughout the Commonwealth.<sup>69</sup> Obtaining permits from railroads can be cumbersome, time consuming, and expensive — all of which serve to undermine the Commonwealth's objectives to facilitate the widespread deployment of broadband on an accelerated basis.

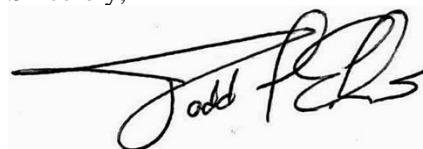
The Commonwealth's railroad infrastructure is extensive. The practices and policies for railroad crossings vary by railroad, and these practices and procedures are insensitive to the needs and timing of broadband installation. Consistent with recommendations of an FCC Advisory Committee on Broadband Deployment, various states have enacted laws and/or regulations seeking to promote timely and efficient treatment of crossing applications, including standard timeframes to review permit applications and a standardized permit fee.<sup>70</sup>

Given the existence of federal authority over aspects of railroad service, BCAP agrees with the draft Five Year Plan's statement that "requiring a standard, cost-effective permit application process and minimal review timelines would streamline the process."<sup>71</sup> However, issues relating to the issuance of local permits to facilitate the crossing of utility property to advance state policy interests is subject to state authority, and the Commonwealth should pursue all opportunities to adopt state policy addressing obstacles to broadband deployment associated with such access.

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BCAP respectfully urges the Authority to consider the positions expressed herein when revising and submitting its final Five-Year Action Plan to NTIA.

Sincerely,



Todd Eachus  
President, BCAP

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<sup>69</sup> See Draft Five-Year Plan at 51.

<sup>70</sup> See, e.g., Virg. Code § 56-16.3 (challenge pending in *Ass'n of Am. Railroads v. Hudson, et al.*, E.D. Virg. Case No. 1-23-cv-00815-MSN-WEF, filed June 23, 2023); Minn. Stat. § 237.045; Wisc. § 196.04 and Wisc. Chap. PSC 132 (admin. Code) (available at [https://docs.legis.wisconsin.gov/code/admin\\_code/psc/132.pdf](https://docs.legis.wisconsin.gov/code/admin_code/psc/132.pdf)); N.D. Code § 49-09.1 *et seq.* See generally FCC Broadband Deployment Advisory Committee State Model Code for Accelerating Broadband Infrastructure Deployment and Investment (available at <https://www.fcc.gov/sites/default/files/bdac-model-code-for-states-04242018.pdf>).

<sup>71</sup> Draft Five-Year Plan at 51.