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	by **B Lynn Follansbee** in **Kansas BEAD Volume 2 Public comment**	id. 44656491

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Are you filing a comment on behalf of an organization?	Yes
Which organization are filing on behalf of?	USTelecom- The Broadband Association
Please indicate which sections of volume 2 you are responding to:	Requirement 16: Low Cost Broadband Service Option Requirement 8: Subgrantee Selection process
Please provide your response to Requirement 8: Subgrantee Selection Process	Program Design In its draft proposal, Kansas indicates that it plans to seek applications for project areas that are consistent with school district boundaries. USTelecom members in Kansas believe that a school district is too big an area for applications in the BEAD program. Given that the BEAD program seeks to achieve broadband service for the most rural and remote parts of the country project areas will necessarily need to be smaller and more defined than the overly large school district size. For context, certain school districts in Kansas encompass the territories of several telecom providers ILECs in certain school districts and include locations that exceed the allowed cost provided in the Notice of Funding Opportunity from NTIA.

USTelecom believes that applicant providers should be allowed to design their own project areas composed of unserved and underserved locations that they select, because providers are best positioned to design their own networks. Alternatively, a state could identify a Census Block (CB) as the minimum application building block but should not use a geographic area larger than a CB. Preferably, after a State identifies its unserved and underserved locations, the State should allow applicants to combine eligible locations into logical provider-defined project areas, subject to the requirement that unserved and/or underserved locations comprise at least 80% of a project's locations. The State could alternatively choose to group eligible locations by CB into "Eligible CBs" and allow applicants to identify at least one but up to any number and/or combination of Eligible CBs to form a project area.
The likely result of choosing too large an application area will be that Kansas will receive fewer applications because the areas within a census block group that need service are fragmented pockets of broadband. Providers, not states, are in the best position to design project areas that will make the most cost-effective use of their existing infrastructure, minimize the new permits and rights of way needed, and thus speed deployment. Allowing providers to design projects with built-in efficiencies will help minimize the amount of BEAD funding needed per location, there helping to extend the reach of the State's BEAD allocation to enable end-to-end fiber deployments to as many unserved and underserved locations as possible.
Enabling providers to design their own project areas comprised of logical groupings of eligible locations encourages competition for BEAD funding by ensuring that companies of all sizes can compete. More competition will stretch BEAD allocations further. A state should not pre-select project areas based on larger artificial geographic units like Census Tracts or counties that do not reflect existing network resources. Forcing providers to deploy to all locations in such large state-defined project areas will effectively disqualify some providers or force them to extend beyond what they can manage from a financial, operational, or human resources perspective. The state programs in Arkansas and Louisiana demonstrate how project area rules can make a difference. In pre-BEAD state broadband programs, the Arkansas broadband grant program used State-defined project areas while the Louisiana GUMBO program allowed applicants to define their own project areas. The results were that in Arkansas only 16 of 36 project areas only received one application and not all projects could be funded because of the high request of funding per location, whereas in Louisiana over 170 applications for 23 companies were received across 58 parishes and 77 projects were funded with deployments serving 68,000 locations in over 50 parishes.
Alternatively, USTelecom suggests that Kansas consider changing its project areas to no larger than census blocks. Smaller minimum units, like CBs, will enable broadband providers of all sizes to participate and will increase competition. Using CBs will help extend the reach of the State's BEAD allocation to enable end-to-end fiber deployments to as many locations as possible. This way experienced providers can design efficient and targeted builds that will have a greater likelihood of reaching the remote areas that are currently left unserved. This will also maximize Kansas's BEAD dollars. Regardless of how project areas are defined, Kansas should also allow providers to combine project areas and

designate some as non-severable or “all-or-nothing” since the proposal for those locations may include shared costs and reflects the most efficient network build. To the extent there are conflicting application areas, Kansas could select a winning application and negotiate with other applicant(s) to consider revising their application(s) so that it no longer includes the overlapping locations.

Letter of Credit

The BEAD Letter of Credit requirements could be a gating requirement and undermine the success of the program and the overall goal of continued investment in next-generation broadband. First, the current requirement will result in at least $1 billion dollars (and up to $2 billion) of BEAD funding going to banks in the form of fees required to issue letters of credit. This will result in less money for broadband deployment. Second, the letter of credit requirement will likely result in less private investment in broadband because providers have a finite amount of capital which they use to fund their deployments and the letter of credit will reduce their available capital. Thus, providers may have to delay or abandon their deployment plans in certain areas.

Like Virginia, (See Virginia Final Initial Proposal Volume 2 at 19-21.) Kansas should consider asking NTIA to allow it to modify the letter of credit requirements consistent with the attached waterfall proposal (attachment A). The waterfall provides a staged approach that balances appropriate risk management using more objective criteria when assessing the need for a letter of credit requirement that would unreasonably divert limited capital for BEAD projects when unnecessary. It also provides for fairness and administrative ease for the state as the requirements are transparent to all and clearly set forth. Thus, all Kansas needs to do is ensure the proper documentation is provided—it does not require an in-depth independent financial evaluation. This alternate solution ensures that the government’s investment is protected while also setting the program up for optimal success.

Another alternative would be for Kansas to follow Ohio’s lead in their draft BEAD Initial Plan Volume 2 wherein Ohio seeks a waiver from the letter of requirement and proposes alternatives. Ohio rightly explains that the waiver is necessary to ensure that providers of all sizes are not barred from participating in BEAD if they can otherwise prove financial stability. Ohio expects that a waiver for letter of credit requirements will help ensure wider participation from ISPs, increase competition, and thereby improve the quality of bids, which combined may ultimately help bolster effective BEAD outlay to reach universal service. Instead of a blanket requirement for letters of credit, Ohio will assess the financial, technical, and operational qualifications of the applicant to evaluate whether the applicant has sufficient financial stability to undertake the proposed project. Ohio proposes that it may require a performance bond, letter of credit, or other financial assurance if it determines that the completion of the project requires additional security based on its assessment of the complete application. USTelecom is supportive of this approach and notes that our waterfall approach reference above is an excellent guide for making such evaluations and encourages Kansas to consider following this approach.

At a minimum, Kansas should propose to phase down the 10% Letter of Credit requirements consistent with the RDOF program—for every 25% milestone the provider reaches, it can reduce its letter of credit by one

	year's worth of BEAD funding. See In the Matter of The Rural Digital Opportunity Fund Auction (Auction 904), Rural Digital Opportunity Fund, Order, AU Docket No. 20-34, WC Docket No. 19-126, DA 20-5, para. 98 (Jan. 30, 2020). This will help maximize the dollars for deployment versus dollars for bank fees. Classification of Awards as Fixed Amount Subawards While further guidance from NTIA on the applicability of the Part 200 Uniform Guidance likely is forthcoming, NTIA indicated in its Request for Comment that it plans to categorize all BEAD awards as fixed amount subawards. It is important that for BEAD purposes, all awards are deemed fixed amount subawards, notwithstanding any specific reimbursement language in the subgrant agreement or state regulation. This is critical to help ensure adherence to NTIA's guidance on Part 200.
Please provide your response to Requirement 16: Low Cost Broadband Service Option	Affordability USTelecom agrees that addressing affordability is important, and it is required by NTIA to be the primary scoring criteria. However, states must do so in a way that does not violate federal law and, unfortunately, the Kansas Office of Broadband Development's draft Initial Plan Volume 2 includes a policy proposal that runs afoul of federal law by stating that full points are available only for subgrantee proposals that include a $90 or less price point for a 1/1 Gbps plan. The draft also requires providers to offer a plan of $30 or less for low-income consumers and for middle class consumers: (1) a $90 per month or less plan, inclusive of all taxes, fees, and charges billed to the customer, for 1Gbps service; or (2) a $60 per month or less plan, inclusive of all taxes, fees, and charges billed to the customer, for 100/20 Mbps service. These proposed requirements equate to impermissible rate regulation. Indeed, NTIA recently issued guidance stating that the middle-class affordability requirement "is not a mandated ISP service offering with defining eligible criteria; it is a strategy designed and implemented by the Eligible Entity." (See NTIA's Tricky Topics to Watch Out for in the Initial Proposal, released September 2023, at page 22, available at https://broadbandusa.ntia.doc.gov/sites/default/files/2023-09/BEAD_Initial_Proposal_-_Tricky_Topics.pdf.) This guidance is consistent with Congress' clear directive to bar rate regulation as part of the BEAD program. In the Infrastructure, Investment and Jobs Act (IIJA) section creating the BEAD program, Congress included a provision titled, "NO REGULATION OF RATES PERMITTED," which established that "[n]othing in this title may be construed to authorize" NTIA "to regulate the rates charged for broadband service." (See Infrastructure Act § 60102(h)(5)(D)) This directive extends to Kansas' – and every other Eligible Entity's – BEAD program, as Congress mandated that NTIA review and approve each Eligible Entity's proposal for BEAD implementation. (See IIJA § 60102(e)(3)(D)(II) (requiring NTIA to approve an Eligible Entity's Initial Proposal) and § 60102(e)(4)(D)(II) (requiring NTIA to approve an Eligible Entity's Final Proposal). Thus, NTIA may not approve any proposal that caps rates for BEAD broadband service without engaging in prohibited rate regulation. (By locating the provision barring rate regulation in the subsection addressed to low-cost broadband service options, Congress signaled that rate caps are not an acceptable mechanism to promote affordability. Id. § 60102(h)(5).) Given this guidance, and that, as

discussed below, any such attempts to set rates are preempted by blackletter law, the first two states to publish their draft BEAD Initial Proposals Volume 2, Virgina and Louisiana, removed any set reference to pricing from their final Volume 2. (Compare Virginia Draft Initial Proposal Volume 2 at 45 (requiring low-cost offering of $30), 47 (requiring $50 100/20 Mpbs offering to satisfy middle class affordability for full points) with Virginia Final Initial Proposal Volume 2 at 49 (removing reference to requisite $30 low-cost offering and instead requiring provider to justify why their proposed rate is affordable), 52, 12 (removing reference to $50 offering and instead relying on the FCC's Urban Rate Survey); Louisiana Draft Initial Proposal Volume 2 at 95 (requiring low-cost offering of $30), 96 (requiring $100 1G offering to satisfy middle class affordability for full points) with Louisiana Final Initial Proposal Volume 2 at 101 (removing reference to requisite $30 low-cost offering and instead requiring the provider demonstrate their proposed rate is affordable), 103, 30 (removing reference to $100 offering and instead relying on FCC Urban Rate Survey).) Thus, there are also other, lawful, better ways for Kansas to ensure affordability for all residents, including following the examples set by Virginia and Louisiana.

Low-cost option. For the low-cost option, in addition to its requirement that providers participate in the Affordable Connectivity Program (ACP), Kansas should make clear that a provider can satisfy the low-cost service option requirement by offering a plan that does not exceed the Federal Communication Commission's (FCC) "reasonable comparability" rate benchmarks. (Under the methodology adopted by the FCC, the reasonable comparability benchmark is the estimated average monthly rate in urban areas plus twice the standard deviation of rates for terrestrial fixed broadband service plans at specified speed tier. See 2023 Urban Rate Survey – Fixed Broadband Service Methodology, available at https://www.fcc.gov/economics-analytics/industry-analysis-division/urban-rate-survey-data-resources. If the rates fall within the benchmark, they are "affordable." The subscriber could then apply their ACP benefit to that plan. Using the reasonable comparability benchmark for BEAD-funded projects is not only compliant with the terms of the IIJA and blackletter preemption law, but it also makes good policy sense. First, in addition to targeting low-income households through use of the ACP, consistency with this benchmark ensures that subgrantees' overall prices are reasonable. Second, it provides a clear way to assess affordability by use of an objective metric as opposed to more subjective factors. Third, using the reasonable comparability benchmark also maximizes efficiencies because the methodology is well-established and updated by the FCC annually. Finally, the reasonable comparability benchmark would provide consistency. Many providers already use the benchmark for their offerings given their participation in CAF II, the CAF II Auction, RDOF, and other USF programs. Leveraging the benchmark would allow providers to adhere to one standard versus compliance with a hodgepodge of state-specific standards.

Middle Class Affordability. Kansas can satisfy its requirement to implement a strategy for middle class affordability by requiring applicants to confirm that their proposed rates for broadband service in a BEAD-funded area are comparable to rates charged in non-BEAD areas where there are multiple broadband providers. Kansas could also follow the sound paths taken by Virginia and Louisiana and compare the applicants' broadband rates to the

Federal Communication Commission’s (FCC) “reasonable comparability” rate benchmarks. (Under the methodology adopted by the FCC, the reasonable comparability benchmark is the estimated average monthly rate in urban areas plus twice the standard deviation of rates for terrestrial fixed broadband service plans at specified speed tier. See 2023 Urban Rate Survey – Fixed Broadband Service Methodology, available at https://www.fcc.gov/economics-analytics/industry-analysis-division/urban-rate-survey-data-resources) If the rates fall within the benchmark, they are “affordable.”

Using the reasonable comparability benchmark for BEAD-funded projects not only compliant with the terms of the IIJA and blackletter preemption law, but it also makes good policy sense. First, in addition to targeting low-income households through use of the ACP, consistency with this benchmark ensures that subgrantees’ overall prices are reasonable. Second, it provides a clear way to assess affordability by use of an objective metric as opposed to more subjective factors. Third, using the reasonable comparability benchmark also maximizes efficiencies because the methodology is well-established and updated by the FCC annually. Finally, the reasonable comparability benchmark would provide consistency. Many providers already use the benchmark for their offerings given their participation in CAF II, the CAF II Auction, RDOF, and other USF programs. Leveraging the benchmark would allow providers to adhere to one standard versus compliance with a hodgepodge of state-specific standards.

Future Flexibility is Necessary. Kansas’ proposal should include some level of flexibility for providers with regard to these rates. The Biden Administration estimates that most BEAD-funded networks will not be deployed until 2030. (See https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/26/fact-sheet-biden-harris-administration-announces-over-40-billion-to-connect-everyone-in-america-to-affordable-reliable-high-speed-internet/) Providers will likely be submitting their proposals in or around 2024. Without specifying any flexibility, requiring all inclusive rates, in conjunction with the timeframe for actual build out, means that providers will be locking in their rates 10 or 11 years in advance, an impractical and unrealistic request. Indeed, requiring providers to maintain a rate for any amount of time amounts to unfair market interference. Furthermore, many of the factors that cause rates to increase are beyond a provider’s control. For example, typical market adjustments due to inflation are a factor as are taxes. Given that Kansas’ proposed rates are required to be all inclusive with taxes included, if the local or state government raises taxes it may require the provider should be permitted to adjust accordingly.

Kansas should instead follow the lead of Virgina and Louisiana. Both states allow providers to make reasonable yearly adjustments. Virginia allows providers to make yearly adjustments of up to 4% on committed prices based on the Consumer Price Index (CPI). (See Virginia Final Initial Proposal Volume 2 at 10, 50.) Louisiana allows providers to adjust their generally available offerings consistent with the FCC’s reasonable comparability benchmark (See Louisiana Final Initial Proposal Volume 2 at 3.) and the low-cost offering consistent with the (CPI). (Louisiana Final Initial Proposal Volume 2 at 102.)

Requiring Set Rates Is Preempted. Finally, in addition to being prohibited by the Infrastructure Act, Kansas’ proposal to require service be offered at

specified rates is preempted by federal law for multiple reasons. First, it conflicts with the federal policy of nonregulation of broadband. (See generally Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 98 (1992) (stating that federal law preempts state law where that state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (quoting English v. General Elec. Co., 496 U.S. 72, 79 (1990))).) The FCC has determined that broadband is subject to light-touch regulation as an information service under the Federal Communications Act, (See Restoring Internet Freedom, Declaratory Ruling et al., 33 FCC Rcd 311 (2017).) and that classification forecloses federal and state officials alike from imposing common carriage regulations on broadband providers, including restrictions on rates. (See Charter Advanced Servs. v. Lange, 903 F.3d 715, 719 (8th Cir. 2018) ("'[A]ny state regulation of an information service conflicts with the federal policy of nonregulation,' so that such regulation is preempted by federal law." (quoting Minn. PUC v. FCC, 483 F.3d 570, 580 (8th Cir. 2007))); N.Y. State Telecomms. Ass'ns v. James, 544 F. Supp. 3d 269, 280-83 (E.D.N.Y. 2021), appeal docketed, 21-1975 (2d Cir. 2021) (finding, at the preliminary injunction stage, that conflict preemption bars New York state law requiring broadband providers to offer low-income consumers service at or below price ceilings).) Second, Kansas' proposal is preempted because federal law occupies the field of interstate broadband regulation, foreclosing the possibility of state regulation. While Kansas may implement the directives of Congress and NTIA under BEAD as an Eligible Entity, that authority does not provide license to go further and restrict the rates that broadband providers may charge. Finally, Congress has expressly prohibited states from regulating rates for wireless broadband, including for fixed wireless broadband service, that may also be part of BEAD deployment. (See 47 U.S.C. § 332(c)(3)(A) (stating that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service" absent express FCC permission grantable only in limited circumstances). Preemption applies even though the proposed language would be part of the Kansas BEAD program and not a standalone regulation, because the Broadband Office would be acting in a regulatory capacity. The Supreme Court has held that preemption will apply where the government acts as a regulator but not when it acts as a market participant. (See Bldg. & Constr. Trades Council v. Associated Builders & Contrs., 507 U.S. 218, 226-227 (1993) (Boston Harbor); see also Am. Trucking Ass'ns v. City of Los Angeles, 569 U.S. 641, 650 (2013) (distinguishing "the State acting in a regulatory rather than proprietary mode").) A federal appeals court has concluded that a state action framed as a condition on funding nonetheless is regulation that may be preempted if the answer to either of the following questions is "no:" "First, does the challenged funding condition serve to advance or preserve the state's proprietary interest in a project or transaction, as an investor, owner, or financier? Second, is the scope of the funding condition 'specifically tailored' to the proprietary interest?" (See Hotel Emples. & Rest. Emples. Union, Local 57 v. Sage Hospitality Res., LLC, 390 F.3d 206, 216 (3d Cir. 2004).) Here, the answer to both questions is clearly "no." The proposed approach is intended to compel providers to make broadband service less expensive for residents, i.e., it is intended to set rates, not to advance the interests of the State as a market participant. Thus, the condition neither advances the state's proprietary

	interest nor is it in any way tailored to that interest.
By submitting the Public Comment Form (the "Form") and any supporting evidence, you attest that all information furnished is true and accurate to the best of your knowledge and that any attachments are free of malware or viruses. You also acknowledge that falsifying any information could result in legal action against you and will bar you from submitting public comments to this web site in the future. You authorize the Kansas Office of Broadband Development, Kansas Department of Commerce (KOBD) to contact you if further information is needed. You expressly acknowledge and consent to some personal information, including your name, address, phone, e-mail, organization you represent, and comments, being posted for public view on the Kansas Department of Commerce web site at www.kansascommerce.gov. The KOBD will use its best efforts to redact any personal identifiable	B. Lynn Follansbee, VP Strategic Initiatives & Partnerships, USTelecom - The Broadband Association

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