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	by **Stephen Duerst** in **Kansas BEAD Volume 2 Public comment**	id. 44669451

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Are you filing a comment on behalf of an organization?	Yes
Which organization are filing on behalf of?	Kansas Cable Telecommunications Association
Please indicate which sections of volume 2 you are responding to:	Requirement 2: Local, Tribal, and Regional Broadband Planning Processes Requirement 8: Subgrantee Selection process Requirement 9: Non-Deployment Activities Requirement 11: Labor Standards and Protections Requirement 14: Cost and Barrier Reduction Requirement 16: Low Cost Broadband Service Option Requirement 20: Middle Class Affordability Requirement 19: Certification of Compliance Requirement 1: Objectives

Please provide your response to Requirement 1: Objectives	Thank you for giving the Kansas Cable Television Association (KCTA) the opportunity to express its views regarding the Kansas Office of Broadband Development's (KOBD) Initial Proposal for the Broadband Equity, Access, and Deployment ("BEAD") Program, Volume 2 (hereinafter "the Proposal"). KCTA appreciates the work of the KOBD in preparing the BEAD Volume 2 Initial Proposal. As "[c]oordination with the ISPs is a priority for KOBD", the cable industry stands ready to continue working with KOBD to achieve its BEAD Program goals. (§ 2.2.1 at 9, 11). The KCTA understands that certain aspects of the Proposal may be required by the BEAD Notice of Funding Opportunity ("NOFO") See BEAD NOFO available at broadbandusa.ntia.doc.gov and related guidance from the National Telecommunications and Information Administration ("NTIA"). See BEAD Initial Proposal Guidance available at broadbandusa.ntia.doc.gov. The KCTA also recognizes that the Office of Broadband wants to minimize any objections to the proposal that NTIA may raise. However, the NOFO gives a significant amount of discretion to states and Kansas should exercise that discretion vigilantly to ensure a successful program for Kansans while avoiding unnecessary and burdensome requirements on applicants and the state. This is particularly of concern when such requirements and burdens would have a chilling effect on participation by experienced internet service providers ("ISPs"). We appreciate the opportunity Kansas has provided for preregistration. Kansas will accept preregistration information from entities interested in applying for the subgrantee selection process, and information collected during preregistration can be applied to future applications. While preregistration is not required to participate, it could be helpful for KCTA member companies to get this information (much of which will be standard across all BEAD applications) on file ahead of time. The preregistration process is flexible, and applicants have 14 days to withdraw their submissions. (§ 2.4.1 at 17) Additional Comments KCTA disagrees with any requirement for providers to identify all fiber routes; last mile, lateral, middle, long haul, and interconnection points for BEAD-funded projects. This type of network detail is unnecessary to be shared and could present competitive issues as well as network security issues. Conclusion The KCTA is eager to cooperate with KOBD regarding this program and ensure broadband access to all Kansas residents. Please contact me if there are questions or concerns regarding our comments.

Please provide your response to Requirement 2: Local, Tribal, and Regional Broadband Planning Processes	Local, Tribal and Regional Broadband Planning Processes (2.2) The KCTA concerned that the Proposal would delegate almost a third of the available "Local and Tribal Coordination" points to the sole discretion of local/tribal authorities. While the KCTA supports consultation and coordination with community leaders, affording localities unfettered discretion to award nearly a third of available points opens the door for favoritism, especially where several Kansas counties have locality-controlled broadband networks which offer or may plan to offer broadband service. There should be procedural safeguards in place to ensure that localities act in a reasonable and non-discriminatory manner, in furtherance of the NOFO requirement that the subgrantee selection process be "fair, open, and competitive." To alleviate such concerns, the KCTA suggests the following: Local and tribal governments are encouraged to support all reasonable applications and such support shall not be unreasonably withheld. Accordingly, where such governments decline to support an application, they must explain their reasoning. Where an applicant has demonstrated meaningful community engagement and local planning, there shall be a rebuttable presumption that the Local and Tribal government is supportive of the application. If the Local and/or Tribal government is not supportive of the application, it may issue a statement explaining its reason for its lack of support. If the Local and/or Tribal government issues such a statement, an applicant must include that statement in its application. The applicant may submit a rebuttal to such a statement from a local or tribal authority in its application to explain why such non-support is unreasonable. If the Office of Broadband determines that the locality or tribal authority acted unreasonably in withholding support, the Office of Broadband may award all or a portion of such points to the applicant. Furthermore, to prevent unreasonable discrimination by localities or Tribes against competing applications, Office of Broadband will award full credit under this criterion to any applicant proposing to serve the same area as an applicant that is affiliated with a Local or Tribal government. To further reduce the risk of favoritism, the KCTA suggests that the weight given to a letter of support be reduced from 2 to 1, with the 1 differential being added to the demonstrated community engagement.
Please provide your response to Requirement 8: Subgrantee Selection Process	Subgrantee Selection Process: Project Funding Areas (2.4) According to the Proposal, KOBD, Project Funding Areas will be defined by Unified School District (USD) borders. This is conceptually flawed. The KOBD should instead allow applicants to define their own proposed project areas, including on a per-location basis, as permitted by the NOFO, (NOFO at 16-17) because unserved and underserved areas may not map neatly onto existing geographic units like a USD. Defining application areas by USD create more work for KOBD because a single contiguous project could easily span multiple USDs, resulting in redundant applications. Further, applicants' determination of the appropriate geographic level for their proposals may be influenced by a variety of location-, project-, and provider-specific factors, such as difficult terrain or right-of-access issues. Moreover, while an applicant must serve all unserved and underserved

locations within the USD, there is a risk of potential overbuilding because using existing geographic boundaries (rather than bespoke project areas tailored to unserved and underserved BSLs) will increase the likelihood that funding will ultimately be allocated to already served areas in excess of the 20% limit. This risk is further exacerbated by the Draft Proposal's statement that "[e]ach application must propose to serve all BSLs within at least one USD," though Kansas clarifies that proposals must serve "all unserved and underserved BSLs" within the PFA (emphasis added). Nonetheless, the Draft Proposal does not appear to contain a clear prohibition on overbuilding, and KOBD should clarify this to ensure IIJA compliance. (§ 2.4.1 at 18)

The Draft Proposal helpfully provides 14 days for applicants to resubmit or withdraw applications if an existing award commitment is found or newly established within the PFA, potentially providing another opportunity for raising issues of already served locations within the proposal. This is a positive because it demonstrates KOBD will consider new data further into the process. (§ 2.4.3 at 31).

Additionally, the Draft Proposal states that KOBD will accept applications from consortiums of qualified applicants that "wish to partner to cover specific Project Funding Areas." However, this may not be a practical solution for avoiding coverage of already served locations since one member is required to be designated as the recipient for the single award across the entire USD. (§ 2.4.1 at 18) Allowing applicants to define their own project areas will permit applicants to develop more efficient and economical proposals that leverage their existing networks and facilities, maximize network efficiency, and reflect the geographic level at which providers can successfully deploy and sustainably operate their proposed networks. In turn, these proposals will allow Kansas to minimize BEAD Program outlay and fulfill the NOFO's directive to connect all unserved locations and, if possible, all underserved locations. ID. at 38. (To mitigate any administrative burdens associated with applications submitted on a per location basis, applicants should be permitted to aggregate in a simple application any unserved or underserved locations that are geographically proximate.)

Confidentiality & NDAs (2.4.1)
The Draft Proposal permits applicants to deem portions of their applications confidential. Applicants are also permitted to execute individual Non-Disclosure Agreements ("NDAs"), but NDAs must be requested "no less than 60 days prior to the beginning of the BEAD Subgrantee Application process or no later than February 1, 2024, whichever date is earlier." (§ 2.4.1 at 18). The KCTA believes this is a positive aspect of the Draft Proposal.

Community Anchor Institutions (2.4.1)
The Draft Proposal requires that applicants "outline the requested dollar amount to separately serve all unserved locations, underserved locations, and unserved or underserved Community Anchor Institutions in that Project Funding Area, as well as the matching funds slated to be contributed to the build." This is an incorrect formulation – designations of unserved or underserved do not apply to CAIs. The only distinction for CAIs in the

NOFO is whether they are eligible (i.e., lacking access to 1G symmetrical service). (§ 2.4.1 at 19)

BEAD Proposal Scoring Criteria (2.4.2)
Minimal BEAD Outlay: Consistent with our advocacy, points awarded for this primary criterion will comprise 50% of the total available points with “[t]he most cost-efficient applications determined by evaluating the total funding requested . . . receiv[ing] the most points under this section.” This is a sound approach given that the State anticipates a significant shortfall of BEAD funds to achieve universal service. However, the Draft Proposal notes that “[a] percentage of the points available will be allocated to applications with an average higher cost per location considering their relative distance from the most cost-effective cost per location projects areas received.” KCTA requests that this point be clarified so providers know what percentage of points will be allocated and how specifically this factor will be evaluated, to ensure it does not dilute the available points in this category."(§ 2.4.2 at 20).

Affordability: The Office’s primary means of ensuring affordability is the weight of affordability in the scoring criteria established in this proposal. Affordability will comprise 15% of the scoring criteria the Office will use to evaluate proposals to serve a location under the BEAD program. Under the scoring criterion, applicants that either: (1) offer broadband pricing in BEAD-funded service areas that is consistent with the broadband pricing the subgrantee makes available in unsubsidized areas within the State for the same or substantially the same level of service, for providers already serving Kansans; or (2) show that their pricing in the BEAD-funded service areas is at or below the FCC’s “reasonable comparability” benchmark for broadband service based on the FCC’s annual Urban Rate Survey will receive full credit. Applicants that fail to meet this criterion with their chosen pricing method will receive no credit. For reasons stated later in our comments, KCTA opposes this scoring method.

Speed to Deployment: With respect to the secondary criteria, the KOBD correctly recognizes that both “speed to deployment” and “speed of network and other technical capabilities” are important criteria for ensuring that BEAD-funded networks provide reliable, high-speed broadband. In the Infrastructure Investment and Jobs Act (“IIJA”), Congress specified that states “shall give priority to projects” based on, among other things, “the expediency with which a project can be completed. IIJA § 60102(h)(1)(A)(iv)), codified at 47 U.S.C. § 1702(h)(1)(A) (iv). In light of this congressional directive, the National Telecommunications and Information Administration’s (“NTIA”) Notice of Funding Opportunity (“NOFO”) emphasizes speed to deployment as a mandatory consideration for states awarding BEAD funds. Subgrantees must deploy the planned network infrastructure and begin providing service to customers within the project area no later than four years after the date on which they receive funding. (NOFO at 43)

In addition to other priority criteria described in the NOFO, states “must give secondary criterion prioritization weight to the prospective subgrantee’s binding commitment to provide service by an earlier date certain . . . with greater benefits awarded to applicants promising an earlier service provision date." ID. Consistent with these federal mandates, and with sound public policy, KOBD is correct to include speed to deployment l in its BEAD selection process. KOBD has discretion under the IIJA and NOFO to treat speed to deployment as among the most important selection criteria and should do so to ensure that these public funds expeditiously connect as many unserved and underserved Kansans as possible. KOBD should not, however, accept claims of rapid deployment at face value without assurance of an applicant's expertise and capability. The application process should therefore recognize as the most credible the deployment timelines of applicants with demonstrated expertise building and operating broadband networks. Together with the other priority selection criteria discussed in KCTA's comments, these measures will contribute to a more effective and efficient BEAD program for Kansas. The draft guidelines which states full points can only be achieved if deployment is less than a year is generally not going to be possible for fiber to the home projects in hard-to-reach rural areas.

Speed of Network & Other Technical Capabilities: The State proposes to award 9% of total available points for this criterion. Capital assets with longer usable lives, scalability, and resilience will score higher on the Draft Proposal's sliding scale for this criterion, even if they have higher costs. Each of the three subcategories will receive a maximum of 3 points. The Draft Proposal does not provide further detail on what factors will be considered, and therefore, KCTA asks for further clarity on the division of this criterion and what is meant by "Network Usable Life," "Network Scalability," and "Network Resilience." (§ 2.4.2 at 28-29)

Waiver of Matching Funds (2.4.2)
KOBD will consider a waiver of the matching funds criteria on a case-by-case basis. To be eligible, an applicant must submit a proposal with more than 80% of Broadband Serviceable Locations ("BSLs") in the Project Funding Area, defined as a "High-Cost Area" by NTIA. Of heightened concern, Kansas may also consider a waiver where an applicant's affordability offering could be improved (i.e., the cost of the match is offset by a higher cost to potential subscribers).From a policy perspective, if the waiver is not limited to High-Cost Areas, KOBD would be creating negative incentives for applicants to estimate higher prices for offerings in order to receive a waiver of matching funds requirements. (§ 2.4.2 at 30)

Build America, Buy America Act (BABA) (2.4.5)
Kansas correctly plans to adhere to the Buy America provisions of the NOFO; however, we appreciate the Draft Proposal helpfully recognizes that the State's requirements will be subject to the results of NTIA's proposed waiver. (§ 2.4.5 at 32)

Overlapping Proposals (2.4.7)
Helpfully, if there are conflicting overlapping proposals that use the same technology involving a contiguous area whereby the primary project areas are identical, the first consideration will be the cost per location and the second consideration will be the match amount offered. Only if the overlapping proposals have identical costs per passing and match will KOBD then consider affordability, fair labor standards, local and Tribal consultations, and speed to deployment. (§ 2.4.7 at 36)

Extremely High Cost Per Location Threshold (EHCPLT) (2.4.9)
KOBD proposes to establish an EHCPLT utilizing cost analysis through an evaluation of proposals submitted across three years of grant programs awarded and administered by KOBD. The programs include CPF, BAG, LINC, and CERG…", as well as the Eligible Entity Planning tool provided by NTIA. KOBD's proposal is problematic for two reasons. First, the KOBD's proposal does not clearly explain how it intends to use the data sources it lists, nor does it explain when KOBD would actually apply the EHCPLT. That means, should the KOBD endeavor to apply the EHCPLT before accepting applications, applicants will not have sufficient information to estimate the likely EHCPLT and, therefore, to evaluate whether and how to properly adjust their proposals. Should the KOBD wait to set the EHCPLT until after accepting applications, there would be no reason for the KOBD to use "a variety of data" rather than simply using programmatic data from BEAD applications. Second, the KOBD's proposal does not account for applications with potential extremely high-cost outliers. For example, a bid for a Priority Broadband Project could exceed the EHCPLT due primarily to the subset of extremely high-cost outliers within the project area, resulting in the potential selection of a non-Priority bid for the entire project area. To prevent this result, which would be inconsistent with the BEAD NOFO's preference for fiber projects, the KOBD should negotiate with a Priority Broadband Project applicant in this scenario and allow the applicant to bring its bid below the threshold. This process would encourage the deployment of fiber in the state to the greatest extent feasible.

Accordingly, the KOBD should clarify its proposed method for establishing an EHCPLT. Specifically, the KCTA believes that the KOBD's methodology must be informed by proposals submitted under the BEAD Program, rather than prior programmatic data from previous broadband projects. That is because those other sources of data will: (i) not adequately account for the current costs associated with broadband deployment; and (ii) necessarily be lower, because projects successfully funded through those programs were funded because they were generally lower cost.

Moreover, regardless of how it sets the EHCPLT, the KOBD should consider adopting a front-end negotiation process that allows applicants to discuss with the KOBD the removal of "extremely high-cost outliers." This would ensure that a few unique locations in an area do not prevent other locations from being served with the most reliable source of broadband possible. The KOBD should then conduct an optimization analysis after extremely high-cost outliers are removed from project areas to ensure that the EHCPLT can be set as high as possible but still meet the state's goals of maximizing the use of fiber and stretching BEAD funding as far as possible.

As described above, the KCTA urges the KOBD to adopt KCTA's proposed two-round selection process, which would enable the KOBD to establish and utilize the EHCPLT in a second round—which would be informed by programmatic data from Round 1—only if establishment of the EHCPLT is necessary. (See supra-Section 2.4.1). This process will ensure that the KOBD is able to fund projects to deploy fiber as much as feasible, and it would provide the KOBD with appropriate programmatic data to more

	accurately set the EHCPLT. Minimum Qualifications: Financial Capability (2.4.11.) The Draft Proposal requires applicants to submit business plans and related analyses beyond those required in the NOFO, such as a marketing plan to stimulate and retain subscriptions; pricing plans that commit to not raising rates for at least five years from the date of infrastructure deployment; and a customer service plan ensuring installation within 10 days of any request. We disagree that this type of detailed business plan is necessary or appropriate. To conduct business differently in BEAD-funded areas from non-BEAD areas would impose tremendous training and operational costs on providers. The implementation of such a business plan would require an increased subsidy and not enable the BEAD money to be utilized as well as we believe it could be in Kansas.
Please provide your response to Requirement 9: Non-Deployment Activities	Non-Deployment Activities (2.5) The State anticipates a shortfall of at least $240M to achieve universal service and, thus, does not anticipate that BEAD funds will remain after extending broadband access to every unserved and underserved BEAD-eligible location. Although this limits the potential for BEAD funds to supplement adoption-related efforts for which we have advocated, it also foreseeably limits the potential that funding to eligible CAIs (lacking 1G symmetrical speeds) will be used a pretense for overbuilding in areas otherwise already served with 100/20 Mbps service. (§ 2.5.1 at 52) Notwithstanding the fact that the State does not intend to use BEAD funding toward non-deployment uses, Kansas includes as a goal “[c]reat[ing] state-wide digital navigator and device placement program(s)” (inherently meaning the State does not plan to rely on provider digital navigator programs) and “work[ing] with local partners to scale working model(s).” (emphasis added) The State should leverage existing provider programs, such as those provided by our members. KCTA members have been trailblazers for digital equity programs for more than a decade, most recently with significant investments in and leadership around digital navigators. (§ 2.1.1 at 5)
Please provide your response to Requirement 11: Labor Standards and Protections	Labor Standards and Protection (2.7) Some of the proposed items included in the Fair Labor Practices are unnecessary. Kansas is a “right-to-work” state and should not require applicants to comply with labor standards beyond those required by federal, state, and local law. KCTA disagrees with Kansas’s proposal to require ISPs to comply with discretionary items in the NOFO including prevailing wage, local hiring provisions and apprenticeship requirements. Proposal at 61. There is no basis in the IIJA for requiring such labor stipulations. Under the IIJA, only two criteria related to an applicant’s workforce are required to be considered: (i) the applicant’s demonstrated record of complying with federal labor and employment laws; and (ii) plans to continue to comply with said laws. 47 U.S.C. § 1702(h)(1)(A)(iv)(IV). This information, when combined with adherence to state law, gives Kansas significant ability to

regularly monitor and assess compliance with fair labor practices.

Preferencing any additional commitments is unnecessary, particularly given that mandatory elements of an applicant's workforce plan and the protections of existing Kansas labor laws are already robust. KCTA would ask for clarification that none of the NOFO workforce protection is mandatory. Regardless of whether applicants are forced to commit to unnecessary requirements to receive a winning bid under Kansas's obligation, it will fundamentally misalign Kansas's BEAD Program with Kansas's own existing labor laws and environment. Kansas is purposefully creating a regime whereby applicants are forced to adopt progressive labor policies that are not required to be in compliance with the grant award process.

KOBD urges Kansas to rely on an applicant's record of compliance with the fair labor practices and plans for ensuring future compliance as the sole bases for scoring. Additionally, Kansas should give no preference based on the additional, unnecessary labor commitments that an applicant may make that risk misaligning Kansas's BEAD Program with its labor laws that apply in other contexts.

Kansas should specifically detail, "As a right-to-work state, Kansas does not plan to incorporate any of the following items into legally binding commitments for subgrantees (including contractors and subcontractors) outside of what is explicitly requires in the BEAD NOFO."
a. Using a directly employed workforce, as opposed to a subcontracted workforce
b. Paying prevailing wages and benefits to workers, including compliance with Davis-Bacon and Service Contract Act requirements, where applicable, and collecting the required certified payrolls
c. Using project labor agreements (i.e., pre-hire collective bargaining agreements between unions and contractors that govern terms and conditions of employment for all workers on a construction project)
d. Use of local hire provisions
e. Commitments to union neutrality
f. Use of labor peace agreements
g. Use of an appropriately skilled workforce (e.g., through Registered Apprenticeships or other joint labor-management training programs that serve all workers, particularly those underrepresented or historically excluded).
h. Use of an appropriately credentialed workforce (i.e., satisfying requirements for appropriate and relevant pre-existing occupational training, certification, and licensure) and
i. Taking steps to prevent the misclassification of workers.

Furthermore, Kansas balances favor between encouraging Registered Apprenticeships and provider-based workforce development initiatives. The State also encourages subgrantees to provide wrap-around services. To promote workforce readiness, Kansas will use 1.5% of its BEAD allocation for state-led workforce development initiatives. It appears that these will not be requirements, but we request KOBD to clarify this point. (§ 2.6.1 at 54-55; § 2.8.1 at 62-63)

Please provide your response to Requirement 14: Cost and Barrier Reduction	The Draft Proposal lists as its first goal: "[e]xpand middle mile infrastructure and interexchange points to reduce deployment costs to unserved communities." Later, the KOBD discusses this in the context of the State's middle-mile grant program and does not appear to be related to its BEAD Program; however, given middle mile's prominence in the Draft Proposal, we would like to reemphasize there are strict limitations against using BEAD funds for subsidizing middle mile deployments. (Proposal at 4,71). In addition, as correctly noted the high cost of deployment to difficult-to-serve locations is driven by a wide variety of factors that may be unrelated to middle-mile infrastructure, such as permitting, last-mile infrastructure, and others. Further, high-speed broadband networks must continuously be maintained and upgraded, as well as protected against cybersecurity threats, to meet evolving customer demands. These operating costs are significant and require a business model which may not align with the KOBD's description of utilizing middle-mile reuse to reduce costs.
Please provide your response to Requirement 16: Low Cost Broadband Service Option	Low-cost Broadband Service Option (2.12) Kansas should revise the proposed definition of a "low-cost broadband service option" to: (i) ensure that Kansas can allow providers already offering low-income plans to continue to do so; and (ii) account for potential increases in inflation and government fees. Additionally, at a minimum, the low-cost option should incorporate a mechanism to account for increases in inflation, such as an annual adjustment based on changes to the U.S. Department of Labor Bureau of Labor Statistics' consumer price index ("CPI"), and for any increases in governmental fees that are or may become applicable to broadband service. KCTA understands that NTIA suggested that an example low-cost broadband service option could be offered to Eligible Subscribers for the useful life of the network assets at $30 or less per month (inclusive of all taxes, fees, and charges). As discussed above, KOBD should: (1) ensure that provider's existing low-income plan offerings satisfy this requirement; and (2) clarify that applicants may annually adjust the low-cost option's required price to account for any increases in inflation and/or governmental fees and an eight-year "useful life" of the network that are or may become applicable to broadband service. For example, the following revisions should be made to Kansas's response under Text Box 2.12.1, which provides, in relevant part: • At a minimum, the subgrantee's low-cost broadband option must: a. Provide typical download speeds of at least 100 Mbps and typical upload speeds of at least 20 Mbps, or the fastest speeds the infrastructure is capable of if less than 100 Mbps/20 Mbps; b. Provide typical latency measurements of no more than 100 milliseconds; c. Not be subject to data caps, non-governmental imposed surcharges, or usage-based throttling, and be subject only to the same (or better) acceptable use policies to which subscribers to all other broadband internet access service plans offered to home subscribers by the participating subgrantee must adhere; and d. In the event the provider later increases the speeds of one of its low-cost plans it will permit Eligible Subscribers that are subscribed to that plan to upgrade to those new speeds at little or no cost.

• Subgrantee applicants must include in their application a commitment to charge a price for their low-cost broadband option to low-income households that meet the eligibility requirements for ACP. The price submitted by the applicant will meet the KOBD definition of the low-cost service option if it meets either of the following:
a. it is consistent with the low-cost offerings the subgrantee applicant currently (at the time of the application) makes available in unsubsidized areas within the State; or
b. it is consistent with the low-cost offerings available from other providers in unsubsidized areas within Kansas (including for subgrantee applicant without an existing low-cost option).
• As an additional, objective mechanism to ensure affordability, the KOBD will require that price submitted by the provider must be below the maximum ceiling of the residential rates provided in the Federal Communications Commission's ("FCC's") U.S. reasonable comparability benchmark, calculated annually in the fixed broadband Urban Rate Survey ("URS") for the service tier with a specified download speed of 100 Mbps and upload speed of 20 Mbps.
• The price identified, as well as the provisions identified above, will be a contractual requirement of awardees for the useful life of the network assets, which is defined as 8 years for the purpose of this section. The price submitted by the subgrantee may be indexed to the Consumer Price Index, as outlined by the U.S. Bureau of Labor Statistics.
• Subgrantees are required to participate in the Affordable Connectivity Program ("ACP") or any substantially similar successor program offered by the federal government, and Eligible Subscribers in BEAD funded areas that are eligible for a broadband service subsidy can apply the subsidy to the low-cost broadband service option.
• Kansas believes this approach best effectuates the purposes of the BEAD Program first and foremost by ensuring that the low-cost service option, combined with ACP participation – the two statutorily prescribed affordability measures in the IIJA – will enable affordable broadband service to be offered to Eligible Subscribers. Secondly, the speed, service, and upgradability elements will ensure that Eligible Subscribers receive high-quality low-cost broadband service over the Funded Network.

The KCTA disagrees with other provisions related to Low-Cost Broadband Service options, as outlined by the KOBD in its draft document. First, KCTA does not agree with provisions that prohibit raising the $30 price fix for five years from infrastructure deployment date for each broadband serviceable location. Instead, we strongly believe there should be consumer price index adjustments and price increases as speeds are upgraded.

Additionally, we disagree with provisions that state no charges are permissible for installation, repair or maintenance of broadband service. This is unacceptable as those charges are necessary to enable member companies to operate a sustainable, high-quality network.

We disagree with provisions that ask for service outage credits, which is poorly defined in the NOFO and does not provide clarity on what is covered as an outage and who is responsible, measured at 1/30 of the monthly rate per day for an outage of over 12 hours. As there is no legal authority to do

	this outside the scope of BEAD/NOFO, this should be left as a condition of BEAD. Finally, we do not agree with the requirement to offer low-cost options in all contracts with potential subscribers, including monthly bills, calls or emails to customer services representatives and prominently displayed on provider websites. This requirement goes beyond NOFO, is costly, resource intensive, and could cause customer confusion because low cost is permitted only for eligible subscribers.
Please provide your response to Requirement 19: Certification of Compliance	Reporting & Monitoring (2.16) KOBD plans to reimburse subgrantees along service milestones, which is consistent with our prior advocacy. KOBD also plans to claw back funds for nonperformance. To monitor subgrantee progress, KOBD will require quarterly progress reports based on the reporting requirements of the NOFO and will also monitor projects through compliance reviews (e.g., site visits, audits, etc.). (§ 2.16 at 88-89). We support these provisions.
Please provide your response to Requirement 20: Middle Class Affordability	Middle-Class Affordability (2.13) Irrespective of the NOFO's approach to a low-cost option for "eligible subscribers," the NOFO does not require states to set a dollar threshold for their middle-class affordability plans. Rather, NTIA's guidance provides a range of possible, discretionary strategies that states can employ in their plans, including by establishing consumer pricing benchmarking. Id. at 82-83 Given this flexibility, Kansas can satisfy NTIA's middle-class affordability plan requirement without violating federal law as detailed in the IIJA's prohibition on rate regulation by requiring providers to certify that they either: (1) offer broadband pricing in BEAD-funded service areas that is consistent with the broadband pricing the subgrantee makes available in unsubsidized areas within the State for the same or substantially the same level of service, for providers already serving Kansans; or (2) show that their pricing in the BEAD-funded service areas is at or below the FCC's "reasonable comparability" benchmark for broadband service based on the FCC's annual Urban Rate Survey. See 47 C.F.R. § 54.313(a)(3). Kansas should implement this middle-class affordability strategy by requiring prospective subgrantees to disclose their prices and terms in those areas and renew this certification as part of regular compliance reporting. Doing so would be consistent with NTIA's example strategy of "promoting consumer pricing benchmarks" that can serve as an "objective criterion" for determining the reasonableness of an offering and promoting "continued monitoring and public reporting to ensure that high-speed Internet connections are affordable for middle-class households." See NTIA Initial Proposal Guidance at 82. It also would be consistent with the approach that the FCC has taken with RDOF and other USF-subsidized high-cost areas, as discussed above. The KCTA agrees that consumers in BEAD-funded project areas should be offered affordable broadband service. The best way to accurately assess this is not to tether affordability to arbitrary prices and speed thresholds, but rather to evaluate whether comparable prices are offered in competitive markets. This would be effectuated in the modified affordability selection criterion proposed above, as well as through a certification in a provider's

application and in regular BEAD compliance reporting going forward.

Additionally, KCTA would request clarification on the requirement to have this package offering. Currently, it does not appear in the scoring section: Total package costs $60 per month or less, inclusive of all taxes, fees, and charges billed to the customer, for 100/20 Mbps service [Note – in the scoring section, KS only mentions the $90 1Gbps symmetrical service and does not mention this $60 100/20 service, which is only included in Middle-class affordability section. There are a couple of inconsistencies between the scoring rubric and the separate Middle-class affordability section].

Similar to what was stated above, we continue to emphasize our disagreement with enforceable commitments requiring member companies not raise the $60 per month option for the 100/20 Mbps service for 5 years from deployment date for each broadband serviceable location, as well as the requirement not to raise the $90 per month option for the 1 Gbps symmetrical service for 5 years from the infrastructure deployment date for each broadband serviceable location.

Finally, as already stated, we disagree with providing service credits, measured at 1/30 of the monthly rate per day, for an outage of over 12 hours. Again, as there is no legal authority to do this outside the scope of BEAD/NOFO, this should be left as a condition of BEAD.

Affordability

As currently drafted, Kansas's affordability-related proposals violate the Infrastructure Investment and Jobs Act ("IIJA"), which explicitly prohibits the use of the BEAD Program to regulate broadband rates, despite recent guidance from NTIA to the contrary. 47 U.S.C. § 1702(h)(5)(D) ("Nothing in this subchapter may be construed to authorize the Assistant Secretary or the National Telecommunications and Information Administration to regulate the rates charged for broadband service."). The Proposal includes a scoring method that would benchmark affordability against an arbitrary dollar threshold and also proposes to establish specific rates for service plans that must be offered to all consumers, See Link Up Kansas, Broadband Equity, Access and Deployment Program Initial Proposal Volume 2, at 30, ("Proposal"), ID-Vol-II-Final-Draft-Post-for-Public-Comment-9.29.23.pdf (Kansas.gov) both of which constitute impermissible rate regulation. Kansas can avoid these legal pitfalls while still fulfilling the IIJA's affordability-related provisions by:

(1) requiring providers to offer broadband pricing in BEAD-funded service areas that is consistent with the broadband pricing the subgrantee makes available in unsubsidized areas within the State, or utilizing the FCC's Urban Rate Survey ("URS") as an objective benchmark to score the affordability criterion, consistent with the URS's long history as a standard to evaluate affordability in subsidized high-cost areas;

(2) revising the definition of the low-cost broadband service option to:

(a) ensure that providers' existing low-income plan offerings satisfy this requirement;

(b) clarify how long the low-cost option must be offered; and

(c) account for potential increases in inflation, government fees, and eight-year "useful life" of the network; and

(3) adopting a middle-class affordability plan that, consistent with the revised selection criterion, ensures consumers in high-cost areas are charged rates consistent with those charged to Kansans in unsubsidized parts of the state. Specific suggested language for Kansas's Initial Proposal is provided below.

I. IIJA's Rate Regulation Prohibition

The IIJA explicitly bars NTIA from regulating rates charged for broadband under the BEAD Program. See 47 U.S.C. § 1702(h)(5)(D). Congress would not have adopted this prohibition if it intended states administering BEAD grants to do the very same thing through their subgrantee selection process or middle-class affordability plans, which NTIA has to approve. Rather, Congress intended to address broadband affordability through other IIJA initiatives, such as the Affordable Connectivity Program and the requirement that BEAD subgrantees offer a "low-cost broadband service option" to "Eligible Subscribers." 47 U.S.C. § 1702(h)(4)(B); see id. § 1752. NTIA has defined "Eligible Subscribers" as households that qualify for ACP or various other government benefits, or those at or below 200 percent of the Federal Poverty Guidelines. NOFO at 12. Congress's decision to center the IIJA's affordability initiatives on direct financial assistance for the families most in need makes sense when NTIA's data over the last decade consistently show that, while the barriers to broadband adoption are multi-faceted and complex, where affordability is the biggest barrier to adoption, non-adopting households are disproportionately the poorest households. See NTIA, Digital National Data Explorer (Oct. 5, 2022), https://www.ntia.doc.gov/other-publication/2022/digital-nation-data explorer#sel=noNeedInterestMainReason&demo=&pc=prop&disp=both (finding that, in 2021, there was a greater difference between the percentage of non-adopting households in the lowest income bracket (<$25,000) and that of the next lowest income bracket ($25,000 – $49,999), than there was between the percentage of non-adopting households in the $25,000 – $49,999 bracket compared to that of all other higher income brackets, including the percentage of non-adopting households in the highest income bracket ($100,000+)); see also Pew Rsch. Ctr., Internet/Broadband Fact Sheet (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/internet-broadband/#home-broadband-use-over-time?tabId=tab-3109350c-8dba-4b7f-ad52-a3e976ab8c8f (similarly finding stark differences in home broadband adoption according to household income, such that only 57% of households making less than $30,000 reported having home broadband service, compared to 92% of households making at least $75,000).

Kansas's approach also cannot be squared with longstanding federal policies against rate-regulating broadband. Rate regulation is a classic form of common carrier regulation that historically has applied to public utilities. See N.Y. State Telecomms. Ass'n, Inc. v. James, 544 F. Supp. 3d 269, 282 (E.D.N.Y. 2021) ("[R]ate regulation is a form of common carrier treatment."); see also Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Further Notice of Proposed Rulemaking, 84 F.C.C.2d 445 ¶ 13 (1980) Broadband does not qualify as such. Indeed, in classifying broadband as an interstate information service, the FCC made the affirmative determination not to impose common carrier regulation on ISPs) and even the 2015 Title II

Order that classified broadband Internet access service as a telecommunications service and applied some common carrier regulations to broadband expressly forbore from the ex-ante rate regulation that Kansas proposes. Congress intended the BEAD Program to be a once-in-a-generation opportunity to close remaining gaps in broadband availability, not a reversal of the longstanding law and policy prohibiting states from engaging in price regulation.

As courts have held in related contexts, statutory prohibitions against rate regulation apply where a state either (1) specifies the rates that must be charged for specific levels of service, See, e.g., James, 544 F. Supp. 3d at 269 (preempting state law that would have required ISPs to offer low-income customers specific levels of broadband service at specific prices); CTIA–Wireless Ass'n v. Echols, 2013 WL 6633177, at *2 (N.D. Ga. Dec. 17, 2013) (preempting regulation requiring a minimum service rate of $5.00/month under Section 332 of the Communications Act); City of Dubuque v. Grp. W Cable, Inc., 1987 WL 11826, at *6 (N.D. Iowa Feb. 25, 1987) (preempting ordinance specifying rates that may be charged for second cable outlets and remote controls). or (2) freezes prices or restricts providers from adjusting rates in certain ways. See, e.g., Town of Norwood v. Adams-Russell Co., 549 N.E.2d 1115, 1118 (Mass. 1990) (holding that the Cable Act preempted a rate freeze provision); City of Burlington v. Mountain Cable Co., 559 A.2d 153, 155 (Vt. 1988) (same); Westmarc Commc'ns, Inc. v. Conn. Dep't of Pub. Util. Control, 807 F. Supp. 876, 886 (D. Conn. 1990) (preempting a regulation prohibiting the cable operator from increasing its rates to offset a fine imposed by the regulator); Cellco P'ship v. Hatch, 431 F.3d 1077, 1080-83 (8th Cir. 2005) (customer consent requirement for any "substantive change" to a service contract was preempted rate regulation, because it "prevent[ed] providers from raising rates for a period of time, and thus fixes the rates"). The Proposal would amount to impermissible rate regulation under both of these analyses, for both BEAD-subsidized areas and across the State. For example, in determining how much credit to award the applicant under the affordability criterion, Kansas's proposed scoring method uses a cost benchmark of $90 for symmetrical gigabit service, inclusive of all taxes, fees, and charges billed to customers in the BEAD project area. Proposal at 82; The applicant will receive full credit under this section if the cost of the gigabit symmetrical service package is less than $100 per month, including all taxes, fees and charges charged to the customer. A percentage of scoring will reflect their percentage distance from $100 per month to more expensive packages in addition to all taxes, fees, and charges to the customer.

Additionally, Kansas's proposed middle-class affordability plan would direct subgrantees to offer all consumers a 100/20 Mbps service option that "[c]osts $60 per month or less, inclusive of all taxes, fees, and charges billed to the customer" and does not contemplate allowing subgrantees to make future adjustments to this rate, which is in contrast to recent guidance from the NTIA FAQ 5.0 which permits for reasonable adjustments over time . Id. The Proposal also "encourage[s] [that] this "affordable service option" be made available across an entity's entire service territory" Id. – not just in BEAD-funded project areas.

II. State Regulation of Broadband Rates for ALL Consumers in the State is Not Permitted
Nothing in the NOFO or the IIJA permits NTIA or requires Kansas to impose specific rates on the service plans that subgrantees must offer to all consumers in the state, this was further reinforced in the NOFO BEAD FAQ 5.0, which clarifies Eligible Entities do not have the regulatory authority to require this outside of a grant project In addition to conflicting with the IIJA, such requirements are unnecessary and unwise as a policy matter.

First, the statutory requirement to adopt a low-cost broadband service option for income-qualified customers does not justify Kansas's impermissible price-setting proposals. To the extent that the NOFO contemplates that a state might actually define a provider rate, it does so as only one example, a wish, of how a state might fulfill the IIJA requirement to provide a "low-cost broadband service option" – not as a requirement that states must mandate a particular price, let alone a particular price available to all consumers. 47 U.S.C. §§ 1702(h)(4)(B), (5); NOFO at 67.

In relevant part, the NOFO provides that states must propose a definition of "low-cost broadband service option," which "should address . . . all recurring charges to the subscriber, as well as any non-recurring costs or fees to the subscriber (e.g., service initiation costs)," among other information. NOFO at 67. Putting aside whether that directive itself is consistent with the rate regulation prohibition in the IIJA, the NOFO makes plain that the "low-cost broadband service option" is limited to "eligible subscribers," i.e., those who meet specific income eligibility requirements. Those eligibility requirements exclude middle-income end users and foreclose the possibility that the required "low-cost broadband service option" could justify a further requirement that such service plans be broadly available to all consumers.

For example, the NOFO provides that the low-cost broadband service option must "[a]llow[] the end user to apply the Affordable Connectivity Benefit subsidy to the service price." Id. at 66-67. But that requirement can only be true if the "end user" is otherwise eligible for ACP in the first instance. In other words, the end user must be a low-income household, since the IIJA sets eligibility for ACP at 200% of the poverty line. This is an increase from the prior threshold of 135% of the poverty line, thereby making by some estimates up to 40% of U.S. households eligible for ACP. See The White House, FACT SHEET: Vice President Harris Marks Important New Milestone in Administration's Efforts to Cut Costs for American Families (July 21, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/21/fact-sheet-vice-president-harris-highlights-milestone-of-1-million-new-participants-on-reducing-high-speed-internet-cost-for-americans/. Furthermore, under the IIJA, the low-cost broadband service option must be made available only to "eligible subscribers," which NTIA defines in accordance with the same household eligibility criteria for ACP. NOFO at 12-13. Thus, households that do not qualify for ACP (e.g., middle-income households) are not eligible for the low-cost broadband service option.

Second, other references to service pricing in the NOFO and NTIA guidance are made in the context of provider disclosures and do not imply a broadening of eligibility for the low-cost broadband service option to all users. For example, the NOFO provides that when selecting subgrantees, a state must consider "the prospective subgrantee's commitment to provide the most affordable total price to the customer for 1 Gbps/1 Gbps service in the project area" for priority broadband projects and 100/20 Mbps service for non-priority projects – although KCTA believes that Kansas can and should consider additional speed tiers as explained below. Id. at 43. The NOFO also provides that subgrantees must submit regular reports "[d]escrib[ing] the non-promotional prices, including any associated fees, charged for different tiers of broadband service being offered," among other information. Id. at 90. Neither provision provides a basis for a state to set specific price thresholds for subgrantees' service plans that must be offered to all consumers. Additionally, while NTIA's BEAD Initial Proposal Guidance inartfully says that "[t]he purpose of [the low-cost option] is to outline how the Eligible Entity plans to ensure that all residents within its jurisdiction will have access to affordable broadband service options," NTIA Initial Proposal Guidance at 79 (emphasis added). this sentence is included in a discussion of the low-cost broadband service option, which, as described above, is limited to "eligible subscribers" who meet certain income thresholds.

Third, Kansas's rate regulation proposals are unnecessary and unwise as a policy matter. The IIJA reflects a finding that "[a]ccess to affordable, reliable, high-speed broadband is essential to full participation in modern life." 47 U.S.C. § 1701(a). But if the BEAD Program is to achieve that goal, then service over funded networks must be economically sustainable over time. In NTIA's own words, "the lack of a sustainable business case—namely a business case that generates a reasonable return on investment—is a core problem the BEAD Program is designed to address." See NTIA, Dep't of Commerce, Tailoring the Application of the Uniform Guidance to the BEAD Program; Request for Comments, 88 Fed. Reg. 42918, 42921 (July 5, 2023). This is because the remaining "[u]nserved and underserved areas present significant barriers for service, as evidenced by the lack of existing high-speed Internet infrastructure even after decades of the Federal efforts to expand broadband deployment in these areas." Id. In recognition of that reality, NTIA notes that "incentives for broad participation are needed to address the unique challenges for which the BEAD Program was created to solve" because rules that "prevent providers from earning a reasonable return on investment during the period of performance . . . would not address the economic conditions that have stunted investment in these areas." Id. Thus, it is particularly inappropriate to adopt prescriptive rate caps.

Even if BEAD grants cover a portion of the capital costs of construction, high-speed broadband networks must continuously be maintained and upgraded, as well as protected against cybersecurity threats, to meet evolving customer demands. These operating costs are significant and require a business model that is not subject to artificial constraints and has the flexibility to adapt to evolving marketplace realities. Price cap rate regulation risks starving the network, which in turn, risks the network becoming obsolete and insecure, requiring ongoing government subsidies just to remain viable, or even failing due to inability to cover operating

	costs. None of these outcomes are good for Kansans. Accordingly, broadband providers should have the flexibility to price and package their services to ensure that BEAD-funded networks can be maintained and operated while still being offered to consumers at prices reasonably comparable to those offered in non-subsidized areas. Kansas's scoring for the affordability criterion and its middle-class affordability plan should reflect these considerations.
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	Stephen P. Duerst

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