

**BEFORE THE
DEPARTMENT OF THE COMMERCE
WASHINGTON, D.C. 20230**

Limited General Applicability Nonavailability)
Waiver of the Buy America Domestic Content)
Procurement Preference as Applied to Recipients)
of Broadband Equity, Access, and)
Deployment Program)
)

COMMENTS OF USTELECOM—THE BROADBAND ASSOCIATION

USTelecom – The Broadband Association¹ respectfully submits these comments in response to The Department of Commerce’s (DOC) Notice and Request for Comment (Notice) related to the proposed Build America, Buy America (BABA)² waiver for the Broadband Equity, Access, and Deployment (BEAD) Program funded by the Infrastructure Investment and Jobs Act of 2021 (Act).³ The Act’s \$42.5 billion in funding for the BEAD Program is a once-in-a-generation opportunity to fully connect all Americans to high-speed broadband as quickly and efficiently as possible. USTelecom supports DOC’s proposal to “issue a limited, general applicability, nonavailability waiver of”⁴ BABA as it is a critical step towards “the timely

¹ USTelecom is the nation’s leading trade association representing service providers and suppliers for the telecom industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks. Its diverse member base ranges from large publicly traded communications corporations to local and regional companies and cooperatives, serving consumers and businesses in every corner of the country and world.

² Infrastructure Act, Title IX, Subtitle A – Build America Buy America.

³ Department of Commerce, *Limited General Applicability Nonavailability Waiver of the Buy America Domestic Content Procurement Preference as Applied to Recipients of Broadband Equity, Access, and Deployment Program* (August 22, 2023) (Notice).

⁴ Notice p. 1.

development of critical domestic infrastructure that delivers broadband internet services to all Americans.”⁵ To ensure the goals of the BEAD Program, including “broad participation” and ensuring providers have “access to the manufactured products necessary to fulfill their obligations,”⁶ there are a few key modifications and clarifications that DOC should incorporate into its final BABA waiver. These are discussed in turn below.

Optical Equipment. The Notice proposes to except Optical Line Terminals (OLTs), Remote Optical Line Terminals (rOLTs), OLT Line Cards, Optic Pluggables, and Optical Network Terminals/Optical Network Units (ONTs/ONUs) (collectively, Optical Equipment) from DOC’s waiver of “all electronics in BEAD program projects.”⁷ While USTelecom applauds the recent efforts of some manufacturers to onshore their Optical Equipment assembly,⁸ DOC should exercise caution in excluding *all* Optical Equipment from the BABA waiver. Optical Equipment is not always interchangeable between different technologies and different manufacturers. Thus, while some manufacturers’ products are interoperable with other manufacturers, some are not. This is problematic given that the BEAD Program is designed such that many awards will be for extension or improvement of an existing network.⁹ Thus, for example, a provider’s existing OLT will need to be compatible with the OLT Line Cards and/or

⁵ Notice p. 1.

⁶ See Notice at p. 1.

⁷ Notice at pp. 7-8.

⁸ See Department of Commerce, *U.S. Secretary of Commerce Gina Raimondo Announces Onshoring of Broadband Electronics Equipment* (Aug. 3, 2023), <https://www.commerce.gov/news/press-releases/2023/08/us-secretary-commerce-gina-raimondo-announces-onshoring-broadband>; National Telecommunications and Information Administration, *Biden-Harris Administration Announces Investments in Domestic Production of Electronics Equipment used in High-Speed Internet Networks* (Aug. 16, 2023), <https://www.ntia.gov/press-release/2023/biden-harris-administration-announces-investments-domestic-production>.

⁹ See Infrastructure Act § 60102(a)(1)(B), (D) (defining “unserved service project” and “underserved service project” to permit up to 20 percent of project locations to be served).

pluggables used for its BEAD-funded deployments. Providers therefore need the flexibility to select the best available equipment that is compatible with the portions of their network on which they will be relying for their BEAD-funded deployments.

Relatedly, warranties on network components may limit a provider's ability to use a different manufacturer's equipment without voiding the warranty and causing the provider to incur additional costs. For example, using an unapproved OLT Line Card could void the warranty on the OLT to which it is interconnected.

DOC should address these compatibility and warranty issues by providing an exception to the Optical Equipment exclusion whereby a provider can certify that the available BABA-compliant equipment is not compatible with its network and/or that use of the BABA-compliant equipment will void the warranty on existing network equipment. Doing so will help maximize service provider participation and, in turn, maximize the success of the BEAD program.

As part of its annual review of the BABA waiver,¹⁰ DOC should be cognizant of both delivery timelines and the price of Optical Equipment. A primary goal of the BEAD Program is the "timely development of critical domestic infrastructure that delivers broadband internet services to all Americans."¹¹ It is thus critical that DOC ensures that orders for BABA-compliant Optical Equipment are timely fulfilled, and that any production and delivery delays do not delay broadband deployment. Moreover, the market for BABA-compliant Optical Equipment will necessarily be less competitive than the broader supply chain given that many manufacturers of the same will not be onshoring assembly operations. Thus, as part of its annual review of the BABA waiver, DOC should ensure that pricing for BABA-compliant Optical

¹⁰ See Notice at p. 9.

¹¹ See Notice at p. 1.

Equipment does not drive up the cost of deployment, as this would result in less broadband being deployed and counter to the heart of the BEAD Program.

Enclosures. USTelecom makes three recommendations regarding the treatment of enclosures under the proposed waiver. *First*, the Notice proposes a limited waiver for “enclosures.”¹² The Notice, however, does not specifically identify what pieces of equipment DOC considers “enclosures.” Accordingly, the final waiver should specify the following pieces of equipment that are universally considered “enclosures”: fiber splice closures, primary flexibility point cabinets or fiber distribution hubs, terminals, pedestals, handholes, vaults, and manholes. Clarity and certainty as to what are considered “enclosures” is important for all BEAD participants.

Second, the Notice proposes to waive the 55 percent cost of components prong, but not the “manufactured in the United States” prong, for enclosures.¹³ While the components of three types of enclosures—fiber splice closures, primary flexibility point cabinets/fiber distribution hubs, and terminals—are largely manufactured in the United States, they are assembled outside the United States. In other words, these three types of enclosures satisfy the BABA requirement that “the cost of the product’s components mined, produced or manufactured in the United States exceeds 55 percent of the total cost of the product’s components,”¹⁴ but they are not “manufactured in the United States”¹⁵ for purposes of BABA. Furthermore, based on our members’ research, there is no currently available source of these three types of enclosures that are “manufactured in the United States.” As a result, these enclosures would not be BABA

¹² Notice at 8.

¹³ Notice at 8.

¹⁴ Infrastructure Act § 70912(6)(B)(ii).

¹⁵ *See id.* at (B)(i).

compliant under the proposed waiver and there is no BABA-compliant source of this important network equipment. Therefore, USTelecom recommends that DOC modify the limited waiver for enclosures to allow either the “manufactured in the United States” standard outlined in the Notice¹⁶ or the statutory 55 percent cost of components test to be used for BABA compliance of enclosures. Doing so will not only ensure that broadband providers have access to products necessary to fulfill their BEAD program obligations but also support American manufacturing as the components of these products are already being manufactured in the United States.¹⁷

Third, at times, a provider may need to use a specialized type of enclosure due to weather conditions or natural disaster risks in a certain area. For example, deployments in parts of Louisiana and Florida require a specialized terminal that is weather resistant given the hurricane risk in those areas.¹⁸ Building resilient networks is a priority of the BEAD Program¹⁹ and should be prioritized over BABA as not doing so could result in more, or more severe, network outages during extreme weather, which is detrimental to affected communities. Accordingly, the final waiver should provide that as part of certifying BABA compliance, a provider can identify any non-compliant enclosures it used in its deployment and the reason why doing so was necessary.²⁰

¹⁶ Notice at p. 8.

¹⁷ See Notice at 1.

¹⁸ Given that there are thousands of different models of enclosures, we do not yet know whether these specialized enclosures are available from a BABA-compliant source.

¹⁹ See, e.g. NTIA, *Notice of Funding Opportunity, Broadband Equity, Access, and Deployment Program* (NOFO) at 43, 62-64 (2022).

²⁰ Moreover, there are thousands of different SKU numbers for enclosures. A provider may need a specific model of enclosure for a part of a build for which a BABA-compliant source is unavailable. In that case, DOC should allow the provider to include any such enclosures as part of the certification discussed above.

Other Network Equipment. The Notice proposes to apply DOC’s de minimis waiver²¹ to all other network equipment which is “not domestically available.”²² The de minimis threshold is 5% of the total project equipment costs, up to a \$1,000,000 maximum.²³ Given how much equipment is used for network deployment, 5% of total equipment costs is not sufficient to cover “other network equipment.” Accordingly, DOC should allow the de minimis threshold, for purposes of the BEAD Program, to be 5% of total **project** costs, up to a \$1,000,000 maximum.

Reporting Requirements. BEAD funding recipients will be responsible for ensuring BABA compliance and reporting their equipment purchases to DOC.²⁴ Part of this obligation is ensuring that expenditures on “other network equipment” do not exceed the de minimis threshold.²⁵ However, there are certain nominal items that go into building any network that providers generally do not track in the ordinary course of business, like screws and nails. Accounting for these nominal items, both for compliance and reporting purposes, will be extremely difficult. For instance, these items, unlike routers and other components, generally don’t have a SKU number, making tracking impractical. Accordingly, DOC should clarify in the final waiver that the network equipment that a provider must track and report for BABA-compliance purposes is only equipment tracked in the ordinary course of business.

²¹ See Department of Commerce, *Department-wide Public Interest Waivers for De Minimis Infrastructure Project Purchases, Small Grants, and Minor Components within Iron and Steel Products*, Notice of Final Waiver (May 17, 2023), <https://www.commerce.gov/sites/default/files/2023-05/De%20Minimis%20Waiver.pdf> (DOC de minimis waiver).

²² Notice at p. 6.

²³ DOC de minimis waiver at p. 4 n. 1.

²⁴ While further guidance on the scope of equipment reporting for providers is forthcoming, *see* Notice at 9, USTelecom urges DOC to ensure such reporting is fashioned in a way to minimize burdens on BEAD participants, which will already be subject to copious reporting obligations under the NOFO. *See* NOFO at 90-92.

²⁵ As set forth above, the threshold set forth in the DOC de minimis waiver will be insufficient to cover “other network equipment.”

In closing, USTelecom appreciates DOC's steadfast work to implement this once-in-a-generation broadband funding program, which offers a historic chance to close the digital divide and unleash the promise of broadband to all Americans. Incorporating the recommendations discussed above into the final waiver will help maximize the success of the BEAD program while still supporting the important goal of increasing American manufacturing. USTelecom and its members stand ready to work with DOC and all stakeholders to continue advancing broadband deployment across the United States.

Respectfully submitted,

USTelecom—The Broadband Association

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