

October 3, 2022

Office of Internet Connectivity and Growth,  
National Telecommunication and Information Administration  
U.S. Department of Commerce  
1401 Constitution Avenue NW, Room 4887  
Washington, DC 20230

**Re:** *Notice; Request for Comments by the National Telecommunications and Information Administration (NTIA) regarding Limited Applicability Nonavailability Waiver of the Buy America Domestic Content Procurement Preference as Applied to Recipients of Middle Mile Grant Program Awards*

**INTRODUCTION:**

The National Rural Electric Cooperative Association (NRECA) submits these comments in response to the National Telecommunications and Information Administration (NTIA) Notice and Request for comments (Notice) on the proposed limited applicability nonavailability waiver that would provide recipients of federal financial assistance under NTIA's Middle Mile Grant Program (MMG Program) a limited exemption from application of the Build America, Buy America (BABA or Act) Preference as applied to limited classes of manufactured products and construction materials. NRECA supports NTIA's proposal of a limited applicability nonavailability waiver, providing recipients of federal financial assistance under NTIA's Middle Mile Grant Program a limited exemption from application of the Buy America Preference as applied to limited classes of manufactured products and construction materials.

The proposed waiver will (1) promote broad participation in the MMG Program, (2) ensure that non-Federal entities and for-profit entities are able to compete for MMG Program

funding on equal footing (especially in light of the very short application timeframe for the MMG Program), (3) ensure that MMG Program awardees will have access to the manufactured products and construction materials necessary to fulfill their obligations under the MMG Program, (4) allow funding recipients to continue to provide economic opportunity through innovation and timely deployment of broadband infrastructure, which is recognized to expand job opportunities, and (5) support the timely development of critical domestic public infrastructure. NTIA proposes to have recipients to whom the proposed waiver would apply report on their purchases of items from foreign sources.

NRECA members are dedicated to improving the communities in which they serve and are active in rural economic development efforts. More than 200 electric co-ops are working toward meaningful and diverse solutions to provide broadband services, which can help bridge the digital divide and jumpstart local economies. Another 100 to 200 are exploring the feasibility of providing broadband, either on their own or through partnerships. This cooperative commitment is vital for some 30% of rural Americans that still lack access to broadband, compared to about 2% in urban areas. NRECA, on behalf of its members, strongly supports implementation of a waiver of the Build America, Buy American provisions for the reasons discussed below.

#### **COMMENTS:**

Congress passed the Build America, Buy America Act which includes strong and permanent domestic sourcing requirements across all Federal financial assistance programs. The Act includes, among other things, Buy America Domestic Content Procurement Preference provisions (“Buy America Preference”), pursuant to which all construction materials must be

produced domestically and the cost of the domestically produced components of any manufactured product must be greater than 55 percent of the total cost of all components of the manufactured product. Under the IIJA, Federal financial assistance projects for infrastructure must comply with domestic content procurement preference requirements established in the “Build America, Buy America Act,” set out at The Infrastructure Investment and Jobs Act of 2021 (IIJA) sections 70901-70952. BABA’s domestic content procurement preference applies to all iron and steel, manufactured products, and construction materials used for infrastructure projects under an award.

NTIA and the Department of Commerce undertook an assessment of the domestic supply chain for relevant manufactured products and construction materials. During the course of that assessment, it became clear that the impact of BABA on the MMG Program would likely be particularly significant, necessitating an approach that acknowledges the non-availability of certain construction materials and manufactured products required for the deployment of middle mile infrastructure on the timeline mandated by the IIJA. MMG Program awards may be announced as early as spring of 2023 and will require supplies to be available on short timeframes, allowing little time to address supply chain issues. Moreover, applications for MMG Program grants were due September 30, 2022, requiring would-be applicants to identify potential domestic sources for necessary construction materials and manufactured products, assess the costs from such sources, and make judgements about whether it will be possible to make necessary acquisitions on the very short time horizon mandated by the MMG Program NOFO.

**Authority to grant a waiver is clear:**

Under BABA Section 70914(b), DOC has authority to waive the application of a domestic content procurement preference when (1) the application of the preference would be contrary to the public interest, (2) the materials and products subject to the preference are not produced in the United States at a sufficient and reasonably available quantity or satisfactory quality, or (3) inclusion of domestically produced materials and products would increase the cost of the overall project by more than 25 percent. Section 70914(c) provides that a waiver under Section 70914(b) must be published by the agency with a detailed written explanation for the proposed determination and provide a public comment period of not less than 15 days. NRECA agrees with the NTIA analysis that it has the authority to enact a waiver and highly encourages NTIA move forward with a waiver as soon as possible to provide clarity to applicants.

**Need for a waiver is clear:**

The Notice and the NTIA's own assessment of supply chain issues makes the clear and compelling case for a waiver to address the issue of many of the manufactured products and some of the construction materials required for middle mile broadband infrastructure deployment are not available in the quantity or quality needed for the MMG Program on the timeframes established by the IIA. As NTIA laid out in the Notice, many of the materials and equipment required for a middle mile deployment are not readily available domestically in the quantities necessary to meet MMG program goals and timelines. In addition, residual impacts of the COVID-19 pandemic on domestic and international manufacturing and supply chain, shipping and logistics issues are well documented, and policymakers have acknowledged national security and cyber security concerns with equipment manufactured in certain regions. On top of these factors, a huge spike in demand is predicted as a result of the historic level of broadband funding, including the MMG program, which will further increase the problems with the availability of

materials and equipment. Electric cooperatives want to deploy networks as quickly as possible and certainly within the timeframes established in the MMG program. That cannot be accomplished without a robust waiver. The waiver is a reasonable and measured approach to address widespread supply chain issues and inadequate supply of domestically manufactured equipment facing the communications industry, while also recognizing national security and cyber security concerns.

### **Equal treatment of applicants demands a waiver:**

NRECA supports an exemption for MMG program awardees from application of the Buy America Preference to address other concerns raised in the Notice. The Notice specifically states that “BABA requirements would impact applicants differently depending on whether they were “non-Federal entities” or “for-profit organizations.””

The Further Notice states:

“OMB-22-11, citing to 2 CFR § 200.1, defines “non-Federal entities” as “States, local governments, territories, Indian tribes, Institutions of Higher Education (IHE), and nonprofit organizations,” and provides that “for-profit organizations are not considered non-Federal entities” for the purposes of the guidance. Thus, some, but not all, of the entities that are eligible to participate in the MMG Program are non-Federal entities. This disparity will place non-federal entities and for-profit entities on different footing, with one class of applicants subject to BABA requirements and another class not subject to such mandates. This disparity, in turn, threatens to distort the competitive bidding process, providing advantages to one class of applicants over another—notwithstanding Congress’s clear effort to place applicants on a level playing field.”

The unequal application of the BABA requirements directly conflicts with the IJA statutory requirement to make grants available on a competitive basis. Specially, IJA § 60401(c), for example, directs the Assistant Secretary to make “grants on a technology-neutral, competitive basis to eligible entities for the construction, improvement, or acquisition of middle

mile infrastructure.” NTIA correctly identified the detrimental impact the unequal BABA obligation would have on the scoring of applications. Application of BABAA without a waiver would thus impose disparate harm, offering a significant advantage to private entities over non-profit and tribally owned companies. This necessitates that NTIA do all it can to ensure that the limited waiver encompasses the entirety of potential materials and equipment shortages, since such a shortage could lead to cost increases and delays for non-federal entities that are subject to the BABA.

Congress clearly intended to place applicants on a level playing field in designating a wide array of providers that could apply to the MMG Program without specific distinction or preference. As it begins to evaluate and score projects, NTIA should not dismiss projects only because a certain kind of provider is subject to and cannot comply with BABA because of domestic supply shortages while other providers are not governed by the same framework.

NRECA urges NTIA to take all available steps to mitigate the impact of this disparate treatment to ensure a level playing field for all MMG applicants. Doing so is consistent with the letter and spirit of the IJA statute and necessary to ensure that all applicants are able to compete for MMG Program funding on equal footing.

**Other issues:**

A few other issues that NTIA should consider is ensuring the BABA reporting burdens are minimized and a periodic review the waiver and updating it as needed to meet changing market needs. NTIA proposes to have MMG Program recipients to whom the proposed waiver would apply report on their purchases of items from foreign sources. While reporting of this information is reasonable and will provide valuable information that can guide future programs, NTIA should seek to limit the reporting burdens. All but three of NRECA’s 900 member

cooperatives are small business entities as classified by the Small Business Administration. Placing additional burdens on these small businesses will increase the costs for these small businesses to participate and discourage participation. Onerous reporting requirements would also further exasperate the potential unequal treatment of applicants in favor of for-profit entities not subject to the BABA. Therefore, streamlining of the reporting requirements is essential.

NRECA supports the initial one-year timeframe for the waiver and the proposal to review the waiver no less than every 6 months. Periodic review will allow NTIA to adjust to changing circumstances in the marketplace. Materials that are readily available today may become scarce due to unforeseen disruptions to manufacturing or supply chain issues. Similarly, domestic production of some materials may be ramped up quicker than expected so they may be removed from the waiver list. The periodic review will provide needed flexibility to NTIA to address issues that arise and should be particularly focused on adding components to the waiver list rather than removing materials and equipment. Given the potential unequal application of the BABA requirements, failure to review and update the waiver to meet changes in the market will disproportionately impact non-federal entities compared to for-profit entities. NRECA supports a mandatory review of the waiver every six months but also recommends that NTIA consider reviewing the waiver more frequently. Review of the waiver more frequently, on an ad hoc basis, or on a quarterly basis, will again ensure that the waiver reflects market conditions for domestically sourced components subject to the waiver and equal treatment of applicants.

**CONCLUSION:**

A waiver is necessary not only to address the shortage of domestically produced equipment and materials but to ensure that all applicants are able to compete for MMG Program funding on equal footing. NRECA supports enactment of the waiver with the recommendations discussed herein.

Respectfully submitted,

**National Rural Electric Cooperative Association**

By: \_\_\_\_\_/s/\_\_\_\_\_

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Dated: October 3, 2022