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Treasury Department Resurrects the Scary Biden Broadband Plan

by

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I. Introduction and Summary

Like it or not, the fine-print conditions attached to the massive tranches of federal subsidy dollars effectively define our nation's broadband infrastructure policy. The specific locations eligible, the speeds deemed to satisfy the meaning of "served," the identify of providers entitled to receive funds – these and various other requirements and criteria collectively manifest our priorities and goals. And while the specific language of the pending infrastructure bill attracted the most attention, scrutiny, and pushback, other funding sources continue to afford the Biden Administration lower-profile opportunities to claw back concessions made during the legislative process that led to Senate passage of the infrastructure bill. As one example, and just in time for Halloween, the U.S. Department of the Treasury recently issued guidance affecting \$10 billion in subsidies that "raise from the dead" the most problematic aspects of the original Biden Broadband Plan.

In March of this year, President Biden offered his clouded vision of the way forward in the form of a [White House Fact Sheet](#). There were numerous significant flaws in the Biden Broadband Plan, which, as documented in the papers listed in the "Further Readings" section

below, Free State Foundation scholars, myself included, were quick to expose. Fortunately, our elected representatives in the Senate stepped in and, through bipartisan negotiations, sanded off some of its most ragged – and problematic – edges. The result, the [Infrastructure Investment and Jobs Act](#) (IIJA), would make \$42.5 billion – still a harrowing total, to be sure – available for broadband infrastructure on more palatable, or at least less self-defeating, terms. Most critically, the IIJA embraces a realistic, technologically neutral definition of "broadband" (100 megabits per second (Mbps) downstream, 20 Mbps upstream); rejects [counterproductive](#) efforts to discriminate in favor of municipal broadband networks (and, thus, against the privately funded networks that already provide near-ubiquitous coverage); and wisely does not [preempt](#) state-imposed constraints on municipal broadband.

But the IIJA, should it pass the House, by no means is the only mechanism by which taxpayers might subsidize the construction of broadband infrastructure. The [American Rescue Plan Act of 2021](#), a \$1.9 trillion COVID-19 stimulus package signed into law on March 11, 2021, appropriated \$10 billion – nearly a fourth of the negotiated total in the IIJA – to the Treasury Department. That money likewise is to be used to fund infrastructure projects. And the strings attached track closely, and in some instances quote verbatim, the Biden Broadband Plan in its original form. With Halloween in mind, that's scary.

II. The Legislative Process Has Significantly Improved the Biden Broadband Plan

In March, the White House gave voice to its broadband-specific [wish list](#). Hidden therein were a number of ghastly concepts. For one, a shocking \$100 billion price tag. For another, a focus on so-called "[future proof](#)" networks – a poorly disguised synonym for "fiber." And, perhaps most frightening of all, a discriminatory preference for municipal broadband.

Fortunately, our elected representatives in Congress have a say in how federal tax dollars are spent. The legislative negotiations that led to the [IIJA](#), which passed the Senate on a bipartisan basis on August 10, 2021, and is currently before the House, carved away many of the Biden Broadband Plan's scariest provisions. As things now stand, the top-line broadband-specific total is \$65 billion, not \$100 billion. "Broadband" is defined in a realistic and technologically neutral manner (100/20 Mbps, not 100/100 Mbps or a symmetrical gigabit), one that encompasses numerous viable distribution technologies, including cable, 5G, and fixed wireless. And the [constitutionally problematic](#) stated preference for favoring municipal broadband has been excised.

Of the \$65 billion in the infrastructure bill for broadband, it is important to remember that – and it horrifies me to use this word to contextualize such a large sum of taxpayer dollars – *only* \$42.5 billion is to be used for the "Broadband Equity, Access and Deployment Program." That initiative, which would be administered by the National Telecommunications and Information Administration (NTIA), would distribute funds to the states to subsidize the construction of last-mile network facilities. The remaining \$22.5 billion would be used for a variety of tangential purposes, including extension and modification of the FCC's existing [Emergency Broadband Benefit](#) program (\$14.2 billion), so-called [digital equity plans](#) (\$2.75

billion), rural broadband (\$2 billion), Tribal broadband (\$2 billion), and middle-mile infrastructure construction (\$1 billion).

III. Treasury Department Guidance Impacting \$10 Billion in Subsidies Are the Biden Broadband Plan's Doppelganger

The Biden Administration lacked the necessary votes in the Senate to push through the Biden Broadband Plan in its original, deeply flawed form. Unfortunately, the Treasury Department, not similarly chained, has given rise to its evil twin.

On March 11, 2021, President Biden signed into law the [American Rescue Plan Act of 2021](#), a \$1.9 trillion COVID-19 stimulus package. Section 9901 amended Title VI of the Social Security Act, 42 U.S.C. § 801 *et seq.*, by adding Section 604. That section established the \$10 billion Coronavirus Capital Projects Fund (CCPF), a program to be administered by the Treasury Department "for making payments to States, territories, and Tribal governments to carry out critical capital projects directly enabling work, education, and health monitoring, including remote options, in response to the public health emergency with respect to the Coronavirus Disease (COVID-19)." Each state is eligible for a minimum of \$100 million.

Although the CCPF "provides flexibility for each State, territory, freely associated state, and Tribal Government to make investments in other Capital Projects designed to directly enable work, education, and health monitoring," the "[Guidance for the Coronavirus Capital Projects Fund for States, Territories & Freely Associated States](#)" (Guidance), issued last month, makes plain that "Treasury expects many Recipients will choose to use Capital Projects Fund grant funding for Broadband Infrastructure Projects."

As noted in the previous section, the IJA includes \$42.5 billion for broadband infrastructure grants. Compare that to the \$10 billion in the CCPF. Nearly a fourth of the amount agreed to in the IJA, the CCPF looms large as a potent, but largely overshadowed, defining force in our nation's big-picture broadband policy – for, as I stated at the outset, subsidy dollars, and the specific strings attached thereto, dictate that policy.

In fact, the Guidance embraces the Biden Broadband Plan's most extreme provisions wholeheartedly. For example, regarding the definition of "broadband," it states that "presumptively eligible projects" include:

The construction and deployment of broadband infrastructure projects ("Broadband Infrastructure Projects") ... if the infrastructure is designed to deliver, upon project completion, service that reliably meets or exceeds symmetrical download and upload speeds of 100 Mbps. If it would be impracticable, because of geography, topography, or excessive cost, for a Broadband Infrastructure Project to be designed to deliver speeds at such a speed, the Project must be designed so that it reliably meets or exceeds 100 Mbps download speeds and between 20 Mbps and 100 Mbps upload speeds

and be scalable to a minimum of 100 Mbps symmetrical for download and upload speeds. (Emphasis added.)

In light of current technological realities, this marks a return to the Biden Broadband Plan's focus on fiber, expressed therein through a vague reference to "future proof" networks. While at first glance it may appear that, like the IJA, the Guidance is embracing a technologically neutral speed threshold – that is, 100/20 Mbps – the requirement that subsidized networks "be scalable to a minimum of 100 Mbps symmetrical for download and upload speeds" appears to be as limiting as an outright requirement that eligible projects deliver 100/100 Mbps service on day one.

Moreover, the Guidance goes on to declare its pro-fiber preference in no uncertain terms: "Recipients are encouraged to prioritize investments in fiber-optic infrastructure where feasible, as such advanced technology better supports future needs." It offers no evidentiary support for this claim. The Guidance also encourages recipients "to prioritize projects that are designed to provide service to households and businesses not currently served by a *wireline* connection that reliably delivers at least 100 Mbps of download speed and 20 Mbps of upload speed" (emphasis added), thereby placing a target on privately funded providers utilizing viable, non-wireline distribution-technology platforms such as 5G, fixed wireless, and satellite.

In addition, it empowers recipients seeking to overbuild existing, privately funded providers by creating a number of technically ambiguous and highly subjective loopholes. Specifically, recipients may:

Take into account a variety of factors, including whether users actually receive internet service at or above speed thresholds at all hours of the day, whether factors other than speed such as latency or jitter, or deterioration of the existing connections make their user experience unreliable, and whether the existing service is being delivered by legacy technologies, such as copper telephone lines (typically using Digital Subscriber Line technology) or early versions of cable system technology (DOCSIS 2.0 or earlier)... Recipients may consider the actual experience of current broadband customers when making their determinations; and *whether there is a provider serving the area that advertises or otherwise claims to offer broadband at a given speed is not dispositive. (emphasis added).*

The practical result is clear: the Guidance doesn't merely permit overbuilding, it encourages recipients to find creative ways to justify doing so.

The Guidance also places a heavy hand on the municipal-broadband side of the scale: "Treasury ... encourages Recipients to prioritize Projects that involve broadband networks owned, operated by or affiliated with local governments, non-profits, and co-operatives – providers with less pressure to generate profits and with a commitment to serving entire communities." That language essentially is identical to the since-rejected opening position of

the Biden Administration, as articulated in the Fact Sheet, which "prioritize[d] support for broadband networks owned, operated by, or affiliated with local governments, non-profits, and co-operatives – providers with less pressure to turn profits and with a commitment to serving entire communities."

Recipients also must participate in the FCC's Emergency Broadband Benefit (EBB) program. One positive note: if and when the EBB concludes, the Guidance makes explicit that the Treasury Department will not require recipients to participate in a federal subsidy program that is limited to those designated as an [Eligible Telecommunications Carrier](#) (ETC), such as the Universal Service Fund. In addition, the Guidance encourages, but stops short of requiring, that funded projects "include at least one low-cost option offered at speeds that are sufficient for a household with multiple users to simultaneously telework and engage in remote learning."

Further, it opens the door to the cherry picking of availability data. Rather than requiring use of the [updated broadband availability maps](#) that the FCC is creating, consistent with the "[Broadband Deployment Accuracy and Technological Availability \(DATA\) Act](#), the Guidance states in the broadest of terms that "Recipients may choose to consider any available data including but not limited to documentation of existing broadband internet service performance, federal and/or state collected broadband data, user speed test results, interviews with community members and business owners, reports from community organizations, and any other information they deem relevant."

In many ways, the Guidance is reminiscent of the "[Broadband Reform and Investment to Drive Growth in the Economy Act of 2021](#)" (the BRIDGE Act), about which I wrote in a July 2021 [Perspectives from FSF Scholars](#). Reintroduced by Senators Michael Bennet (D-CO), Rob Portman (R-OH), and Angus King (I-ME) after – and seemingly in response to – the Biden Broadband Plan, the BRIDGE Act could have:

- Made subsidies available to overbuild existing, privately funded networks providing anything less than symmetrical gigabit service;
- Preempted state laws that protect taxpayers from the [financial havoc](#) so often wreaked by municipal broadband boondoggles – and empowered local governments to discriminate against their privately funded competitors;
- Encouraged decisionmakers to "cherry pick" the most favorable broadband availability data rather than rely upon the modernized maps that the FCC is in the process of generating; and
- Required subsidy recipients to offer a [rate-regulated package](#).

But whereas the BRIDGE Act's sponsors lacked the votes necessary to convert its provisions into law, the Treasury Department, an executive branch agency, was able to resurrect the most horrifying aspects of the Biden Broadband Plan.

IV. Conclusion

There are so many different federal broadband funding sources that it is a challenge to [keep track](#) of them all. In and of itself, and especially with Halloween fast approaching, that reality creates the haunting specter of waste, duplication, fraud, and abuse. Even more frightening is the fact that buried within these various subsidy programs are the skeletal specifics of our national broadband policy. On a bipartisan basis, the Senate rejected the most terrifying aspects of the Biden Broadband Plan when it passed the IJA on a 69-30 vote. But like the undead, many of those provisions have risen again, on a slightly smaller but still influential scale, through the scary Guidance issued by the Treasury Department.

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Further Readings

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Andrew Long, "['Future Proofing' Subsidized Broadband Would Inflate Consumer Prices](#)," *FSF Blog* (April 13, 2021).