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**The Department of Agriculture (Obviously) Is Not the FCC:
Why, Then, Is It Dictating Communications Policy?**

by

Andrew Long *

I. Introduction and Summary

The Federal Communications Commission is the congressionally established administrative agency primarily responsible for establishing our nation's communications policies. Yet while the FCC remains hamstrung by a 2-2 partisan split, and thus largely unable to advance President Biden's fraught broadband-related agenda, other agencies within his administration have begun usurping that role.

In particular, the Departments of Treasury and, more recently, Agriculture inappropriately have leveraged their oversight of federal funding programs to champion some of the worst elements of the Biden Broadband Plan: so-called "Net Neutrality" restrictions; "open access" requirements; rate regulation; an exclusive preference for fiber despite the proven viability of rival distribution technologies (cable, 5G, fixed wireless, satellite, and so on); and discrimination in favor of municipal broadband projects vis-à-vis private sector undertakings.

As I [wrote](#) in the lead up to Halloween, the [American Rescue Plan Act of 2021](#) assigned to the Treasury Department the responsibility to distribute \$10 billion in Coronavirus-related funding,

the bulk of which is expected to be used to pay for broadband infrastructure. Frighteningly, Treasury seized that opportunity to impose upon grant recipients aspects of the Biden Broadband Plan rejected by the bipartisan group of Senators who negotiated the [infrastructure package](#) that days ago became law, which includes \$42.5 billion for the construction of broadband facilities.

Specifically, the "[Guidance for the Coronavirus Capital Projects Fund for States, Territories & Freely Associated States](#)," which was issued by the Treasury Department in September 2021, (1) requires that funded networks be upgradeable to 100 megabits per second (Mbps) symmetrical service, effectively implementing President Biden's myopic preference for fiber-based networks; (2) encourages applicants to ignore evidence that broadband service is available in a given area in order to receive taxpayer dollars to overbuild privately funded infrastructure; and (3) states an explicit preference for municipal broadband projects, using language virtually identical to that found in the March 2021 White House [Fact Sheet](#).

More recently, the Department of Agriculture on October 22, 2021, [announced](#) that, for the first time, it will apply policy-dictating [evaluation criteria](#) when deciding between competing applications for [ReConnect Program](#) loans and grants. Congress established the ReConnect Program, the goal of which is to bring broadband access to rural areas, in 2018. It is the job of the Department of Agriculture to distribute that money, which it did without causing a stir, to the tune of over \$1.5 billion, during Fiscal Years 2020 and 2021.

During the third round of funding, however, applicants will receive a preference, in the form of "points," for agreeing to abide by so-called "Net Neutrality" rules similar to those eliminated by the FCC in 2018's [Restoring Internet Freedom Order](#). In addition, applicants for the \$1.15 billion made available will receive points for committing to operating their networks pursuant to a "wholesale" (in other words, "open access") model and providing a "low-cost option," both of which unnecessarily and detrimentally inject government rate regulation into the competitive broadband marketplace. Moreover, municipal broadband projects, which have a long history of [failing to achieve financial viability and leaving taxpaying residents with the bill](#), also will be awarded points.

These Biden Administration agencies should stand down when it comes to pursuing efforts to implement controversial communications policies, especially when there is widespread agreement that, ultimately, their misguided actions will dampen investment and innovation and dissipate resources that otherwise would go to the deployment of new facilities.

II. It Is the FCC's Job to Determine the Regulatory Classification of Broadband

Congress empowered the FCC to establish the regulatory classification of high-speed Internet access services pursuant to [definitions](#) set forth in the Communications Act. Specifically, the Commission is responsible for deciding, based upon record evidence in a notice-and-comment rulemaking, whether to regulate broadband as a common carrier "telecommunications service" pursuant to Title II or, as currently and appropriately is the case, as an "information service" subject to light regulation under Title I. That determination, of course, has major implications for both overall consumer welfare and the nation's economy. Regrettably, in recent years it has

[vacillated](#) in response to the identity of the political party in control of the White House and, as a direct consequence, the makeup of the Commission itself.

Rather than waiting for a reconstituted Commission to consider changes in policy, troublingly, President Biden appears willing to engage in "end runs" of the FCC to implement his broadband policy preferences. He has indicated these objectives primarily through the release of two documents: (1) a [White House Fact Sheet](#) in March, and (2) an [Executive Order](#) in July. They included the re-reclassification of broadband as a "telecommunications service" – and along with it, "open access" requirements; rate regulation; and the reimposition of so-called "Net Neutrality" restrictions – as well as a preference for fiber-based networks, specifically municipal broadband projects. However, the \$1.2 trillion [Infrastructure Investment and Jobs Act](#) (IIJA), which he recently signed into law, was the product of bipartisan negotiations and, consequently, struck a much different, and relatively more reasonable, compromise. The legislative process performed the role the Founders intended.

And yet, an alarming trend is emerging, where factions within the Biden Administration – first the Treasury Department, and now the Department of Agriculture (USDA) – are trespassing into the clear policy domain of the FCC to advance controversial and ill-advised broadband policy priorities in the face of conflicting congressional intent. And they do this outside of the traditional notice-and-comment rulemaking process that the FCC would be required to undertake, as Acting Chairwoman Jessica Rosenworcel [acknowledged](#) at her recent [confirmation hearing](#) before the Senate Commerce Committee.

III. The USDA Lacks the Authority and Expertise to Dictate Broadband Policy

In "[Treasury Department Resurrects the Scary Biden Broadband Plan](#)," an October 20, 2021, *Perspectives from FSF Scholars*, I exposed a number of troubling aspects of the [guidance](#) promulgated by the Treasury Department in connection with the \$10 billion Coronavirus Capital Projects Fund established by the [American Rescue Plan Act of 2021](#). They included a reality-defying, fiber-prioritizing definition of "broadband" (essentially, symmetrical 100 Mbps service); a license to cherry pick service availability data to justify the overbuilding of existing, privately funded infrastructure; and discrimination in favor of municipal broadband projects.

In similar fashion, the USDA recently announced [evaluation criteria](#) for [ReConnect Program](#) applications that go even further in imposing the Biden Broadband Plan's most extreme features. Authorized by Congress as part of the [Consolidated Appropriations Act, 2018](#), the [ReConnect Program](#) "offers loans, grants, and loan-grant combinations to facilitate broadband deployment in areas of rural America that currently do not have sufficient access to broadband." [Over \\$656 million](#) was awarded in Fiscal Year 2019 and [more than \\$852 million](#) in Fiscal Year 2020.

In the leadup to the upcoming application window for up to \$1.15 billion in third-round ReConnect Program funding, the USDA has [made plain](#) its intention to leverage its disbursement role to champion (1) common carrier regulations (so-called "Net Neutrality" requirements, "open access" obligations, and rate regulation), and (2) municipal broadband.

This intrusion into the domain of the FCC constitutes an unacceptable "end run." One, the Commission's [decision](#) at the end of 2017 to classify high-speed Internet access as an "information service" precludes it, the agency empowered by Congress to interpret the Communications Act, from imposing common carrier regulations. The USDA has no business contradicting that consequence. Two, the bipartisan legislative negotiations that produced the just-signed IJA, perhaps better known as the [\\$1.2 trillion infrastructure bill](#), rejected the Biden Broadband Plan's efforts to (1) impose such requirements, and (2) discriminate in favor of municipal broadband. The USDA is wrong to defy the clear and timely will of our elected representatives, particularly on a subject well beyond its authority and expertise.

IV. The ReConnect Program's Evaluation Criteria Promote Bad Policy

On October 22, 2021, Secretary Tom Vilsack [announced](#) that the USDA will begin accepting applications for Round Three of the ReConnect Program on November 24, 2021. This time around, up to \$1.15 billion will be distributed. For the first time, however, the program's [evaluation criteria](#) have been crafted specifically to advance controversial policy objectives far outside the USDA's jurisdiction.

In deciding between competing ReConnect Program applications, USDA will utilize a points-based system to prioritize those projects that advance a specific list of goals. Some of those aims align with the intent of Congress. For example, an application to connect "the least dense rural areas" will receive 25 points, as will an application to construct high-speed Internet network infrastructure in areas that lack "broadband" as defined by the FCC: 25 megabits per second (Mbps) downstream and 3 Mbps upstream.

However, I do note with concern that the evaluation criteria expressly state that "[a]pplicants are not required to treat the publicly available FCC current Form 477 data as dispositive of what speed service currently exists." In addition, they fail to even mention the next-generation broadband availability maps that the FCC is developing pursuant to the [Broadband DATA Act](#). This invites reliance on biased data and risks the use of taxpayer dollars to overbuild areas already served by privately funded infrastructure.

In contrast, and what I highlight below, are those criteria that (1) reject the legal impact of the FCC's 2018 [Restoring Internet Freedom Order](#), and (2) explicitly endorse ill-advised attempts by municipalities to enter the broadband marketplace. Under then-Chairman Ajit Pai, the FCC voted at the end of 2017 to reclassify broadband Internet access as an "information service" subject to minimal regulation under Title I. The evaluation criteria announced by the USDA willfully ignore that decision – and proceed as though broadband were classified as a "telecommunications service" to which common carrier requirements may apply.

First, and most controversially, the ReConnect Program evaluation criteria awards 10 points to "applicants that commit to net neutrality." It defines "net neutrality" as follows:

[T]he applicant's networks shall not (1) block lawful content, applications, services, or non-harmful devices, subject to reasonable network management; (2) impair or degrade lawful Internet traffic on the basis of Internet content,

application, or service, or use of a non-harmful device, subject to reasonable network management; and (3) engage in paid prioritization, meaning the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.

As a group of 13 Republican Senators explained in a November 5, 2021, [letter](#) to Secretary Vilsack, "it is deeply troubling that USDA is suggesting it has the authority much less the qualified staff and expertise to make determinations about 'lawful Internet traffic.'" Further, "Net Neutrality," as so defined, is a misguided, inefficient policy that discourages continued private investment and innovation.

Second, the evaluation criteria promise 10 points to applicants "that commit to offering wholesale broadband services at rates and terms that are reasonable and nondiscriminatory." In other words, the USDA is promoting so-called "open access" networks – and thereby opening a can of worms. Who will decide what constitutes "reasonable and nondiscriminatory" rates and terms? The USDA? The FCC? Even the latter, which has experience in this area, has failed to do so successfully in the past because, as a practical matter, an "open access" mandate necessarily involves establishing a full-on public utility rate regulatory regime. The former, on the other hand, would be entering uncharted territory.

Third, applicants that "demonstrate that the broadband prices they will offer are affordable to their target markets, provide information about the pricing and speed tiers they intend to offer, and 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*" (emphasis added) will receive 20 points. Again, this requires the establishment of benchmarks, with respect to both price and service level, that demand staffing levels and expertise that the USDA without question lacks.

Finally, the evaluation criteria make available 15 points to "[a]pplications submitted by local governments, non-profits or cooperatives." As I described in "[Treasury Department Resurrects the Scary Biden Broadband Plan](#)," an October 2021 *Perspectives from FSF Scholars*, the [Infrastructure Investment and Jobs Act](#) (IIJA), a law that was able to make its way through Congress on a bipartisan basis, wisely rejected the [stated intention](#) of President Biden to "prioritize[] support for broadband networks owned, operated by, or affiliated with local governments, non-profits and co-operatives." President Biden [signed the IIJA into law](#) on November 15, 2021.

V. Conclusion

It is wrong – and perhaps unlawful as beyond their authority – for the Departments of Treasury and Agriculture to take it upon themselves to leverage their limited roles as funding-program administrators to hijack the authority of the FCC and defy the will of Congress to advance the most flawed elements of the Biden Broadband Plan. It also is inappropriate for these agencies to

reverse established and effective communications policies without first providing interested members of the public a full opportunity to comment via a traditional rulemaking conducted pursuant to the [Administrative Procedure Act](#).

As the expert agency responsible for interpreting and applying the Communications Act, the reclassification of broadband as a "telecommunications service" – and with it, the imposition of Net Neutrality, "open access," and rate regulations – would be the FCC's bad decision to make if that is what it wishes to attempt to do. It likewise would be the FCC's bad decision to struggle to justify in the face of the mountains of [conflicting record evidence that surely would be submitted in response to the Notice of Proposed Rulemaking prerequisite to yet another change in direction](#), a point that Acting Chairwoman Rosenworcel [acknowledged](#) during her November 17, 2021, [confirmation hearing](#). Discriminatory treatment of municipal broadband boondoggles, meanwhile, simply is a bad and [costly](#) policy choice, one that Congress, in the recently signed bipartisan \$1.2 trillion infrastructure package, rightly rejected despite the Biden Administration proposing such discrimination.

* Andrew Long is a Senior Fellow of the Free State Foundation, an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it.

Further Readings

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