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**Self-Defeating Treasury Subsidy Rule Wrongly Champions Broadband  
Overbuilds**

by

**Randolph J. May and Andrew Long \***

**I. Introduction and Summary**

Once again, the Department of Treasury has leveraged its administrative role in distributing federal dollars to advance extremely detrimental broadband policies. Its just-released Final Rule for the \$350 billion State and Local Fiscal Recovery Funds (SLFRF) program renders meaningless congressional instruction that grants be confined to those "necessary" in response to the COVID-19 pandemic.

Troublingly, and contrary to congressional intent, Treasury's Final Rule opens the door wide to subsidized overbuilds of existing, privately funded broadband networks by, [in Treasury's highly subjective and practically unbounded words](#), "expand[ing] eligible areas for investment in broadband infrastructure to include locations *where the recipient has identified need for additional broadband investment*" (emphasis added). As FCC Commissioner Brendan Carr recently [noted with concern](#), this "gives the green light for recipients to spend those funds on overbuilding existing, high-speed networks in communities that already have multiple broadband providers."

Treasury's Final Rule deliberately and unilaterally implements elements of President Biden's flawed broadband ambitions. In the bipartisan compromise embodied in the recent infrastructure bill that appropriated over \$42 billion specifically to broadband infrastructure, Congress rejected aspects of the Biden Broadband Plan that would have resulted in overbuilding by specifically prioritizing first "unserved" areas, second "underserved areas, and third "community anchor institutions."

The Final Rule rejects not only this approach, but also the brief but unambiguous legislative language directing Treasury to limit the allocation of funding to those broadband projects "necessary" "to mitigate the fiscal effects stemming from the" COVID-19 pandemic. And, whereas Treasury's earlier Interim Final Rule regarding broadband funding embraced the limiting concept of "unserved" (that is, lacking access to speeds of at least 25/3 Mbps), the Final Rule now opens the door to subsidized construction anywhere an applicant is able to imagine "an identified need for additional broadband infrastructure investment." This "flexibility," as Treasury puts it, happens to encompass, among other possibilities, "lack of access to a connection that reliably meets or exceeds symmetrical 100 Mbps download and upload speeds, lack of affordable access to broadband service, or lack of reliable broadband service." Incredibly, even where 100/20 Mbps service already is available, or federal or state funding commitments to provide 100/20 Mbps already have been made, "overbuilder" applicants still can obtain money from Treasury's SLFRF program.

In sum, by subsidizing overbuilding of existing broadband facilities, and thereby facilitating the wasteful and inefficient expenditure of federal funds contrary to congressional intent, Treasury's Final Rule jeopardizes achievement of the goal of universal deployment and access and discourages continued private investment, the primary driver to date of broadband network expansion.

## **II. Treasury's Final Rule Defies the Intent of Congress**

On January 6, 2022, The Department of Treasury issued its [Final Rule](#) for the \$350 billion SLFRF program established by the \$1.9 trillion pandemic-specific [American Rescue Plan Act of 2021](#) (ARPA). A top telecommunications policy priority of the Biden Administration is to fast-track universal high-speed Internet access. The Final Rule, however, encourages the use of federal subsidies to construct redundant network facilities in areas already served – not the high-cost, primarily unserved rural areas where government intervention may be needed in order to achieve that goal.

Thanks to over two decades of sustained private investment totaling nearly [\\$2 trillion](#), in December 2020 the FCC [reported](#) that, based upon 2019 data, more than 95 percent of Americans have access to broadband. That number surely has increased in the subsequent two-plus years. Nevertheless, the COVID-19 pandemic intensified the sense of urgency regarding rural and other locations that, largely due to unfavorable economics, remain offline. Consequently, and to ensure that every American has the ability to access employment, learning, healthcare, and other opportunities via a robust high-speed Internet connection, Congress

included the expansion of broadband infrastructure to unserved areas in the list of eligible uses of SLFRF program funding.

Treasury's Final Rule, however, trespasses far beyond the bounds of that objective, brazenly and without reasoned justification championing the use of billions in taxpayer dollars to overbuild privately funded networks that already serve consumers' needs. The direct consequences likely will be dire: (1) massive waste, inefficiency, and redundancy; (2) decreased investment and marketplace participation by commercial Internet service providers (ISPs) with the proven ability to deploy broadband infrastructure and drive adoption, and (3) the distinct possibility that, after all that money has been spent, the highest-cost/lowest-margin areas could remain unconnected.

The SLFRF program encompasses two separate funds created by ARPA: the Coronavirus State Fiscal Recovery Fund and the Coronavirus Local Fiscal Recovery Fund. Combined, they promise a total of \$350 billion in government subsidies – targeting, among other things, the construction of high-speed Internet infrastructure – to states, localities, and Tribal governments. By no means, however, can ARPA be said to present a comprehensive articulation of congressional intent with respect to our nation's broadband policy priorities.

Indeed, the briefly stated objective of the nearly \$220 billion Coronavirus State Fiscal Recovery Fund is "to mak[e] payments ... to States, territories, and Tribal governments to mitigate the fiscal effects stemming from the public health emergency with respect to the Coronavirus Disease (COVID–19)." On the topic of broadband infrastructure, the relevant statutory language indicates merely that the money is to be used "to make *necessary* investments" (emphasis added). And regarding the role of Treasury, it simply states that "[t]he Secretary shall have the authority to issue such regulations as may be *necessary or appropriate* to carry out this section" (emphasis added).

Likewise, the purpose of the over \$130 billion Coronavirus Local Fiscal Recover Fund is to "mak[e] payments ... to metropolitan cities, nonentitlement units of local government, and counties to mitigate the fiscal effects stemming from the public health emergency with respect to the Coronavirus Disease (COVID–19)." Again, the funds are to be used "to make *necessary* investments in ... broadband infrastructure" (emphasis added), and the Secretary of Treasury is given "the authority to issue such regulations as may be *necessary or appropriate* to carry out this section" (emphasis added). This repeated use of the qualifier "necessary" should have constrained the administrative steps taken by Treasury to stand up the SLFRF program. As discussed below, however, the Final Rule effectively renders that term devoid of meaning.

Notably, the Final Rule is not the only instance where Treasury has acted in ways inconsistent with congressional intent. As I detailed in "[Treasury Department Resurrects the Scary Biden Broadband Plan](#)," an October 2021 *Perspectives from FSF Scholars*, Treasury injected numerous problematic elements of President Biden's broadband-policy [wish list](#) into its "[Guidance for the Coronavirus Capital Projects Fund for States, Territories & Freely Associated States](#)" (CCPF Guidance) governing a separate \$10 billion fund established by ARPA. (In addition, the Department of Agriculture has taken similarly troublesome actions, as I described in "[The Department of Agriculture \(Obviously\) Is Not the FCC: Why, Then, Is It Dictating Communications Policy?](#)," a November 2021 *FSF Perspectives*.)

In stark contrast, the detailed text of the [Infrastructure Investment and Jobs Act](#) (IIJA) – which, after extensive negotiations, passed on a bipartisan basis – serves as a far more definitive legislative expression of broadband deployment policy. One that rejects many of the most extreme aspects of the Biden Broadband Plan as first set forth in a March 2021 [White House Fact Sheet](#) (and critiqued in a series of Free State Foundation papers linked in the "Further Readings" section below). Most relevant to this discussion are the priorities defined by the IIJA regarding the allocation of the \$42.45 billion it appropriates for broadband deployment.

In its guidance to NTIA regarding the administration of the Broadband Equity, Access, and Deployment (BEAD) Program, the IIJA makes plain that funding first must target "unserved" areas (that is, where high-speed Internet access service delivering speeds of at least 25 megabits per second (Mbps) downstream and 3 Mbps upstream is not yet available), then "underserved" areas (defined as locations where 100/20 Mbps service is not yet available), and finally to "community anchor institutions." This clear framework reflects sound policy to allow the use of government money for the construction of broadband infrastructure only in areas lacking a robust connection.

### **III. The Final Rule's Promotion of Overbuilds Is Inefficient and Counterproductive**

Subsidies that target truly unserved locations, primarily in rural and low-population-density areas where unfavorable economic prospects serve as a hurdle for private investment, can serve a worthwhile role in accelerating the timing of universal broadband access. But government funding made available to overbuild existing infrastructure not only wastes taxpayer dollars, it also jeopardizes achievement of the very goal it seeks to address. This explains why the IIJA directs [NTIA](#) to prioritize "unserved" areas, as discussed above.

Throughout vast swaths of the country, the broadband marketplace is competitive. Providers utilizing distribution technologies appropriate to the geographic and other characteristics of a given location – including fiber, cable broadband, 5G and other fixed wireless solutions, and satellite – aggressively vie for subscribers. [According to the FCC](#), at the end of 2019 roughly 3 out of 4 U.S. households had a choice between at least two broadband ISPs. Sound competition principles, as well as [express congressional policy](#), dictate that where the marketplace is operating efficiently, government should not interfere. This is the bedrock reason why federal agencies must avoid the use of taxpayer dollars to overbuild existing network facilities.

Of course, there are additional reasons why subsidized overbuilds are a bad idea. For one, they represent the inefficient use of limited resources – in other words, waste. For another, they create incentives for recipients to target higher margin locations – whether the result of denser populations, more favorable geographic conditions, or other factors – rather than areas that are, in fact, unserved. In addition, they unreasonably threaten the ability of privately funded providers to generate a reasonable return on their investment, and thereby discourage them from taking the financial risk necessary to expand their footprints.

Lest we forget, private investment, to the tune of [\\$1.9 trillion](#) over the last 25 years and nearly \$80 billion in 2020 alone, already has delivered to the American public near-ubiquitous

broadband connectivity: again citing [FCC data](#), at year-end 2019, nearly 96 percent of Americans had access to broadband. Continued private investment, and the associated assumption of risk of private capital, therefore should be encouraged – not actively undermined by the unwarranted and discriminatory allocation of government subsidies resulting in marketplace distortion.

The Final Rule, however, goes to extreme lengths to promote overbuilds. Somewhat deceptively, the [Press Release](#) issued by Treasury announcing the Final Rule states vaguely that "Treasury has broadened ... broadband infrastructure projects – understanding the unique challenges facing each state and locality in delivering ... high-speed broadband to their communities." But in practical terms, what the Final Rule does is go even further than the [Interim Final Rule](#) to find "creative" and harmful ways to disregard the existence of broadband networks already delivering to consumers more than sufficient speeds. And it does so without either apology or reasoned explanation:

The threshold for the interim final rule allowed benefits to accrue in a more targeted manner to the approximately 9 percent of the country with access to speeds under the 25/3 Mbps threshold. However, since SLFRF funds are distributed to tens of thousands of governments across the country with a variety of broadband needs, Treasury believes that allowing recipients *greater flexibility* to determine locations to serve in their jurisdictions – including considering affordability and competition barriers – will lead to greater long-term public benefit. Further, *given that many federal broadband grant programs are focused solely on unserved and underserved areas, Treasury believes that the final rule's flexibility enables these funds to fill an important role in the overall federal broadband landscape.* (Emphasis added.)

It is not at all evident what this "important role in the overall federal broadband landscape" entails, but what is clear is that it (1) exceeds the goal of ensuring all Americans are able to participate in virtual society via broadband access, and (2) improperly surpasses the bounds of recently expressed congressional intent. As noted above, the IJA prioritizes "unserved" areas, then "underserved" areas, and then "community anchor institutions." The Final Rule, on the other hand, actively encourages the use, in the first instance, of the SLFRF program's \$350 billion to overbuild via the highly subjective guise of "greater flexibility." Moreover, it largely rejects the constraining concept of "served" altogether, as revealed by the quoted language immediately above and below:

Households and businesses with an identified need for additional broadband infrastructure investment do not have to be the only ones in the service area served by an eligible broadband infrastructure project. Indeed, serving these households and businesses may require a holistic approach that provides service to a wider area, for example, in order to make ongoing service of certain households or businesses within the service area economical.

The Final Rule promotes overbuilding in other ways, as well. As noted above, the text of ARPA states that SLFRF program funds are to be used "to make *necessary* investments in ... broadband

infrastructure" (emphasis added). The [Interim Final Rule](#) defined "necessary investments" narrowly: in relevant part, those "unlikely to be made using private sources of funds." The Final Rule rejects this important qualifier: "Given that it may be difficult to assess in a particular case what the probability of private investment in a project would be, Treasury has eliminated this standard from the meaning of necessary ...."

In addition, where the Interim Final Rule embraced the sound and limiting concept of "unserved" (that is, lacking access to speeds of at least 25/3 Mbps), the Final Rule opens the door to subsidized construction anywhere an applicant is able to imagine "an identified need for additional broadband infrastructure investment." This "flexibility" encompasses, among other possibilities, "lack of access to a connection that reliably meets or exceeds symmetrical 100 Mbps download and upload speeds, lack of affordable access to broadband service, or lack of reliable broadband service." Incredibly, even where 100/20 Mbps service is available, or federal or state funding commitments to provide 100/20 Mbps already have been made, applicants still can obtain money from the SLFRF program.

As we explained in "[Biden Broadband Plan: 'Future Proofing' Is Likely 'Fool's Proofing,'](#)" a June 2021 *Perspectives from FSF Scholars*, 100 Mbps symmetrical service is a technical requirement that, as a practical matter, heavily favors fiber over other viable distribution platforms. Consequently, the use of this unreasonable and unrealistic speed benchmark opens up areas served by robust broadband networks utilizing non-fiber technologies to government-subsidized competition. Affordability and reliability, meanwhile, are not only highly subjective but, more to the point, secondary considerations to what is, or at least should be, the fundamental and operative question: whether a given location is connected.

Like the CCPF Guidance discussed above, the Final Rule also encourages applicants to discount and/or disregard altogether evidence that a given area already is served. Specifically, the Final Rule states 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*"(emphasis added).

FCC Commissioner Brendan Carr shares these concerns. In a [statement](#) released on January 14, 2022, he wrote that "it makes no sense for the Biden Administration to treat parts of this country that already have access to broadband services at speeds nearing 100 Mbps down and 20 Mbps up the exact same as communities that are stuck with nothing today." He also took issue with the fact that the Final Rule "allow[s] these billions of dollars to be spent based on bad data ... rather than the broadband maps that the federal government has been funding and standing up."

Although the Final Rule officially will not take effect until April 1, 2022, Treasury has made clear that, for all intents and purposes, [it already is in force](#). As Commissioner Carr noted hopefully, however, "it is not too late to correct course. The state, local, and Tribal governments that receive ARPA funding will have the power to direct these dollars to those communities that have been left behind, rather than those that already benefit from high-speed Internet services today."



## IV. Conclusion

The Department of Treasury's Final Rule for the \$350 billion State and Local Fiscal Recovery Funds program represents the latest instance where the Biden Administration has defied the will of Americans' elected representatives to advance rejected elements of the President's deeply flawed broadband policy wish list. In championing government-subsidized overbuilds of existing, privately financed broadband networks, the Final Rule discourages continued private investment, interferes with the efficient operation of the competitive marketplace, ignores congressional intent, and undermines achievement of the very goal it seeks to advance: universal broadband access.

\* Randolph May is President and Andrew Long 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

Randolph J. May and Andrew Long, "[Biden's Executive Agencies Doing 'Net Neutrality' End Run](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 67 (December 22, 2021).

Andrew Long, "[The Department of Agriculture \(Obviously\) Is Not the FCC: Why, Then, Is It Dictating Communications Policy?](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 62 (November 29, 2021).

Andrew Long, "[Treasury Department Resurrects the Scary Biden Broadband Plan](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 56 (October 20, 2021).

Andrew Long, "[New Study Once Again Dispels Municipal Broadband Viability: And Affirms the Wisdom of State Bans](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 44 (August 18, 2021).

Seth L. Cooper, "[Say No to the Biden Broadband Plan for Government Subsidies and Price Controls](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 38 (July 27, 2021).

Randolph J. May, "[Not All Government Spending on Infrastructure Is Investment](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 37 (July 22, 2021).

Randolph J. May and Andrew Long, "[Biden Broadband Plan: 'Future Proofing' Is Likely 'Fool's Proofing'](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 32 (June 24, 2021).

Randolph J. May and Andrew Long, "[Biden Broadband Plan: Transparency and Accuracy Required for Sound Policy](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 27 (June 2, 2021).

Randolph J. May and Seth L. Cooper, "[Biden Broadband Plan Favoring Government-Owned Networks Lacks a Constitutional Foundation](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 24 (May 11, 2021).

Randolph J. May and Andrew Long, "[Biden Broadband Plan: Claims That Broadband Is 'Too Expensive' Are Unfounded](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 23 (May 7, 2021).

Randolph J. May and Andrew Long, "[Biden Broadband Plan: Misdirected Broadband Subsidies Hurt Competition and Consumers](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 21 (April 28, 2021).

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