

**Before the  
NATIONAL TELECOMMUNICATIONS AND INFORMATION  
ADMINISTRATION  
Washington, D.C. 20230**

In the Matter of	)	
	)	
Infrastructure Investment and	)	Docket No. 220105-0002
	)	Regs.gov NTIA-2021-0002
Jobs Act Implementation	)	

**COMMENTS OF  
THE FREE STATE FOUNDATION\***

**I. Introduction and Summary**

These comments are submitted by the Free State Foundation (FSF) to the National Telecommunications and Information Administration (NTIA) in response to its request for comments regarding "Infrastructure Investment and Jobs Act Implementation."<sup>1</sup> Congress has entrusted NTIA with the disbursement of \$65 billion in broadband-related government funding. The Broadband Equity, Access, and Deployment (BEAD) Program, which received the bulk of that significant sum – over \$42 billion – is dedicated to broadband infrastructure construction grants, to be distributed by the states, to connect "unserved" (and, secondarily, "underserved") locations.

In this unprecedented expenditure of taxpayer funds, the exercise of great care and discipline is necessary to ensure that waste, fraud, and abuse are prevented, or at least minimized. NTIA has the affirmative responsibility and duty to ensure that its oversight,

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\* These comments express the views of Randolph J. May, President of the Free State Foundation, and Andrew Long, Senior Fellow. The views expressed do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it. The Free State Foundation is an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland.  
<sup>1</sup> "Infrastructure Investment and Jobs Act Implementation," Department of Commerce, National Telecommunications and Information Administration, Notice, Request for Comment, Federal Register Vol. 87, No. 6, pp. 1122-26 (January 10, 2022).

in conjunction with the states' implementation, stays focused on geographic areas that truly and objectively are unserved. And NTIA has the duty to ensure that the states remain neutral with respect to both distribution technologies and service provider identities (that is, municipalities, cooperatives, and nonprofit entities vis-à-vis commercial Internet service providers). If NTIA fails in the exercise of its oversight responsibility, public support for the use of government funding for broadband programs, certainly at such a massive scale, rightly will be eroded.

In particular, NTIA must not allow highly technical definitions, future-looking prognostications, or other secondary considerations to upend the definitions of "unserved" and "underserved" agreed to by Congress. These definitions serve two important purposes. First, by specifying that service availability is to be determined based on the next-generation broadband service availability maps that the FCC, per the Broadband DATA Act, is in the process of generating, the Infrastructure Investment and Jobs Act (IIJA) ensures that determinations as to where subsidies should be directed are based upon reliable information.<sup>2</sup> Second, by embracing realistic speed benchmarks, the IIJA rejects the "fiber-only" position championed by the Biden Administration in favor of a pro-competitive, consumer-driven, technologically neutral approach – that is, one that treats with an even hand all viable distribution technologies able to satisfy consumer demand: fiber, cable broadband, 5G, fixed wireless, satellite, and any others.

NTIA likewise must make sure that the grant process respects the IIJA's well-justified neutral view of municipal broadband projects. Early on, President Biden staked

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<sup>2</sup> See, e.g., Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, div. F, tit. I, § 60102(a)(1)(A) (2021) (*IIJA*) (stating that an "unserved location" is to be "determined in accordance with the broadband DATA maps").

out his misguided intention to prioritize such efforts, but the IIJA landed in a much different place: it allows only that the states "may not exclude" municipalities, cooperatives, and nonprofits from applying for subsidies.

Rules and other guidance recently announced by the Departments of Treasury and Agriculture prove these concerns justified. Both have wrongly leveraged their responsibility to establish the administrative details of grant programs to pursue very problematic elements of President Biden's broadband initial wish list wholly lacking express legislative authorization. By contrast, here the job of NTIA is far more explicitly defined: to ensure that its oversight, and the states' execution, of the BEAD Program is consistent with the unambiguous congressional policy priorities articulated by the IIJA. Absent such consistency, the expenditure of funds is sure to lead to waste that will mean less broadband deployment than otherwise would occur, while also undermining confidence in NTIA's oversight abilities and, more broadly, the efficacy of the multitude of other government broadband funding programs created in recent years.

## **II. The BEAD Program's Top Priority Must Be Advancing Deployment in Currently "Unserved" Locations**

As a direct result of nearly \$2 trillion in private investment – including almost twice the amount in 2020 alone (\$80 billion)<sup>3</sup> than what Congress has appropriated for the BEAD Program – the vast majority of locations today already are "served" by broadband. According to the most recent data available from the FCC, at the end of 2019, approximately 96 percent of Americans had access to broadband.<sup>4</sup> Given ongoing

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<sup>3</sup> See USTelecom | The Broadband Association, "2020 Broadband Capex Report" (September 22, 2021), available at <https://www.ustelecom.org/wp-content/uploads/2021/09/USTelecom-2020-Broadband-Capex-Report.pdf>.

<sup>4</sup> See *2020 Communications Marketplace Report*, GN Docket No. 20-60, FCC 20-188 (2020), at ¶ 282.

investment, the next FCC report unquestionably should paint an even more impressive picture. Continued capital investment, and additional assumption of financial risk, by commercial Internet service providers (ISPs) therefore ought to be encouraged.

So, in response to the first question presented in the *Notice* – "[w]hat are the most important steps NTIA can take to ensure that the Bipartisan Infrastructure Law's broadband programs meet their goals" – the answer should be clear. NTIA, as well as the states, must maintain a laser-like focus on directing the appropriated funds to those locations that, due to challenging economics, still lack access to robust high-speed Internet service.

Indeed, when President Biden signed the \$1.2 trillion IIA into law on November 15, 2021, he assured the American public that the billions of dollars appropriated for broadband would "make high-speed Internet affordable and available everywhere – everywhere in America – urban suburban, rural ...."<sup>5</sup> But experience has taught us that, no matter how much money is dedicated to closing digital divides, realization of that promise requires discipline.<sup>6</sup> Absent clearly demarcated guardrails that limit subsidies to unserved areas, even the BEAD Program's additional \$42.45 billion could fail to achieve the goal of universal broadband access.

The reason that certain areas today continue to lack access to a high-speed Internet connection is, in nearly all cases, a function of the economics of broadband

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<sup>5</sup> Release, "Remarks by President Biden at Signing of H.R. 3684, The Infrastructure Investment and Jobs Act" (November 15, 2021), available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/11/15/remarks-by-president-biden-at-signing-of-h-r-3684-the-infrastructure-investment-and-jobs-act/>.

<sup>6</sup> See, e.g., Linda Hardesty, "Congressmen worry RDOF funds will be squandered," *Fierce Telecom* (January 25, 2021), available at <https://www.fiercetelecom.com/financial/congressmen-worry-rdof-funds-will-be-squandered>.

network construction. Rural and other low-population-density areas, as well as those characterized by challenging geographic features (such as mountainous and/or rocky terrain), require a higher-than-average level of investment – and promise a lower-than-average expected rate of return. Such locations, in fact, present *the* most compelling case for focused government intervention in what otherwise is a highly competitive marketplace: in these limited instances, targeted subsidies can tip a potential infrastructure construction project from a money loser to an economically sustainable endeavor.

By the same logic, if recipients of BEAD Program funding are allowed to "overbuild" in areas already served – that is, in areas where the economics already have justified private investment – then, as rational actors, they may choose to do so. Consequently, and contrary to Congress's intention, taxpayer dollars could be used to subsidize competitors rather than to connect high-cost locations as yet unserved.

It therefore is essential that NTIA affirmatively exercise its oversight authority to ensure adherence to the general framework established by the IIA. Given that, at present, many states indisputably lack both the relevant experience and the bureaucratic resources required to distribute responsibly the billions which they receive,<sup>7</sup> this necessarily must include proactive and thorough oversight of the grant process at the state level.

As detailed below, two overarching principles should guide how NTIA administers the BEAD Program – and, by direct extension, how the states make grant-

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<sup>7</sup> See Andrew Magloughlin, "Tilson Report Shows Lack of State Readiness for Biden's Broadband Programs," *FSF Blog* (December 9, 2021), available at <http://freestatefoundation.blogspot.com/2021/12/tilson-report-shows-lack-of-state.html> (describing a report by Tilson that found that "[o]nly 25 of the 54 states and territories Tilson surveyed can administer broadband grants right now").

related decisions. First, NTIA must take care to avoid rules, policies, or technical specifications that have the effect of undermining the technologically neutral definitions of "unserved" and "underserved" set forth in the IIA. This includes honoring the express congressional intention that updated FCC broadband data maps serve as the exclusive and definitive source of service availability information. Second, NTIA must ensure that municipalities, cooperatives, and nonprofit entities are not prioritized over privately funded providers.

### **III. Congressional Guidance Requires a Rejection of the Biden Broadband Plan**

In March 2021 the White House issued a Fact Sheet laying out what we call the Biden Broadband Plan – that is, the President's high-speed Internet access policy positions.<sup>8</sup> The flawed, overreaching plan included proposals to prioritize (1) what it described vaguely as "future proof" broadband infrastructure – widely understood to be thinly veiled code for "fiber only," and (2) "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."

The Departments of Treasury and Agriculture, tasked with distributing large amounts of federal dollars but provided with little guidance as to how to do so, have taken steps likely to lead to wasteful expenditures. As described in recent *Perspectives from FSF Scholars*,<sup>9</sup> Treasury, enabled by the brief legislative language found in the

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<sup>8</sup> See generally Release, "FACT SHEET: The American Jobs Plan" (March 31, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/>.

<sup>9</sup> See Randolph J. May and Andrew Long, "Self-Defeating Treasury Subsidy Rule Wrongly Champions Broadband Overbuilds," *Perspectives from FSF Scholars*, Vol. 17, No. 4 (January 19, 2022), available at <https://freestatefoundation.org/wp-content/uploads/2022/01/Self-Defeating-Treasury-Subsidy-Rule-Wrongly-Champions-Broadband-Overbuilds-011922.pdf>; Andrew Long, "Treasury Department Resurrects the Scary Biden Broadband Plan," *Perspectives from FSF Scholars*, Vol. 16, No. 56 (October 20, 2021),

American Rescue Plan Act of 2021,<sup>10</sup> has on two distinct occasions taken steps to grant subsidy recipients license to ignore clear evidence of existing broadband service and use taxpayer dollars to overbuild broadband networks funded by private investment.

Of greatest concern, perhaps, are the lengths to which Treasury has opened the door to reliance upon what FCC Commissioner Brendan Carr has characterized as "bad data"<sup>11</sup> – that is, questionable sources of broadband service availability that conveniently justify the allocation of grants to areas in fact already served. Specifically, Treasury's Final Rule for the \$350 billion State and Local Fiscal Recovery Funds (SLFRF) program unwisely includes the following expansive language:

[I]n determining areas for investment, 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.<sup>12</sup>

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available at <https://freestatefoundation.org/wp-content/uploads/2021/10/Treasury-Department-Resurrects-the-Scary-Biden-Broadband-Plan.102121.pdf>.

<sup>10</sup> See American Rescue Plan Act of 2021, Pub. L. No. 117-2, tit. IX, subtit. M, § 9901 (2020) (appropriating roughly \$350 billion "to mitigate the fiscal effects stemming from the public health emergency with respect to the Coronavirus Disease (COVID-19)").

<sup>11</sup> Statement, "Carr Concerned That Biden Administration's New Broadband Infrastructure Rules Are Poised to Leave Rural Communities and Unconnected Americans Behind" (January 14, 2022), available at <https://www.fcc.gov/document/carr-concerned-biden-broadband-rules>. See also *id.* (explaining that the Treasury Final Rule "does this by authorizing recipients to determine whether an area lacks access to high-speed Internet service by relying on informal interviews and reports – however inaccurate those may be – rather than the broadband maps that the federal government has been funding and standing up").

<sup>12</sup> Department of the Treasury Final Rule, Coronavirus State and Local Recovery Funds (January 6, 2022), at 303, available at <https://home.treasury.gov/system/files/136/SLFRF-Final-Rule.pdf>. See also Andrew Long, "Treasury Department Resurrects the Scary Biden Broadband Plan," *Perspectives from FSF Scholars*, Vol. 16, No. 56 (October 20, 2021), at 5, available at <https://freestatefoundation.org/wp-content/uploads/2021/10/Treasury-Department-Resurrects-the-Scary-Biden-Broadband-Plan.102121.pdf> (noting that Treasury's "Guidance for the Coronavirus Capital Projects Fund for States, Territories & Freely Associated States," available at <https://home.treasury.gov/system/files/136/Capital-Projects-Fund-Guidance-States-Territories-and-Freely-Associated-States.pdf>, similarly 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").

Meanwhile, and as highlighted in another recent *Perspectives from FSF Scholars*,<sup>13</sup> the Department of Agriculture's so-called "evaluation criteria,"<sup>14</sup> which it will apply to competing ReConnect Fund applications, advance several flawed features of the Biden Broadband Plan through the awarding of priority "points." Most relevant for current purposes is the way in which Agriculture favors municipal broadband projects (which, as Free State Foundation scholars have pointed out on numerous occasions,<sup>15</sup> have a long track record of financial failure): "[a]pplications submitted by local governments, non-profits or cooperatives (including for projects involving public-private partnerships where the local government, non-profit, or cooperative is the applicant) will be awarded 15 points."<sup>16</sup>

Fortunately, the plain language of the IIJA greatly limits the possibility for similar mischief with regard to the BEAD Program. Reflecting the bipartisan negotiations that led to its passage, the IIJA includes provisions that constrain with specificity how this money is to be used. In doing so, the IIJA embodies the compromises that were necessary

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<sup>13</sup> 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), available at <https://freestatefoundation.org/wp-content/uploads/2021/11/The-Department-of-Agriculture-Obviously-Is-Not-the-FCC-112921.pdf>.

<sup>14</sup> See U.S. Department of Agriculture, "Evaluation Criteria," available at <https://www.usda.gov/reconnect/evaluation-criteria> ("Applications in the same category will be scored and ranked against the following special evaluation criteria.").

<sup>15</sup> See, e.g., 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), available at <https://freestatefoundation.org/wp-content/uploads/2021/08/New-Study-Once-Again-Dispels-Municipal-Broadband-Viability-081821.pdf>; 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), available at <https://freestatefoundation.org/wp-content/uploads/2021/05/Biden-Broadband-Plan-Favoring-Government-Owned-Networks-Lacks-a-Constitutional-Foundation-051121.pdf>; Theodore R. Bolema, "Hiding the Subsidy: The Financial Transparency Problem With Municipal Broadband Systems," *Perspectives from FSF Scholars*, Vol. 16, No. 8 (February 12, 2021), available at <https://freestatefoundation.org/wp-content/uploads/2021/02/Hiding-the-Subsidy-The-Financial-Transparency-Problem-with-Municipal-Broadband-Systems-021221.pdf>.

<sup>16</sup> U.S. Department of Agriculture, "Evaluation Criteria," available at <https://www.usda.gov/reconnect/evaluation-criteria>.



for it to clear both legislative chambers – and, unlike the rules, guidance, and evaluation criteria issued by Treasury and Agriculture, the IJA rejects the more extreme aspirational features of the original Biden Broadband Plan.

Where the Biden Broadband Plan sought to limit subsidy availability exclusively to fiber builds (which it misleadingly referred to as "future proof" networks), the IJA includes realistic definitions of "unserved" and "underserved." Specifically, the IJA directs NTIA to apply the same realistic definition of an "unserved" location embraced by the FCC: 25 megabits per second (Mbps) downstream and 3 Mbps upstream (25/3 Mbps).<sup>17</sup> An "underserved" location, meanwhile, is defined as one lacking access to service at speeds readily achievable via a multitude of distribution technologies (fiber, cable broadband, 5G, fixed wireless, satellite, and so on): greater than 25/3 Mbps but less than 100/20 Mbps.<sup>18</sup> These statutory definitions are consistent with the concept of technological neutrality.

Technological neutrality – meaning, in this context, that all distribution methods able to satisfy consumer demand for high-speed Internet service should be treated equally – has at least two virtues. First, it promotes economic efficiency. From a deployment perspective, the various distribution technologies that broadband providers utilize present different advantages and disadvantages. Some are better suited to densely populated areas, some to rural locations, some to certain types of terrain. The freedom to select the technological option(s) best suited to a given area will keep costs low. Second, by encouraging the use of the full range of viable platforms, technological neutrality

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<sup>17</sup> See IJA § 60102(a)(1)(A).

<sup>18</sup> See IJA § 60102(a)(1)(C)(ii).

promotes intermodal competition and facilitates the marketplace availability of multiple service options from which consumers can choose to satisfy their demands.

Where Treasury has encouraged the use of questionable service availability data to justify government-subsidized overbuilds of privately funded infrastructure, the IJA instead specifies use of the updated broadband maps being generated by the FCC: the definitions of both "unserved" and "underserved" locations clearly state that such determinations are to be made "in accordance with the broadband DATA maps."<sup>19</sup> In March 2020 Congress passed the Broadband Deployment Accuracy and Technological Availability (DATA) Act,<sup>20</sup> which directed the FCC to create updated broadband service availability maps and:

[U]se such maps ... to determine the areas in which terrestrial fixed, fixed wireless, mobile, and satellite broadband internet access service is and is not available[] and when making any new award of funding with respect to the deployment of broadband internet access service intended for use by residential and mobile customers.<sup>21</sup>

And where the Biden Broadband Plan would have discriminatorily prioritized municipal broadband projects, and Agriculture in fact does prioritize them via its "evaluation criteria," the IJA instead expresses a clear expectation that all proposals are to be judged solely on the merits, without regard to the identity – public or private – of the applicant. The IJA makes plain that the states "*may not exclude* cooperatives, nonprofit organizations, public-private partnerships, private companies, public or private

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<sup>19</sup> IJA § 60102(a)(1)(A), (C)(ii).

<sup>20</sup> See generally Broadband Deployment Accuracy and Technological Availability (DATA) Act, Pub. L. No. 116-130 (2020).

<sup>21</sup> 47 U.S.C. § 642(c)(2). See also 47 U.S.C. § 642(c)(4)(B) (directing the FCC to "consult with ... the National Telecommunications and Information Administration to enable the Administration to consult the maps created under paragraph (1) when considering the awarding of funds for the deployment of broadband internet access service under any future program administered by the Administration").

utilities, public utility districts, or local governments from eligibility for such grant funds."<sup>22</sup> This language, which reflects the bipartisan congressional consensus that led to the IJA's enactment, represents an unambiguous rejection of the Biden Broadband Plan's express desire to "prioritize[] support" for such risky endeavors.<sup>23</sup>

#### **IV. At Every Turn, NTIA Must Advance Congressional Intent**

With the background set forth above in front of mind, at every opportunity presented NTIA should act, and ensure that the states act, in a manner that (1) preserves Congress's definitions of "unserved" and "underserved," (2) respects the concept of technological neutrality, and (3) treats municipal, cooperative, nonprofit, and commercial applicants as equals.

So, for example, in Question 13, NTIA seeks input on whether it should adopt specific service quality benchmarks:

What guidance or requirements, if any, should NTIA consider with respect to network reliability and availability, cybersecurity, resiliency, latency, or other service quality features and metrics? What criteria should NTIA establish to assess grant recipients' plans to ensure that service providers maintain and/or exceed thresholds for reliability, quality of service, sustainability, upgradability and other required service characteristics?

Any technical specifications that NTIA does embrace, after consultation with industry subject-matter experts, must not disqualify or disadvantage non-fiber proposals.

Similarly, the thrust of Question 14 – which inquires about "ensuring that networks constructed using taxpayer funds are designed to provide robust and sustainable service at

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<sup>22</sup> *IJA* § 60102(h)(1)(A)(iii) (emphasis added).

<sup>23</sup> See Release, "FACT SHEET: The American Jobs Plan" (March 31, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/> ("It also prioritizes 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.").

affordable prices over the long term" – and Question 15 – which asks "[w]hat sort of speeds, throughput, latencies, or other metrics will be required to fully connect all Americans to meaningful use over the next five, ten, and twenty years" – opens the door dangerously to requirements that have the practical effect of excluding certain distribution platforms from eligibility in contravention of congressional intent. Finally, and as we explained in a June 2021 *Perspectives from FSF Scholars*,<sup>24</sup> predictions as to future consumer usage and demand are, at best, guesses, and possibly wrong ones. They should not serve as justification to stray from a technologically neutral approach or, more specifically, to discriminate in favor of fiber-based projects.

In addition, NTIA should reevaluate its view, expressed in Question 7, that "the participation of a variety of provider types [is] important to achieving the overall goals of the Bipartisan Infrastructure Law broadband programs." As explained above, Congress prudently allowed only that municipalities not be excluded from the application process. NTIA therefore should focus solely on the likelihood that a given project will put government dollars to their most efficient use – not on the type of provider submitting the grant application.

## **V. Conclusion**

Congress has assigned to NTIA a mighty responsibility: to ensure that the states distribute over \$42 billion in broadband dollars in a disciplined, effective, and efficient manner. One of the lawmakers responsible for negotiating the legislation that

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<sup>24</sup> See 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), available at <https://freestatefoundation.org/wp-content/uploads/2021/06/Future-Proofing-Is-Likely-Fools-Proofing-062421.pdf> (arguing that "it would be foolhardy to try to predict the speed, latency, and other technical specifications that consumers will demand in the future").

appropriated that money, Senator Jeanne Shaheen, recently stated her desire "to ensure broadband funding is 'distributed as intended.'"<sup>25</sup> In our view, that requires (1) an unrelenting focus on truly unserved locations; (2) an unwavering commitment to the concept of technological neutrality (that is, establishing technical benchmarks that afford all viable distribution platforms an opportunity to compete for funds); and (3) an unbiased, merit-based assessment of competing grant applications that does not tilt the scale in favor of municipal, cooperative, or nonprofit entity projects.

If NTIA fails in this regard, not only will the likelihood of waste, fraud, and abuse be increased, but there is a greater likelihood that public support for the expenditure of taxpayers' dollars to support broadband network expansion will diminish rapidly.

Respectfully submitted,

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February 3, 2022

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<sup>25</sup> Emily Birnbaum and Brendan Bordelon, "What Breyer's departure could mean for tech," *Politico* (January 27, 2022), available at <https://www.politico.com/newsletters/morning-tech/2022/01/28/what-breyers-departure-could-mean-for-tech-00002639>.