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**NTIA's Broadband Subsidies Must Respect State Law Limits on  
Government-Owned Networks**

by

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On May 13, NTIA released its [Notice of Funding Opportunity \("NOFO"\)](#) for the Broadband Equity, Access, and Deployment Program ("BEAD Program"). NTIA's administering of the program's \$42.45 billion in subsidies for bringing broadband connectivity to all Americans was a focal point of discussion days earlier at [#FSFConf14](#), the Free State Foundation's [Fourteenth Annual Policy Conference](#). Headline speakers at the conference raised concerns about massive subsidies potentially being misspent on networks owned by local governments that lack the skill and experience needed to deliver high-quality broadband services.

Those concerns remain valid following NTIA's release of the BEAD Program's NOFO. The NOFO appears to assert that NTIA may withhold grants from states with laws that exclude government-owned broadband networks from eligibility to obtain subgrants – particularly states with laws that postdate the Infrastructure Investment and Jobs Act of 2021. But Supreme Court precedents recognize that federal subsidies cannot be conditioned on states surrendering sovereign powers over their local governments without a clear statement by Congress. Congress never clearly placed such conditions on states' participation in the BEAD Program. NTIA should respect states' decisions regarding their local governments and ensure that subgrants go to the best providers available to connect unserved Americans.

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Under the [Infrastructure Investment and Jobs Act of 2021](#), NTIA is authorized to administer the \$42.45 billion BEAD Program. Its [May 13 NOFO](#) includes requirements for states that wish to receive grants. The NOFO also includes rules that states are to follow in awarding subgrants, on a competitive basis, to broadband providers for purposes such as connecting unserved locations, connecting anchor institutions, mapping, and promoting adoption.

During [#FSFConf14](#), USTelecom President and CEO Jonathan Spalter warned against federal agencies giving "blanket preference or even a priority... to municipalities and non-profits who... at any scale of broadband deployment, have run into significant consistency issues and effectiveness issues." He emphasized that agencies should be "prioritizing excellence, not categories of participants based on not very solid logic."

Additionally, NCTA President and CEO Michael Powell [cautioned](#) government agencies against "giving out preferences or favoring people largely for political purposes." Such preferences involve a trade-off that could later be regretted because of the difficulty of the buildouts. As Mr. Powell explained: "The management of this, from a construction standpoint," is going to require "very seasoned executives, deep pockets, lots of experience, and the ability to scale and manage through what is really a once-in-century set of economic factors." Those factors include: a "forty-year inflationary environment" that is "unprecedented in the modern era for building and construction," "one of the worst supply chain breaks in the modern history of the United States," "one of the worst labor shortages for the crews and constructions, for building these projects, who will also be competing for other projects," and "a serious backlog on silicon and chips."

The issue of BEAD Program subsidies and government-owned broadband networks previously was addressed in my March 7 *Perspectives from FSF Scholars*, "[NTIA Lacks Authority to Cut Broadband Funds From States That Limit Municipal Networks](#)." As explained in that *Perspectives*, Supreme Court precedents recognize that Congress's power to place conditions on the receipt of federal funds by states is constrained by the "General Welfare Clause" located in Article I, Section 8 of the U.S. Constitution. [South Dakota v. Dole](#) (1987) sets forth a clear statement rule regarding federal spending conditions. When Congress seeks to put conditions on states' receipt of federal funds that implicate states' core sovereign interests in organizing the powers, territory, finances, and other operational matters of their political subdivisions, it must do so "unambiguously."

Section 60102(h)(1)(A)(iii) of the [Infrastructure Act](#) provides that state participants in the BEAD Program "may not exclude cooperatives, nonprofit organizations, public-private partnerships, private companies, public or private utilities, public utility districts, or local governments from eligibility for such grant funds." My [March 7 Perspectives](#) made the point that Section 60102(h)(1)(A)(iii) was ambiguous. Congress never clearly conditioned the receipt of money on states' waiving enforcement of laws that limit government-owned networks within their borders. Consequently, NTIA lacks authority to make suspension of such state law limits a requirement for program participation.

To NTIA's credit, the NOFO released on May 13 does *not* expressly require states to waive their laws limiting government-owned broadband in order to receive BEAD Program grants. However, provisions in the NOFO regarding NTIA's claimed authority regarding agency

determinations about a state's laws or regulation limiting government-owned broadband networks appears to run up against and, in some cases, exceed the agency's authority.

The [NOFO](#) requires that states ("Eligible Entities") seeking BEAD Program grant money must submit to NTIA an "Initial Proposal" that will "among other things, describe the competitive process the Eligible Entity proposes to use to select subgrantees to construct broadband projects." After selecting subgrantees and executing its Initial Proposal, states must "submit to NTIA a Final Proposal describing how it complied with that Initial Proposal" in order to obtain remaining grant funds. Both proposals are subject to NTIA approval.

Among its provisions, the NOFO "encourages" states to waive all laws "predat[ing] the enactment of the Infrastructure Act" that limit government-owned broadband networks or their ability to receive subgrants. It also requires states to disclose all such non-waived laws and their impacts on subgrant eligibility and awards. Another NOFO provision requires states to include, in their Final Proposals, "[a] description of efforts undertaken... to ensure the participation of non-traditional broadband providers" such as "municipalities or political subdivisions" as well as an "explanation for awards to traditional broadband providers when one or more non-traditional providers submitted competing proposals to serve an area."

NTIA's requests for information as well as the agency's encouragement to states to waive their laws most likely are permissible. Yet NTIA should accord significant deference to state determinations pertaining to their own laws. And the agency should respect states' decisions about the extent to which they seek participation of their local governments. Any withholding of grant awards to states based on NTIA's public policy disagreements with state laws that limit government-owned networks would amount to a *de facto* spending condition that lacks clear authorization by Congress.

The NOFO's most questionable language seems to say that NTIA may deny proposals based on the agency's judgment about state laws that limit government-owned networks:

In determining whether to approve an Eligible Entity's Initial or Final Proposal, NTIA will consider whether the Eligible Entity has, *after the enactment of the Infrastructure Act*, adopted new laws, regulations, policies, procedures or any other form of rule or restriction that, in the determination of NTIA, seeks to exclude or has the effect of excluding any potential providers from eligibility for its subgrant competition. This could include new laws that have the effect of excluding providers from offering broadband service or rendering them incapable of effectively competing for subgrants. (emphasis added)

Section 60102(h)(1)(A)(iii)'s provision that states "may not exclude" different types of entities from subgrant eligibility seems to confer on NTIA at least some authority to ascertain whether state laws "exclude" non-profit organizations, private market providers, and other non-state entities from subgrant eligibility. And NTIA may be able to withhold funds from states with laws that exclude private or non-state entities from subgrant eligibility.

But NTIA likely has no authority to withhold BEAD Program grant money on account of a state's law that "seeks to exclude or has the effect of excluding" government-owned broadband networks. The notion of a state law "excluding" government-owned networks from

subgrant eligibility cannot rightly be regarded in the same sense as a state law "excluding" non-state entities. Rather, a state's law limiting government-owned networks constitutes a state's decision that its own political arms will not seek subgrants.

The reasons for understanding and treating state law restrictions on their local governments differently from state law restrictions on private entities are explained by the Supreme Court in *Nixon v. Missouri Municipal League* (2004):

In familiar instances of regulatory preemption under the Supremacy Clause, a federal measure preempting state regulation in some precinct of economic conduct carried on by a private person or corporation simply leaves the private party free to do anything it chooses consistent with the prevailing federal law.... On the subject covered, the state law just drops out...

But no such simple result would follow from federal preemption meant to unshackle local governments from entrepreneurial limitations. The trouble is that a local government's capacity to enter an economic market turns not only on the effect of straightforward economic regulation below the national level (including outright bans), but on the authority and potential will of governments at the state or local level to support entry into the market...

As the Court observed in *Nixon*, "when a government regulates itself (or the subdivision through which it acts) there is no clear distinction between the regulator and the entity regulated." Also, "[l]egal limits on what the government itself (including its subdivisions) may do will often be indistinguishable from choices that express what the government wishes to do with the authority and resources it can command."

Accordingly, NTIA cannot withhold BEAD Program grants from a state for its having made a sovereign decision that its own political arms will not engage in the broadband business or seek subgrants. This holds regardless of whether the state's law predates or postdates the Infrastructure Act. Nowhere in the Act did Congress clearly condition states' participation in the BEAD program upon their agreeing to temporarily abdicate authority over their political subdivisions or alter the powers of their local governments.

Issues about spending conditions and state sovereignty may seem complicated or arcane. Nonetheless, those issues are raised by the NOFO's apparent assertion of NTIA authority to withhold grants to states based on state laws limiting government-owned networks. At the same time, the NOFO provides no express acknowledgment of the limits on the agency's authority with respect to states' authority over their political subdivisions. NTIA ought to expressly recognize those important limits as the BEAD Program goes forward. The agency should respect states' decisions about government-owned networks and emphasize that subgrants should ultimately go to the best providers available to connect unserved Americans.

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## Further Readings

Andrew Long, "[Future Guidance Can Fix NTIA's Flawed 'Fiber-First Approach'](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 27 (May 24, 2022).

Seth L. Cooper, "[MEDIA ADVISORY: NTIA Releases Notice of Funding Opportunity for the BEAD Program](#)," *FSF Blog* (May 13, 2022).

Seth L. Cooper, "NTIA Lacks Authority to Cut Broadband Funds From States That Limit Municipal Networks," *Perspectives from FSF Scholars*, Vol. 17, No. 13 (March 7, 2022).

Andrew Long, "[Overlapping Broadband Appropriations Demand Agency Coordination: New FCC Maps Can Track Grants, Avert Waste](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 12 (March 2, 2022).

[Comments of the Free State Foundation](#), *In the Matter of Infrastructure Investment and Jobs Act Implementation*, NTIA Docket No. 220105-0002 (February 3, 2022).

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

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