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January 6, 2023

Senator John Thune  
United States Senate SD-511  
Washington, DC 20510

Dear Senator Thune:

On behalf of the Free State Foundation's scholars and myself, I thank you for this opportunity to address concerns relating to the lack of an adequate national strategy regarding the expenditure of billions of dollars intended to ensure ubiquitous nationwide access to high-speed Internet connectivity. And I commend you for initiating this important effort consistent with Congress's core oversight responsibilities. The Free State Foundation (FSF) is a free market-oriented think tank that focuses heavily on communications and Internet law and policy as well as administrative law and sound governance. The substantive answers to your inquiry and the dozens of citations and links contained herein to relevant Free State Foundation scholarly papers are evidence of our widely acknowledged expertise.\*

***Introduction***

The Free State Foundation's big-picture position regarding broadband deployment is that the role of marketplace innovation and competition, fueled by over \$2 trillion in private capital investments since 1996 and \$86 billion in 2021 alone, should be acknowledged, protected, and encouraged. And in those increasingly limited locations where challenging economic realities justify targeted government intervention to close remaining digital divides, marketplace competition should be replicated to the greatest extent possible to maximize overall consumer welfare while promoting fiscal responsibility.

In practical terms, first and foremost, this means that taxpayer dollars should never be used to subsidize the "overbuilding" of existing, privately funded networks that are already meeting consumer needs. Government subsidies should be applied judiciously solely to unserved areas. Then, and only then, should subsidies be directed to areas properly deemed "underserved." And in no event should subsidies be awarded in a manner that artificially tilts the competitive landscape toward government-preferred service providers, whether municipal or cooperative systems, or providers that choose to deploy fiber (or both). In other words, to the maximum extent possible, economic

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\* The substantial contributions of Senior Fellow Andrew Long and Director of Policy Studies and Senior Fellow Seth Cooper in preparing this Response are gratefully acknowledged. Numerous citations and links to their scholarly works, as well as other Free State Foundation scholars, are contained in the Response.

efficiency should serve as the overarching guiding principle so that all Americans can reap the benefits that accrue from the operation of marketplace forces.

In addition, great care must be taken to prevent waste, fraud, and abuse. Unfortunately, the scattershot nature that defines the current multi-agency, multi-program approach to disbursing broadband subsidies inevitably invites such abuse. Meaningful oversight, such as this effort you have initiated, is essential to achieve a coordinated, government-wide approach that helps avoid waste and ensures that taxpayer dollars are expended prudently. Effective oversight also will help inform efforts by law enforcement officials to hold parties accountable for fraud and other abuse of subsidy dollars.

Moreover, it is important that Congress require the FCC to continue to remove obstacles that delay deployment of broadband infrastructure and raise the costs of deployment. This may require granting the FCC more explicit authority to preempt various state and local regulations and practices relating to infrastructure siting that continue to pose unnecessary impediments to rapid deployment of both wireline and wireless services, including small cell 5G broadband facilities. It also may require measures to streamline infrastructure siting on federal lands.

And Congress should require the FCC to complete in a timely fashion its ongoing pole attachment proceeding and ensure that the final rules require prompt resolution of pole attachment disputes. Furthermore, Congress should eliminate the existing exemption from FCC-imposed limits on rates for attachments to poles owned by municipalities and electric cooperatives.

Finally, efforts spearheaded by Congress to expand broadband connectivity should not be allowed to be waylaid by extraneous supposed policy priorities, such as preferences for labor unions, "net neutrality," or various forms of rate regulation, however disguised or denominated. Attempts to impose these controversial extraneous policy preferences through the conditioning of federal broadband subsidies only serve to distract, delay, and drive costs higher. They are even more harmful now given the inflationary pressures currently wreaking havoc on projected price estimates.

Below you will find the Free State Foundation's complete responses to the specific questions posed in your letter.

***Infrastructure Investment and Jobs Act-Specific Issues:***

1. As part of the IIJA, Congress established a technology-neutral approach for the BEAD program. Do you believe NTIA followed Congress' intent in establishing a technology-neutral approach? If not, should Congress consider amending the IIJA statute to make it more explicit that all technologies are allowed to participate? If so, how?

In two significant ways, NTIA's rules for the BEAD program, as set forth in the Notice of Funding Opportunity (NOFO), run contrary to congressional intent regarding

technological neutrality. First, they embody a blind preference for fiber broadband networks that fails to take account of the relative suitability, with respect to cost, geography, population density, and other considerations, of other delivery technologies (cable, 5G, satellite, fixed wireless, and so on) in assessing the needs of a given unserved location. Second, they exclude by name proven solutions – specifically, satellite-based services and offerings that rely exclusively upon unlicensed spectrum – despite their potential ability in some circumstances to deliver "broadband," as defined in technical terms by the IIJA, most efficiently to a specific area.

The value of a technology-neutral approach to government-subsidy eligibility is that it maximizes the pool of potential applicants. Just as additional entrants in a competitive marketplace can generate greater efficiency, better quality, increased innovation, and lower prices, so, too, can additional applicants make the best use of grant money. The goal of the BEAD program, among many other federal spending endeavors, is to connect unserved locations. Defining "broadband" purely in technical terms such as speed, latency, reliability, and time to build, rather than by referencing specific distribution technologies, is the most direct and efficient route to achieving that goal.

Through the broadband-specific provisions of the IIJA, Congress embraced technological neutrality and unambiguously rejected President Biden's announced desire to favor fiber-based networks to the exclusion of other viable broadband platforms.

Thus, the IIJA appropriately defines "reliable broadband service," not by delineating specific distribution methodologies, but rather in terms of technical capabilities, specifically: (1) download and upload speed (less than 25 megabits per second (Mbps) download and 3 Mbps upload (25/3 Mbps) for "unserved," between 25/3 Mbps and 100/20 Mbps for "underserved"), and (2) latency (for both "unserved" and "underserved," "a latency sufficient to support real-time, interactive applications"). This technology-neutral approach maximizes the potential pool of subsidy applicants, thereby making it more likely that taxpayer dollars will be put to their optimal use.

By means of the BEAD program NOFO, however, NTIA in large part reverts to a fiber-first strategy, asserting that "'Priority Broadband Projects' are those that use end-to-end fiber-optic architecture" and that "[o]nly end-to-end fiber will 'ensure that the network built by the project can easily scale speeds over time to ... meet the evolving connectivity needs of households and businesses' and 'support the deployment of 5G, successor wireless technologies, and other advanced services,'" two on-their-face technologically neutral requirements set forth in the IIJA.

As Michelle P. Connolly, Ph.D., a member of the Free State Foundation's Board of Academic Advisors and Professor of the Practice within the Economics Department at Duke University, [recently wrote](#):

[The NOFO's] selection criteria gives fiber priority above all other technologies despite the fact that for many rural areas this is not the ideal technology to guarantee access to all households and businesses. There are

other technologies such as fixed wireless and low earth orbiting (LEO) satellites currently capable of providing high speed, low latency service. These can likely be deployed more quickly and with lower cost, especially in rural areas with difficult geographic terrain.

And as Free State Foundation Senior Fellow Andrew Long and I emphasized in a [June 2021 reaction](#) to President Biden's [initial broadband proposal](#), which claimed to "future proof" broadband infrastructure:

[T]he very concept of "future proofing" should be abandoned, at least to the extent that it is intended to be used in a way that dictates broadband policy choices. In other words, it should not be used to reject the competition-maximizing principle of technological neutrality or to justify discriminatory treatment of the various technologies used to deliver high-speed Internet access service to consumers.

As a factual matter, the notion that only fiber can satisfy conjectured future demand scenarios is unfounded. As just one example, and as Mr. Long described in a [September 2020 Perspectives from FSF Scholars](#), the cable industry's "10G" platform, regarding which both [Comcast](#) and [Charter](#) have recently announced rollout plans, is able to deliver download speeds up to 10 gigabits per second.

Nevertheless, NTIA's NOFO in unambiguous terms excludes satellite-based offerings and those that rely exclusively on unlicensed spectrum from the definition of "Reliable Broadband Service," even where they meet the technical thresholds set forth in the IIA: "For the purposes of the BEAD Program, locations served exclusively by satellite, services using entirely unlicensed spectrum, or a technology not specified by the Commission for purposes of the Broadband DATA Maps, do not meet the criteria for Reliable Broadband Service and so will be considered 'unserved.'" Consequently, providers that utilize these platforms are ineligible for subsidies, are vulnerable to government-funded overbuilding, and are denied an unfettered opportunity to compete. As set forth above, artificially constrained competition necessarily leads to reduced consumer welfare.

In response, Congress should consider amendments to the IIA that define the term "broadband" exclusively with respect to technical capability – upload and download speeds, latency, reliability – so that the most efficient solution for a given location is the one that is deployed.

For more from FSF scholars on this topic, please see the following:

- Randolph J. May, "[Charter Announces Big Plan for Deploying Ultra-Fast 10G Broadband](#)," *FSF Blog* (December 16, 2022).
- Andrew Long, "[Senators Urge NTIA to Acknowledge Role of Broadband via Unlicensed Spectrum](#)," *FSF Blog* (December 1, 2022).

- Michelle P. Connolly, "[NTIA's BEAD Program Needs Revisions to Succeed](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 50 (October 3, 2022).
  - Randolph J. May, "[Comcast Announces Nationwide Rollout of Ultra-Fast 10G Services](#)," *FSF Blog* (September 9, 2022).
  - Seth L. Cooper, "[A Case for Modest Speed Benchmarks in the FCC's Next Broadband Report](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 44 (September 7, 2022).
  - 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, "[Fixed Wireless Access Is Boosting Rural Broadband and Consumer Choice](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 21 (April 25, 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).
  - Seth L. Cooper and Andrew K. Magloughlin, "[The Broadband Internet Services Market in January 2022: 5G, Cable, Fixed Wireless, Wi-Fi 6, and Fiber Are Benefitting Consumers](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 5 (January 21, 2022).
  - Randolph J. May and Andrew Long, "[Biden Broadband Plan: 'Future Proofing' Is Likely 'Fools Proofing'](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 32 (June 24, 2021).
  - Andrew Long, "['Future Proofing' Subsidized Broadband Would Inflate Consumer Prices](#)," *FSF Blog* (April 13, 2021).
  - Andrew Long, "['10G' Can Help Future-Proof Broadband Infrastructure](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 47 (September 11, 2020).
2. In the BEAD Notice of Funding Opportunity (NOFO), there are detailed reporting requirements on subgrantees who do not use a unionized workforce or a project labor agreement. As a practical matter, do you think this favors certain providers over others? Does Congress or NTIA need to take further action to remove this requirement?

At a recent Senate Committee on Commerce, Science & Transportation hearing, you [referred](#) to a number of requirements in the NOFO, including the labor-related reporting provisions, as "extraneous political goals." And a just-published [Government Accountability Office report](#) highlighted "concerns regarding the ability of the broadband infrastructure deployment industry to attract sufficient numbers of workers needed to deploy broadband infrastructure funded by selected federal programs."

The focus of the BEAD program should be to ensure that broadband is made available to every U.S. location at the lowest cost and in the shortest amount of time. Unrelated policy priorities should not distract from the goal of closing remaining digital divides on an accelerated basis.

As Professor Connolly recently pointed out in "[NTIA's BEAD Program Needs Revisions to Succeed](#)," an October 2022 *Perspectives from FSF Scholars*:

It is not at all clear that most labor required for deployment is unionized. Given labor shortages, especially in fields required for broadband deployment, such a requirement – whether to hire unionized labor or to have a pre-hire collective bargaining agreement – imposes both higher costs and, most importantly, in the current labor environment, greater delays in deployment.

To ensure that workforce-related hurdles do not impede the timely construction of broadband infrastructure and/or artificially restrict competition, Congress should amend the IJA to eliminate these misguided reporting requirements.

3. The BEAD NOFO promotes government-owned networks. Do you believe government-owned networks are an effective entity to deploy broadband networks? If yes, please explain.

While [President Biden's broadband plan](#) "prioritize[d] support for broadband networks owned, operated by, or affiliated with local governments, non-profits, and co-operatives," the IJA merely declares that "[a]n eligible entity, in awarding subgrants for the deployment of a broadband network ... *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" (emphasis added).

And yet, as the question acknowledges, the BEAD NOFO nevertheless encourages government-owned networks, requiring that each state ("Eligible Entity") include in its Final Proposal:

A description of efforts undertaken ... to ensure the participation of non-traditional broadband providers (such as municipalities or political subdivisions, cooperatives, non-profits, Tribal Governments, and utilities), including an explanation for awards to traditional broadband providers when one or more non-traditional providers submitted competing proposals to serve an area.

In addition, Seth L. Cooper, Free State Foundation Director of Policy Studies and Senior Fellow, [flagged as problematic](#) that "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." Even more questionably, the NOFO "seems to say that NTIA may deny proposals based on the agency's judgment about state laws that limit government-owned networks."

However, the very premise underlying such attempts to preference government-owned (as well as cooperative) networks – that in some manner they offer a consumer-benefiting

alternative to privately funded broadband providers – lacks a factual foundation. In practice, government-owned networks create incentives for discriminatory behavior against private competitors with respect to subsidies they receive and preferential access they are granted to permitting, rights of way, and, where applicable, government-owned utility pole attachments. And, on top of this, taxpayers are burdened with financial liabilities when, despite their inherent preferential advantages, they frequently fail.

In a [November 2022 \*Perspectives from FSF Scholars\*](#), Dr. Connolly presented the results of an academic study she conducted with Tianjiu Zuo: "[A]ll else equal, municipal and cooperative participation in the broadband marketplace had a disproportionately negative impact on additional Internet service provider (ISP) entry – and, consequently, overall competition." Dr. Connolly identified three anti-competitive contributing factors: "regulatory conflicts of interest for municipal ISPs, insulation from market pressures (i.e., non-economic market entry and exit), and exemption from pole attachment rate regulation in cases where the municipal/cooperative ISP also provides electric and/or telephone service and therefore owns local utility poles."

And in an [August 2021 \*Perspectives from FSF Scholars\*](#), Mr. Long cited a study by Christopher Yoo, Jesse Lambert, and Timothy Pfenninger documenting "the extent to which such projects fail to achieve financial viability, in both the short- and long-term," and "the frequency with which municipal broadband projects expose taxpayers to unreasonable and unforeseen financial liability." Of the 15 projects that they reviewed, not one has realized short-term financial viability – and only two appear able to do so in the long-term.

Thus, government-owned networks have a high propensity to reduce overall consumer welfare by suppressing competition and imposing costs through higher taxes, higher electricity rates, or both. This explains why as many as 20 different state legislatures have enacted laws that restrict municipal entry into the broadband marketplace.

For more from FSF scholars on this topic, please see the following:

- Michelle P. Connolly, "[The Adverse Impact of Municipal and Cooperative Internet Service on Entry and Competition](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 57 (November 4, 2022).
- Andrew Long, "[The Goal of Broadband Subsidies Should Be to Connect the Unserved, Not Promote Municipal Networks](#)," *FSF Blog* (August 9, 2022).
- Seth L. Cooper, "[NTIA's Broadband Subsidies Must Respect State Law Limits on Government-Owned Networks](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 28 (May 26, 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, "[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 Seth L. Cooper, "[Why Biden's Broadband Plan Is Constitutionally Suspect](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 26 (May 20, 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).
  - 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).
  - Theodore R. Bolema, "[Municipal Broadband Proponents Falsely Claim No Harm to Taxpayers](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 41 (July 27, 2020).
  - Randolph J. May, "[Self-Evident Self-Dealing: A Municipal Broadband Bill Speaks](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 5 (January 27, 2020).
  - Randolph J. May, "[Another Muni Broadband System Bails Out](#)," *FSF Blog* (January 3, 2020).
  - "[New Paper Shows Economic Consequences of Municipal Fiber Projects](#)," *FSF Blog* (May 25, 2017).
4. One of the provisions of the IIJA requires products and materials used for broadband projects to be produced in the United States. Given the current supply chain issues, should Congress consider modifying this obligation or otherwise clarify this provision?

There is no question that in order to safeguard sensitive data, the products and materials used to construct subsidized broadband networks must be secure, reliable, and obtained from trusted sources. Absent such assurances, networks will be underutilized. However, an overly broad "Made in the USA" requirement could unreasonably raise costs and introduce unacceptable delays, especially considering the ongoing supply chain issues upon which this question is premised.

As Dr. Connolly noted in "[NTIA's BEAD Program Needs Revisions to Succeed](#)," an October 2022 *Perspectives from FSF Scholars*, pursuant to the BEAD NOFO:

All iron, steel, manufacturing products and construction materials used by subgrantees must be produced in the U.S. unless the quality or quantity available is insufficient or if doing so pushes costs more than 25% higher. Higher costs will reduce the amount of deployment that can be achieved for a given amount of funding. Additionally, given current supply chain issues, trying to restrict procurement to a single country, even if domestic, will generally slow deployment.



Consequently, Congress could consider clarifying amendments to the IIA that allow subsidy recipients to procure products and materials from verifiably trustworthy non-U.S. vendors. General "Buy American" restrictions that are unrelated to legitimate security or safety concerns may delay and/or raise the costs of deployment.

5. The Broadband Buildout Accountability Act, S. 3671, would remove the Freedom of Information Act exemption in the BEAD program. Should Congress enact this legislative proposal? If not, why?

Given the amount of money involved and the history of wasteful expenditures associated with earlier government-funded broadband subsidy programs, it is essential that Congress, the Administration, and the public at large have access to the information necessary to engage in meaningful oversight of the vast number of agencies and programs doling out federal dollars. Accordingly, the Free State Foundation supports efforts, such as the [Broadband Buildout Accountability Act](#), of which Senator Thune is a cosponsor, designed to maximize visibility into the ways that tax dollars are spent.

In the [press release](#), Senator Thune stated that "[t]his common-sense legislation would help strengthen it by ensuring there is proper oversight of NTIA's role in administering broadband funding to areas that need it the most" and Senator Rick Scott stated that the bill "will increase transparency and help ensure this taxpayer money is spent with maximum accountability and return on investment." Allowing the public to have access to this information can be accomplished using accelerated document production and review requirements without delaying deployment. Free State Foundation scholars support this measure to increase transparency.

6. Are there other technical issues in the BEAD program that Congress should address before NTIA announces funding allocations by June 30, 2023?

Given the BEAD program's ambitions, Free State Foundation scholars not surprisingly have identified a number of shortcomings located in its details. For one, upon the NOFO's release, Mr. Cooper [highlighted](#) two concerns: (1) that it "includes a misguided recommendation that states ought to favor open access wholesale last-mile broadband services in setting their criteria for awarding grants," and (2) that it "gives the appearance of putting unserved and underserved locations on equal footing." In a subsequent [Perspectives from FSF Scholars](#), Dr. Connolly elaborated upon this second point:

[T]he NOFO officially prioritizes unserved locations, then underserved locations, then community anchor institutions (CAI). However, a state may seek proposals for all three at the same time, and if the state "certifies that it will ensure coverage of all unserved locations" it may then award funds for underserved locations.... Allowing for contemporaneous disbursement of BEAD funds for unserved and underserved [areas] ... means that if subgrantees chosen to deploy in unserved areas fail, a state may have already disbursed all its BEAD funds for projects in

underserved areas and have nothing left to go back and re-attempt deployment in the unserved area(s).

Second, and as discussed in greater detail below, the IJJA defines both an "unserved service project" and an "underserved service project" as "a project in which not less than 80 percent of broadband-serviceable locations served by the project" satisfy the relevant criteria (that is, are either "unserved" or "underserved" locations). This allows recipients to use the federal subsidies they receive to overbuild privately funded networks in as much as 20 percent of their total project footprint – and thus creates incentives to draw project boundaries that capture already served high-profit areas.

Third, and likewise further addressed below, the IJJA states that BEAD program grant recipients "shall offer not less than 1 low-cost broadband service option for eligible subscribers," a requirement that inexorably will result in rate regulation. The NOFO compounds that issue by stating that (1) grant recipients may not "impose data usage caps on any plans offered over a Funded Network or impose unjust or unreasonable network management practices, and (2) a qualified "low-cost broadband service option" must address "any material network management practices" and may not be "subject to data caps, surcharges, or usage-based throttling" – thereby folding in the highly problematic topic of net neutrality.

For more from FSF scholars on this topic, please see the following:

- Michelle P. Connolly, "[NTIA's BEAD Program Needs Revisions to Succeed](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 50 (October 3, 2022).
- Seth L. Cooper, "[MEDIA ADVISORY: NTIA Releases Notice of Funding Opportunity for the BEAD Program](#)," *FSF Blog* (May 13, 2022).

### ***General Broadband Issues:***

1. As noted above, there are over 130 programs supporting broadband access across 15 agencies.
  - a. To date, which of these programs do you believe has had the most success in delivering broadband services to truly unserved areas?

Given that the BEAD program has not yet begun distributing grants, and at this stage many of the other federal subsidy programs have not had sufficient time to produce tangible results (that is, operational broadband infrastructure delivering high-speed Internet access to American consumers), the FCC's Universal Service Fund (USF) programs, including the Connect America Fund (I and II) and the Rural Digital Opportunity Fund, uniquely stand as examples of relatively successful government efforts to close remaining digital divides.

However, as the Free State Foundation argued in its [Comments](#) to the FCC on the *Report on the Future of the Universal Service Fund*, given (1) the promise of the BEAD program to extend broadband connectivity to all unserved remaining locations, to say nothing of the many other federal programs focused on that same goal, and (2) the fiscally unsustainable nature of the current USF contribution mechanism, "the Commission should reduce the size of the High-Cost Fund over time, and, at least for the most part, end all such subsidies." Regrettably, the Report fails to anticipate an "end state" for the High-Cost Fund, as I noted in an [August 2022 Perspectives from FSF Scholars](#).

- b. Should Congress consider eliminating any of these programs? If so, which ones?

At this stage it seems too late to return the horse to the barn with respect to, say, Treasury's \$350 billion [Federal and State Fiscal Recovery Fund \(FSFRF\) Program](#) and \$10 billion [Coronavirus Capital Projects Fund \(CCPF\)](#) – two initiatives that, as discussed below, raise concerns with respect to overbuilding of existing networks, among other issues. As Mr. Long pointed out in a [November 2022 Perspectives from FSF Scholars](#), both programs already have disbursed substantial sums of money. Instead, Congress should formulate a national broadband strategy that would coordinate existing programs, avoid duplicate grants, and prevent waste, fraud, and abuse.

As you note, a May 2022 Government Accountability Office [Report](#) identified "at least 133 funding programs that could support increased broadband access" under the purview of 15 different agencies – and warned that "[t]his patchwork of programs could lead to wasteful duplication of funding and effort." That same Report recommended that the "Executive Office of the President ... develop and implement a national broadband strategy with clear roles, goals, objectives, and performance measures to support better management of fragmented, overlapping federal broadband programs and synchronize coordination efforts."

The [Proper Leadership to Align Networks \(PLAN\) for Broadband Act](#), introduced by Senators Roger Wicker and Ben Ray Lujan in August 2022, aims at achieving that worthy goal. As Mr. Cooper described in a [contemporaneous blog post](#), it "would require the President, in consult with the heads of several federal agencies, to develop a 'National Strategy to Close the Digital Divide' as well as an 'Implementation Plan.'"

- c. Should Congress merge and combine any of these programs? If so, which programs would be best suited to be merged?

Given the large number of separate programs, it seems self-evident that some of them should be combined and/or eliminated so that there are many fewer programs and fewer agencies disbursing subsidies. This would increase manageability and facilitate accountability and meaningful congressional oversight. By way of example, Mr. Cooper [wrote approvingly](#) regarding the [Rural Internet Improvement Act of 2022](#), introduced by Senator Thune, which would merge USDA's ReConnect Program with its traditional broadband loan and grant program, among other worthy improvements to the USDA's

broadband efforts. In deciding which programs to merge or eliminate, Congress should consider the extent to which the entity's program expertise and capabilities are more less firmly embedded and proven, and whether the entity has demonstrated in the past a commitment to efficiency and effective administration of government funds.

For more from FSF scholars on this topic, please see the following:

- Seth L. Cooper, "[Senators Introduce the Rural Internet Improvement Act](#)," *FSF Blog* (December 8, 2022).
  - Andrew Long, "[A True Assessment of the USF's Future Relevance Demands a Full Accounting of Broadband Subsidies](#)," *FSF Blog* (August 30, 2022).
  - Randolph J. May, "[The FCC's USF Report: Unprecedented Broadband Funding Requires Fundamental Universal Service Reforms](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 42 (August 26, 2022).
  - Seth L. Cooper, "[PLAN for Broadband Act Addresses Funding Coordination Concerns](#)," *FSF Blog* (August 15, 2022).
  - Andrew Long, "[GAO, FCC's Carr Echo Broadband Funding Coordination Concerns](#)," *FSF Blog* (June 14, 2022).
  - [Reply Comments of the Free State Foundation](#), *Report on the Future of the Universal Service Fund*, WC Docket No. 21-476 (February 17, 2022).
  - [Comments of the Free State Foundation](#), *Report on the Future of the Universal Service Fund*, WC Docket No. 21-476 (February 17, 2022).
  - 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).
  - Andrew Long, "[Treasury Department Resurrects the Scary Biden Broadband Plan](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 56 (October 20, 2021).
2. What specific reforms and constraints should Congress consider to ensure federal funds are not being awarded where providers are receiving other federal or state broadband funding support?

First, and as discussed in greater detail below, to facilitate efforts to identify and avoid duplicate grants, Congress should require all agencies responsible for distributing broadband subsidies, on an ongoing basis, to provide the FCC with location-specific data regarding funded projects for inclusion in the National Broadband Map.

Second, Congress should direct all such agencies to rely upon a single technical definition of "broadband" in terms of upload and download speed, latency, reliability, and so on. As it currently stands, the FCC continues to define "broadband" as at least 25/3 Mbps, while the IJA established for purposes of the BEAD program a second eligible category, "underserved locations," having access to greater than 25/3 Mbps but less than 100/20 Mbps. And Treasury's Assistance Listing for the Coronavirus State and Local Fiscal Recovery Funds (SLFRF) Program demands that subsidized networks "be scalable to a minimum of 100 Mbps symmetrical for download and upload speeds," [arguably](#) requiring that "eligible projects deliver 100/100 Mbps service on day one." The use of

conflicting definitions of "broadband" effectively guarantees that duplicate – and, hence, wasteful – funding will result.

Third, Congress could direct agencies to limit the inclusion of served locations, appropriately and consistently defined, within the areas targeted by subsidized projects. The IJA permits BEAD program subsidy recipients to build out networks that cover areas where as many as 20 percent of locations are served, USDA's ReConnect Program [currently](#) sets the threshold at 50 percent, and Treasury's SLFRF Program permits funding recipients to disregard the existence of 25/3 Mbps service, [claiming](#) curiously that such "flexibility enables these funds to fill an important role in the overall federal broadband landscape." Again, by allowing grant recipients to sweep in substantial numbers of served locations, these programs create incentives to overbuild existing, often privately funded, networks, thus disincentivizing further private investment.

For more from FSF scholars on this topic, please see the following:

- Seth L. Cooper, "[Senators Introduce the Rural Internet Improvement Act](#)," *FSF Blog* (December 8, 2022).
  - Seth L. Cooper, "[A Case for Modest Speed Benchmarks in the FCC's Next Broadband Report](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 44 (September 7, 2022).
  - 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).
  - 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).
3. Should Congress take additional action in response to concerns that broadband funding may be used to overbuild existing service? If so, what reforms and constraints should be implemented?

Yes. For reasons set forth in responses above, Congress should pass legislation that expressly prevents the use of government subsidies to overbuild existing service. This legislation should include: (1) a truly technologically neutral definition of broadband that ensures that every distribution platform able to meet speed, latency, and reliability thresholds is immune from government-subsidized competitors; (2) a uniform definition of "broadband" that prevents duplicative grants – whether to one applicant or multiple applicants – with respect to a single location; (3) a sufficiently narrow allowance for projects that happen to include served locations – one that minimizes opportunities for "cream skimming"; and (4) a transparency requirement, applicable to all funding agencies, to provide the FCC with location-specific information regarding funded projects for inclusion in the National Broadband Map.

4. Should Congress take additional action in response to concerns that broadband funding may be conditioned upon recipients imposing some form of rate regulation of broadband services, whether or not such requirements are explicitly denominated "rate regulation?" If so, what reforms and constraints should be implemented?

The eligibility requirements for many broadband subsidy programs include an obligation (or strong suggestion) to make available a "low-cost" option. The IJJA sets forth a "reasonable" requirement for the BEAD program, upon which the NOFO elaborates. Defining what "low-cost" or "reasonable" means inevitably involves a form of rate regulation, a perilous endeavor with a long and troubled history in the telecom arena. To the extent necessary to address any adoption concerns, a better approach is to rely exclusively upon a revised version of the FCC's Affordable Connectivity Program (ACP) that targets lower-income people.

It is not difficult to find examples of "low-cost" or "reasonable" offering provisions that, in effect, are forms of rate regulation are not difficult to find. The USDA's [ReConnect Program](#) prioritizes applications that "include at least one low-cost option at speeds that are sufficient for a household with multiple users to simultaneously telework and engage in remote learning." The [Final Rule](#) for Treasury's SLFRF Program states that "recipients are encouraged to require that services provided by a broadband infrastructure project include at least one low-cost option offered without data usage caps and at speeds that are sufficient for a household with multiple users to simultaneously telework and engage in remote learning." The [Guidance](#) for Treasury's CCPF indicates that funded projects should "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."

The IJJA, meanwhile, requires that BEAD program 5-year action plans "propose solutions for the deployment of affordable broadband service" – and the NOFO states that (1) "each Eligible Entity must include in its Initial and Final Proposals a middle-class affordability plan to ensure that *all* consumers have access to *affordable* high-speed internet" (emphasis in original), and (2) "each Eligible Entity must submit a plan to ensure that high-quality broadband services are available to all middle-class families in the BEAD-funded network's service area at reasonable prices." As Professor Connolly [explained](#), "[w]hile the NOFO does not specify what a 'reasonable' price is or what defines a family as middle class, it is essentially suggesting that states could use the selection process to introduce direct rate regulation."

Instead, Congress should embrace a different, less administratively daunting, approach: exclusive reliance upon the existing ACP, which provides eligible consumers with a widely redeemable \$30 monthly subsidy, to address concerns relating to affordability. As I highlighted in an [October 2022 Perspectives from FSF Scholars](#), the long-term viability of the ACP, which will run out of money in a few short years, requires that Congress appropriate additional money. It also needs eligibility requirement revisions that better



target its limited resources to those lower-income persons most in need. Nevertheless, the ACP's approach stands as a far better solution than attempting to set rates for so-called "low-cost" offerings.

For more from FSF scholars on this topic, please see the following:

- Randolph J. May, "[Congress Should Extend and Revise the Affordable Connectivity Program](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 53 (October 25, 2022).
  - Michelle P. Connolly, "[NTIA's BEAD Program Needs Revisions to Succeed](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 50 (October 3, 2022).
  - Randolph J. May and Seth L. Cooper, "[The FCC Should Keep Broadband Free From Rate Regulation](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 19 (April 12, 2022).
  - Seth L. Cooper, "[State-Level Price Controls on Broadband Conflict With Federal Policy: Court Should Affirm the Preemptive Force of the FCC's 2018 Order](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 1 (January 3, 2022).
  - Randolph J. May, "[A Reasonable Alternative to Internet Public Utility Regulation](#)," *Perspectives from FSF Scholars*, Vol. 16, No.13 (March 12, 2021).
5. Should Congress take additional action in response to concerns that broadband funding may be conditioned upon recipients imposing some form of "net neutrality" mandates upon broadband services, whether or not such mandates are explicitly denominated "net neutrality?" If so, what reforms and constraints should be implemented?

Congress should instruct all agencies disbursing broadband funding that they may not leverage their disbursing and oversight responsibilities in ways that interfere with providers' network management practices or otherwise impose conditions, however denominated, that, in effect, mandate forms of "net neutrality."

In a [November 2021 Perspectives from FSF Scholars](#), Mr. Long and I drew attention to the fact that the USDA prioritizes applicants to its ReConnect Program "that commit to net neutrality," defined to include a refusal to engage in paid prioritization. We expressed grave concern:

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.

Similarly, the NOFO prohibits grant recipients from "impos[ing] unjust or unreasonable network management practices." In neither case did Congress provide these agencies



with the authority to wade into this contentious policy debate. Clarifying legislation that prohibits these "extraneous" eligibility requirements certainly would be appropriate.

For more from FSF scholars on this topic, please see the following:

- 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).
6. How effective have the Memoranda of Understanding between (1) the FCC, USDA, and NTIA, and (2) the FCC, USDA, NTIA, and Treasury been with respect to broadband coordination efforts? Are there additional reforms federal agencies should implement to better coordinate on broadband deployment efforts?

While Free State Foundation scholars hope these agreements will foster improved coordination, prevent duplicate grants, and minimize waste, fraud, and abuse, to date, the utility of these two interagency Memoranda of Understanding (MOUs) remains uncertain. Given that the programs for which the FCC, USDA, NTIA, and Treasury are responsible make up the lion's share of the overall total of federal dollars appropriated, the need for prompt implementation of these coordination commitments cannot be overstated, especially given the absence of a national broadband strategy.

Others have expressed similar fears. For example, at the Free State Foundation's Fourteenth Annual Policy Conference on May 6, 2022, FCC Commissioner Brendan Carr [declared](#) "that we do not have the right policy cuts in place and the right coordination across agencies to effectively get those dollars into the ground connecting communities." Former FCC Acting Chair and Commissioner Mignon Clyburn [made comments](#) at that conference along the same lines.

Notably, in a [Public Notice](#) seeking input for a required report to Congress on its [MOU with NTIA and the USDA](#), the FCC's Wireline Competition Bureau stated simply that "[t]he agreement has established a formal channel for information sharing and coordination among the Agencies, bolstering the Agencies' existing dialogue, and has contributed to an expanded awareness of the details of funding programs."

In responsive [Comments](#), the Free State Foundation stated it would be premature to assess the efficacy of the two interagency MOUs and argued that "[u]ltimately, the agreements' success will be determined by the degree to which they further the goal of universal broadband connectivity in a manner that prioritizes efficiency."

Finally, and as Mr. Cooper highlighted in a recent [blog post](#), the [Rural Internet Improvement Act of 2022](#), of which you are a sponsor, would improve coordination efforts specifically between the USDA and the FCC.

For more from FSF scholars on this topic, please see the following:

- Seth L. Cooper, "[Senators Introduce the Rural Internet Improvement Act](#)," *FSF Blog* (December 8, 2022).
  - Andrew Long, "[FCC Broadband Map Paves the Way for BEAD Grants, Better Oversight](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 61 (December 2, 2022).
  - Andrew Long, "[Absent Oversight, the Broadband Funding Faucet Likely Will Overflow](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 58 (November 10, 2022).
  - [Comments of the Free State Foundation](#), *Facilitating Interagency Coordination of Broadband Deployment Funding*, WC Docket No. 22-251 (August 1, 2022).
  - Andrew Long, "[GAO, FCC's Carr Echo Broadband Funding Coordination Concerns](#)," *FSF Blog* (June 14, 2022).
  - Seth L. Cooper, "[#FSFConf14: FCC Commissioner Carr Addresses Agency Coordination and Connecting Unserved Americans](#)," *FSF Blog* (May 31, 2022).
  - Seth L. Cooper, "[#FSFConf14: Agency Sharing of Information is Essential for Broadband Program Success](#)," *FSF Blog* (May 27, 2022).
  - Andrew Long, "[Broadband Funding Agencies Ink Data-Coordination MOU](#)," *FSF Blog* (May 16, 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).
7. Should Congress take steps to increase the transparency of agencies when allocating and disbursing broadband funds? If so, what steps should Congress take?

Yes. Absent adequate transparency, which at present appears to be lacking, the greatest concern is that money will be allocated where it is not needed, either because service currently is available in that area or funding from a different source already has been pledged. This especially is true given the number of programs and agencies involved. Accordingly, the single most important action Congress could take to improve transparency regarding in-progress, but funded, projects would be to require that every relevant agency/program contribute location-specific funding data to the FCC's broadband mapping undertaking.

Information regarding specific areas in which broadband service already is provided, which is included in the "pre-production draft" of the [National Broadband Map](#) released on November 18, 2022, presents only half the picture. Given the lengthy amount of time that typically transpires between initial approval and project completion, equally important is a visual representation of the locations where projects have been approved for funding, but have not yet initiated service or even broken ground.

However, currently it does not appear that all agencies will rely upon, or contribute data to, the National Broadband Map. For example, the Department of Agriculture's ReConnect Program references an entirely [different map](#). Legislation directing every agency responsible for distributing broadband infrastructure subsidies to provide the FCC with such information would facilitate far more effective oversight and greatly reduce waste, fraud, and abuse.

For more from FSF scholars on this topic, please see the following:

- Andrew Long, "[FCC Broadband Map Paves the Way for BEAD Grants, Better Oversight](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 61 (December 2, 2022).
  - Andrew Long, "[Absent Oversight, the Broadband Funding Faucet Likely Will Overflow](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 58 (November 10, 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).
  - 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).
8. What, if any, permitting regulations at the federal level are impeding broadband deployment?

The accelerated construction of broadband infrastructure demands more from the federal government than just financial subsidies. Action also must be taken to eliminate bureaucratic red tape that imposes unwarranted expenses and introduces delays.

The rapid extension of broadband infrastructure to areas still unserved stands as a primary federal policy priority. It follows that regulations that threaten to thwart the timely realization of that objective must be addressed. So, for example, the [Accelerating Rural Broadband Deployment Act](#), bipartisan legislation sponsored by Senators Steve Daines (MT) and Mark Kelly (AZ), would facilitate access to rights-of-way on federal lands and establish a 60-day shot clock after which applications not acted upon would be deemed granted.

In addition, permitting requirements involving environmental and historic-building reviews can drag out the approval process unnecessarily. In 2018, the FCC adopted the [Accelerating Wireless Broadband Deployment Order](#), which created exemptions from such obligations for certain small wireless equipment ("small cell") installations essential to the deployment of 5G mobile broadband service, but that agency action was vacated by the U.S. Court of Appeals for the D.C. Circuit in a [2019 opinion](#). Free State Foundation scholars have urged the Commission to "[reinstitute, with stronger reasoning,](#)" those exemptions. Federal legislation addressing this chokepoint, such as the

[Streamlining Permitting to Enable Efficient Deployment of Broadband Act of 2021](#), likewise would help.

Congress also could resolve regulatory uncertainties regarding historic preservation reviews that effectively prevent the collocation of equipment on nearly 5,000 "twilight towers" that were constructed between March 16, 2001, and March 3, 2005. One solution would be to exempt from historic-preservation reviews under Section 106 of the National Historic Preservation Act collocations or non-substantial upgrades to towers that meet criteria identical to or similar to what the FCC proposed in December 2017.

Another way Congress might address impediments to broadband deployment is by establishing a federal "dig once" policy that promotes forward-looking decisionmaking regarding the installation of infrastructure. Legislation such as the [Nationwide Dig Once Act of 2021](#), sponsored by Representative Anna Eshoo (CA), would serve that important purpose.

For more from FSF scholars on this topic, please see the following:

- [Reply Comments of the Free State Foundation](#), *The State of Competition in the Communications Marketplace*, GN Docket No. 22-203 (August 1, 2022).
  - Seth L. Cooper and Andrew K. Magloughlin, "[The Broadband Internet Services Market in January 2022: 5G, Cable, Fixed Wireless, Wi-Fi 6, and Fiber Are Benefitting Consumers](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 5 (January 21, 2022).
  - [Comments of the Free State Foundation](#), *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 19-285 (November 22, 2019).
  - Daniel A. Lyons, "[D.C. Circuit Decision Represents Setback to Next-Generation Network Deployment Efforts](#)," *Perspectives from FSF Scholars*, Vol. 14, No. 19 (August 15, 2019).
  - "[Commissioner Carr's Proposal Would Create At Least \\$1.56 Billion in 5G Investment](#)," *FSF Blog* (March 13, 2018).
  - Seth L. Cooper, "[Congress Should Implement a Dig Once Policy](#)," *FSF Blog* (April 3, 2017).
9. Does the FCC presently possess sufficient authority to preempt state and local requirements that may unreasonably impede the deployment of broadband networks? If not, what steps should Congress consider to address the unreasonable impediments?

On several occasions, Free State Foundation scholars have praised the FCC for taking steps, consistent with the statutory authority provided by Congress via Sections 224, 253(a), 303(d), 332(c)(7), and 1455(a) of the Communications Act, among others, to ensure that state and local government approval processes do not unreasonably delay efforts to deploy broadband network infrastructure.

For example, in "[The FCC Should Preserve and Expand Its Broadband Infrastructure Reforms](#)," a June 2022 *Perspectives from FSF Scholars*, Mr. Cooper and Andrew K. Magloughlin noted with approval a number of Commission decisions under then-Chairman Ajit Pai, including the 2018 *Moratorium Order*, the 2018 *Small Cell Order* discussed immediately above, the 2018 *One Touch Make Ready Order*, the 2020 *5G Upgrade Order*, and the 2020 *Over-the-Air-Reception-Devices Order*.

Express legislative pronouncements are less vulnerable than agency actions to time-consuming judicial challenges, including claims based upon the anti-commandeering doctrine. Moreover, there is concern that the FCC could be persuaded to reverse course by state and local governments that have staunchly opposed infrastructure siting policy streamlining efforts. Accordingly, Congress should consider codifying existing infrastructure siting reforms in order to expedite the construction of high-speed Internet access networks. In addition, Congress could establish shot clocks and fee caps on wireline infrastructure deployment in state and local rights-of-way.

For more from FSF scholars on this topic, please see the following:

- Seth L. Cooper and Andrew K. Magloughlin, "[The FCC Should Preserve and Expand Its Broadband Infrastructure Reforms](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 30 (June 8, 2022).
- Randolph J. May and Seth L. Cooper, "[Real Infrastructure Opportunity for Congress: Speed Deployment of 5G Network](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 36 (July 21, 2021).
- Seth L. Cooper, "[Supreme Court Order Ends Legal Challenge to FCC's Wireless Infrastructure Orders](#)," *FSF Blog* (June 29, 2021).
- Randolph J. May and Seth L. Cooper, "[Wireless Infrastructure Reforms Rest on Solid Constitutional Foundations: Congress Should Preempt Local Obstacles to 5G Deployment](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 29 (June 8, 2021).
- Andrew Long, "[A Court Defends Federal Policy Promoting Deployment of Wireless Infrastructure](#)," *FSF Blog* (March 25, 2021).

10. What specific steps can Congress take to reduce costs to broadband providers when deploying new networks?

As an initial matter, it is important to recognize that the "extraneous" requirements included in the BEAD NOFO – labor-related reporting obligations, the promotion of often mismanaged and competition-distorting government-owned networks, unduly restrictive "Made in the USA" procurement guidelines, and so on – discussed above all impose unnecessary costs. As such, any action by Congress to refocus the BEAD program on its intended goal – closing digital divides quickly while using taxpayer dollars in the most efficient manner – would lead to reduced costs. So, too, would the permitting and preemption fixes discussed above, as well as the pole-attachment reforms discussed below.

In addition, passage of the [Broadband Grant Tax Treatment Act](#) would shield certain broadband subsidies, including those made available by the IJA and the [American Rescue Plan Act](#), from federal taxation. While not technically a cost-saving measure, this pending legislation would maximize the utility of subsidies: absent congressional action, as much as 21 percent of those grants will return to the U.S. Treasury.

For more from FSF scholars on this topic, please see the following:

- Andrew Long, "[Broadband Subsidy Tax Companion Bill Introduced in the House](#)," *FSF Blog* (December 8, 2022).
- Andrew Long, "[Draft Bill Would Treat Broadband Subsidies as Nontaxable](#)," *FSF Blog* November 17, 2022).

11. Would updating pole attachment regulations spur more rural broadband deployment? If so, what actions should be taken?

Absent timely and affordable access to utility poles, the purpose of federal broadband subsidies – that is, the expedited expansion of high-speed Internet service to primarily rural locations not currently served – simply cannot be achieved. That is why the Free State Foundation filed comments in June 2022 urging the FCC to (1) "establish an objective formula for pole replacement cost-sharing in conjunction with a rebuttable presumption that utility pole owners directly benefit from replacement poles," and (2) "place pole attachment disputes in unserved areas on its Accelerated Docket." It is essential that pole attachment disputes be resolved in a timely manner.

In addition, Congress should eliminate the exemption from FCC-imposed limits on attachment rates for poles owned by municipalities and electric cooperatives set forth in Section 224 of the Communications Act. In an [August 2019 post to the FSF Blog](#), Mr. Cooper highlighted a paper written by Dr. Connolly finding that municipalities and electric cooperatives serving over one-fourth of the U.S. population "charge pole attachment rates that are more than double the rate charged by [investor-owned] utilities." Excessive pole rates raise deployment costs and waste limited government subsidies.

And as Mr. Cooper pointed out, "[t]his issue is even more important now that a number of municipalities and electricity co-ops have expressed interest in moving into the broadband market." As explained above, government entry into the broadband marketplace creates a number of regulatory conflicts of interest, including the incentive to discriminate against private competitors regarding pole attachment rates.

For more from FSF scholars on this topic, please see the following:

- [Comments of the Free State Foundation, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment](#), WC Docket No. 17-84 (June 27, 2022).
- Randolph J. May, "[PRESS RELEASE: FSF President Randolph May Commends FCC's Proposed Pole Attachment Rulemaking](#)," *FSF Blog* (February 24, 2022).



- Andrew Long, "[New Study Quantifies Huge Potential Losses Absent Revised Pole-Attachment Policies](#)," *FSF Blog* (December 7, 2021).
- Andrew Long, "[Charter to Commission: Pole Disputes Threaten Timely Deployment of Broadband Infrastructure](#)," *FSF Blog* (November 30, 2021).
- Seth L. Cooper, "[FCC Ruling on Pole Attachments Will Clear Obstacles to Broadband Deployment](#)," *FSF Blog* (August 19, 2020).
- Seth L. Cooper, "[Connolly Paper Analyzes Excessive Pole Attachment Rates](#)," *FSF Blog* (August 9, 2019).

12. How are federal broadband programs addressing cybersecurity challenges? Should Congress consider reforms to improve cybersecurity?

The importance of preventing sensitive data from getting into the wrong hands steadily grows. Congress's recently-enacted ban on the Chinese-owned social media app TikTok on government-owned devices is worthwhile. And in late November, the FCC issued a [Report and Order](#) that "[p]rohibits authorization of all telecommunications and video surveillance equipment produced by Huawei and ZTE." Meanwhile, requests for "rip and replace" reimbursements from the Secure and Trusted Communications Networks Reimbursement Program have exceeded the \$1.9 billion Congress appropriated by [roughly \\$3.7 billion](#).

The BEAD program NOFO requires subsidy recipients to have in place a cybersecurity risk management plan that "reflects the latest version of the National Institute of Standards and Technology (NIST) Framework for Improving Critical Infrastructure Cybersecurity (currently Version 1.1) and the standards and controls set forth in Executive Order 14028."

A requirement that subsidized networks have adequate cybersecurity measures in place will ensure that those networks in fact are utilized as intended – and avoid a repeat of the costly "rip and replace" situation. As a general matter, however, government should rely on private-sector solutions to the greatest extent possible and avoid inflexible, overly costly mandates.

13. Are there other broadband policy issues that Congress should consider reforming during the 118th Congress?

An impactful broadband-related action that Congress could take is to put an end to the net neutrality "[bouncing ball](#)." Set in motion by the Supreme Court's application of the *Chevron* doctrine to the FCC's decision to classify Internet access services as "information services" in 2005's [National Cable & Telecommunications Association v. Brand X Internet Services](#), the regulatory classification of broadband will remain in flux – and, specifically, dependent upon the political makeup of a fully constituted, five-member Commission – unless and until Congress establishes a proper "net neutrality" policy.



[As I stated in early 2022](#), and many times previously, Congress should eliminate this investment- and innovation-deterring uncertainty "by adopting a new law that prevents consumer harm while recognizing the technologically dynamic nature of today's Internet ecosystem." As part of a compromise, such a light-touch regulatory approach could codify the voluntary status quo with respect to deliberate discriminatory conduct – as Mr. Cooper and I [recently emphasized](#), "[a]lmost all ISPs' terms of service contain legally enforceable commitments not to block or throttle subscribers' access to lawful content" – but permit broadband providers to experiment with consumer-benefiting features such as [zero-rating and paid prioritization](#).

For more from FSF scholars on this topic, please see the following:

- Randolph J. May and Seth L. Cooper, "It's Net Neutrality Groundhog Day – Again!" *Perspectives from FSF Scholars*, Vol. 17, No. 38 (August 2, 2022).
- Randolph J. May, "[PRESS RELEASE: Ninth Circuit Panel Decision Affirming the District Court's Denial of a Preliminary Injunction to Enjoin California's Net Neutrality Law](#)," *FSF Blog* (January 28, 2022).
- Seth L. Cooper, "[California-Style Net Neutrality Regulation Hurts Wireless Consumers](#)," *FSF Blog* (March 17, 2021).
- Seth L. Cooper, "[Net Neutrality Is Dead, and the Internet Is Much Better Off for It](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 61 (November 18, 2020).
- Randolph J. May, "[The Ongoing Saga of Chevron and Net Neutrality](#)," *Perspectives from FSF Scholars*, Vol. 14, No. 33 (October 21, 2019).
- Randolph J. May and Michael J. Horney, "[California Net Neutrality Bill Would Stifle Network Investment](#)," *Perspectives from FSF Scholars*, Vol. 13, No. 34 (September 11, 2018).

\* \* \*

Again, I thank you for soliciting the Free State Foundation's views on the important questions set forth in your letter dated December 6, 2022. Please let me know whenever there is more that the Free State Foundation can do to assist your critical oversight efforts.

Sincerely,



Randolph J. May  
President  
The Free State Foundation

cc: Alex Sachtjen