



*Perspectives from FSF Scholars*  
*February 15, 2024*  
*Vol. 19, No. 6*

**Virginia Flags NTIA's Impermissible Pressure to Regulate Broadband Rates**

by

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In a recent letter to the National Telecommunications and Information Administration (NTIA), the Virginia Office of Broadband (VOB) brought much-needed attention to NTIA's efforts to defy Congress and impermissibly inject rate regulation into the \$42.45 billion Broadband Equity, Access, and Deployment (BEAD) Program. Rather than approve the VOB's laudable proposal to ground its definition of a "low-cost broadband service option" in marketplace-derived data, NTIA instead insisted, in the words of the VOB, that it "require broadband providers to offer a rate for the low-cost option *at a pre-set or pre-determinable price certain* as a condition to receipt of any BEAD funding" (emphasis added). In requiring "an exact price or formula," NTIA clearly crossed the rate-regulation Rubicon. As the letter lays out, "[t]his would have the effect of attempting to regulate the rate of BEAD-funded low-cost broadband service."

Established by the [Infrastructure Investment and Jobs Act](#) (IIJA), the BEAD Program directs NTIA to provide massive grants to states and territories ("eligible entities") – Virginia, for example, was allocated just under \$1.5 billion – for the construction of broadband facilities in areas identified by the FCC's [National Broadband Map](#) as "unserved." Each eligible entity, in turn, is responsible for establishing a process, tailored to its unique circumstances and consistent with both the statutory provisions of the IIJA and the guidance provided by NTIA through a

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[Notice of Funding Opportunity](#) (BEAD NOFO), for distributing those funds to the subgrantees that actually will build subsidized broadband network infrastructure. The IJA empowers NTIA, at multiple points, to review various aspects of each eligible entity's funding-distribution program.

The focus of the December 6, 2023, letter from VOB Director Tamarah Holmes, Ph.D., to NTIA Administrator and Department of Commerce Assistant Secretary Alan Davidson, the text of which can be found [here](#) (*see* page 52), is the IJA's requirement that every subgrantee "shall offer not less than 1 low-cost broadband service option for eligible subscribers." Each eligible entity must include in its final proposal a definition of "low-cost broadband service option." And NTIA must approve that definition. Importantly, however, the IJA also expressly provides that "[n]othing in this title may be construed to authorize the Assistant Secretary or the National Telecommunications and Information Administration to regulate the rates charged for broadband service." As detailed by the VOB in its letter, NTIA's response to its proposed definition impermissibly crosses that line and, therefore, violates the statutory prohibition.

Stepping back from the instant fact pattern for just a moment, I want to highlight the inherent contradiction that Section 60102 of the IJA presents. Rate regulation of broadband Internet services is widely regarded as an electrified "third rail" to be avoided at all costs. And for good reason. Competitive forces are ideally suited to the task of driving prices to their optimal levels. A heavy regulatory hand, by contrast, tends to clumsily set prices too low, thereby disincentivizing entry and innovation, or too high, thereby discouraging adoption. In either case, overall consumer welfare is constrained artificially.

The common compulsion experienced by regulators to interfere with efficiently operating marketplaces, however, can inspire overly narrow interpretations as to what is (and is not) "rate regulation" in attempts to deny that that in fact is the true intent. Section 60102 of the IJA offers a compelling practical example of this phenomenon: on the one hand, it explicitly prohibits the regulation of rates, but on the other, it directs eligible entities – and, ultimately, NTIA – to pronounce, though perhaps in a roundabout fashion involving formulae and other oblique mechanisms, precisely what a "low-cost" rate is. No matter how this activity is described in statutory language or administrative guidance, its consequence is the same: regulators setting rates – that is, "rate regulation."

Thus, I maintain that the space the IJA presupposes between (1) permissibly defining what a "low-cost" rate is, and (2) impermissibly regulating rates is rather ephemeral. Sadly, the VOB in its letter does not go so far as to embrace this position. It does, however, raise legitimate concerns regarding NTIA's demand that it specify "an exact price or formula." It also takes legitimate issue with NTIA's insistence that the VOB define its "low-cost broadband service option" in its *initial* proposal, pointing out that, per the plain language of the IJA, eligible entities are to submit for approval their proposed definitions as part of their *final* proposal.

As the letter explains, Volume 2 of Virginia's BEAD Initial Proposal, the most recent version of which can be found [here](#), would require applicants "to provide their market analysis, which demonstrates why the set price for their low-cost service option is affordable." It also:

[G]oes further and adds safeguard[s] by requiring the low-cost broadband service option be made available to all eligible prospective customers across the subgrantee's service territory, including locations within the awarded project areas under the BEAD program. *Objectively, this approach ties the low-cost broadband service option to market conditions across a subgrantee's entire service territory.* (emphasis added)

NTIA rejected the VOB's proposed approach because it failed to identify "an exact price or formula." As the VOB's letter points out, however, "[t]his would have the effect of attempting to regulate the rate of BEAD-funded low-cost broadband service" in defiance of the IJJA's prohibition of explicit "rate regulation" as well as judicial precedent indicating that "states are preempted by federal law from regulating the rates of broadband services generally." The letter also argues compellingly that NTIA's demand for "an exact price or formula" impermissibly exceeds the congressional authority set forth in the IJJA. And given that the IJJA tasks eligible entities, rather than the NTIA itself, with defining a "low-cost option," the letter appropriately expresses concern that the VOB "is being asked by the funding agency, NTIA, to take an action that NTIA is expressly prohibited from taking."

Reasonable minds can – and, in this case, do – disagree whether there exists between, on the one hand, a general prohibition against rate regulation and, on the other, a requirement to define a "low-cost" rate, sufficient space in which state governments can define (and the NTIA can approve) the latter without running afoul of the former. Arguably, the definition proposed by the VOB, which relies upon real-world marketplace data, including the price applicants offer in areas where competition exists, could be said to thread that needle. NTIA's demand for "an exact price or formula," by contrast, clearly does not.

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### **Further Readings**

Andrew Long, "[Two Wrongs Don't Make a Right: NTIA's Endorsement Can't Save the FCC's Flawed Read of Section 706](#)," *Perspectives from FSF Scholars*, Vol. 19, No. 2 (January 19, 2024).

Randolph J. May, "[Senator Cruz Proposes Fixes to Flawed BEAD Program](#)," *Perspectives from FSF Scholars*, Vol. 18, No. 42 (October 2, 2023).

Andrew Long, "[BEAD Program State-by-State Funding Allocations Announced](#)," *FSF Blog* (July 6, 2023).

Andrew Long, "[Senator Thune Spearheads Call to Revise BEAD Program Rules](#)," *FSF Blog* (April 20, 2023).

Andrew Long, "[New Report Puts a \\$60B Price Tag on NTIA's Fiber-Broadband Bias](#)," *FSF Blog* (February 10, 2023).

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).

Seth L. Cooper, "[Senators Urge Fixes to NTIA's NOFO for Broadband Subsidies](#)," *FSF Blog* (August 25, 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, "[MEDIA ADVISORY: NTIA Releases Notice of Funding Opportunity for the BEAD Program](#)," *FSF Blog* (May 13, 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).