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The Fate of the BEAD Program Rests on "Devilish Details"

by

Andrew Long *

I. Introduction and Summary

Step by lumbering bureaucratic step, the $42.45 billion Broadband Equity, Access, and Deployment (BEAD) Program inches forward. As of May 31, 2024, all 56 "eligible entities" – states, territories, and the District of Columbia – had submitted to the National Telecommunications and Information Administration (NTIA) their Initial Proposals (Volumes I and II) and received approval for Volume I, which defines the process for challenging a grant request. And to date, NTIA has approved Volume II, which details how eligible entities will distribute taxpayer dollars to "subgrantees" – the broadband Internet service providers (ISPs) that will build out government-subsidized broadband infrastructure to those locations still "unserved" – for seven states and the District of Columbia.

This multitiered process, laid out by Congress in the Infrastructure Investment and Jobs Act (IIJA) back in 2021, empowers each eligible entity to craft a tailored process that aligns best with its unique circumstances: geography, population distribution, current service availability, and so on. However, it also creates numerous opportunities for motivated mischief makers to inject their policy biases – what I refer to as "devilish details" – into the day-to-day administration of the

BEAD Program. This *Perspectives* delves into those details, taking into account the latest information regarding actions at both the federal and state levels.

The BEAD Program represents a once-in-a-lifetime opportunity to achieve coast-to-coast broadband availability. And while $42.45 billion ought to be more than enough to connect every single location, the one-two punch of inflation and cost-raising policies born of the Biden Broadband Plan raises the concerning possibility that, after all the money has been spent, unserved areas could remain. Indeed, just last month the Western Governors' Association alerted federal policy and lawmakers "that continued federal investment will be needed to shore up connectivity gaps and backfill BEAD funding."

And it is those aforementioned devilish details – of late obscured in below-the-radar administrative actions that (1) regulate broadband rates and (2) reject the principle of technological neutrality – that introduce inefficiencies (primarily duplication, waste, and fraud), diminish competition, and raise deployment costs. Big picture, they threaten the ability of the BEAD Program to deliver universal broadband access – if not altogether, which appears to be an increasing possibility, then in a way that uses taxpayer dollars responsibly.

For example, insidious efforts are underway to:

- Regulate the rate of the congressionally mandated "low-cost broadband service option" in a manner that eviscerates the ability of providers to receive a reasonable rate of return, depresses competitive bidding, and leads to higher project costs. In his recent appearance on the Free State Foundation-hosted "TMT with Mike O'Rielly" videocast, former FCC Chairman Ajit Pai, speaking from the perspective and experience of his current role as a private equity investor, said that "regulatory and legislative decisions can have a very significant impact. Price regulation is the easiest example of that…. I can tell you that to the extent that there is the prospect of federal or especially state price regulation, that significantly deters us from wanting to make investments in some cases."
- Ignore the IIJA's technologically neutral definition of "broadband" – 100 Megabits per second (Mbps) downstream and 20 Mbps upstream (100/20) – and instead push fiber in every instance no matter what the cost. Specifically, eligible entities are setting the "Extremely High Cost Per Location Threshold" (EHCPLT) – the permissible upper spending limit to build out fiber – at a dollar amount that justifies excessively wasteful spending on "gold-plated" networks even when an alternative distribution technology clearly could deliver broadband much more cheaply. Or, more troublingly, choosing to ignore the EHCPLT altogether, with NTIA's blessing.

Transparency and intense oversight at every stage is essential to prevent 56 eligible entities from making these and similar wasteful mistakes.

At the same time, it is important to keep in mind that although these devilish details generally are found in eligible entity implementation plans, in some instances it is NTIA itself, whether through the BEAD Program Notice of Funding Opportunity (NOFO), the Initial Proposal Guidance, or the approval process, that bears responsibility. This is yet another example of the

Biden Administration finding opportunities at every turn to revive congressionally rejected elements of the Biden Broadband Plan.

II. Rate Regulation, However Labeled, Suppresses Competition and Raises Costs

Section 60102 of the IIJA plainly states 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." However, and as I highlighted in "Virginia Flags NTIA's Impermissible Pressure to Regulate Broadband Rates," a February 2024 *Perspectives from FSF Scholars*, that same section – in a manner arguably inconsistent on its face – also requires subgrantees to "offer not less than 1 low-cost broadband service option for eligible subscribers" and for eligible entities to submit to NTIA for approval "a proposed definition of 'low-cost broadband service option.'"

(Further complicating matters, the BEAD Program NOFO bootstraps from a congressional finding that "[a]ccess to affordable, reliable, high-speed broadband is essential to full participation in modern life in the United States" to requiring that "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.")

As I detailed in the *Perspectives* referenced above, whatever middle ground exists between (1) a prohibition on rate regulation and (2) a requirement to make available a low-cost option also serves as fertile topsoil for devilish details. Virginia proposed to define a "low-cost broadband service option" in reference to subgrantee-submitted market analyses and an "approach that ties the low-cost broadband service option to market conditions across a subgrantee's entire service territory." NTIA rejected that proposal on the basis that it failed to identify "an exact price or formula." But as Virginia Office of Broadband Director Tamarah Holmes, Ph.D., pointed out in a December 2023 letter (*see* page 52) to NTIA Administrator and Department of Commerce Assistant Secretary Alan Davidson, dictating an "exact price or formula" necessarily constitutes impermissible rate regulation.

In contrast, Virginia's proposed approach, which requires that "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," leverages prices determined by actual marketplace forces in competitive regions and extends them to subsidized areas – not arbitrary lines drawn by policymakers.

NTIA's BEAD Program Initial Proposal Progress Dashboard indicates that, as of May 30, 2024, Volume II of Virginia's Initial Proposal, which incorporates the letter from Dr. Holmes – and, by extension, the rate-regulation impasse – has not yet been approved.

Of course, eight other eligible entities have been able to define "low-cost broadband service option" in a way that is acceptable to NTIA: Delaware, Kansas, Louisiana, Nevada, Pennsylvania, Washington, West Virginia, and the District of Columbia, all of which have obtained approval for both volumes of their Initial Proposals. Louisiana, for example, relied upon the metric created by the FCC in the Lifeline context: a price that does not "exceed two percent of low income consumers' disposable household income."

Even when an eligible entity and NTIA agree on a "low-cost broadband service option" definition, however, problems associated with government rate-setting arise – regardless of the words used to describe those actions. In particular, rates that are set too low can discourage ISPs from participating – the math simply does not add up to a reasonable return on investment – and thereby suppress participation. Fewer providers bidding leads to higher costs, lower quality, and, in the long run, greater likelihood of project failure.

Making a similar point, former FCC Chairman Ajit Pai, speaking from the perspective and experience of his current role as a private equity investor on the latest episode of Free State Foundation Adjunct Senior Fellow Michael O'Rielly's FSF-hosted "TMT With Mike O'Rielly" videocast, said that "regulatory and legislative decisions can have a very significant impact. Price regulation is the easiest example of that…. I can tell you that to the extent that there is the prospect of federal or especially state price regulation, that significantly deters us from wanting to make investments in some cases." As Mr. Pai emphasized, the Biden Administration's determination to regulate the rates of broadband service will prove counterproductive and an obstacle to achieving the BEAD program's deployment objectives.

Keep in mind, too, that the only example presented in the BEAD Program NOFO of an acceptable "low-cost broadband service option" would cap the price at "$30 per month or less, inclusive of all taxes, fees, and charges … with no additional non-recurring costs or fees to the consumer," the exact amount of the subsidy available from the (now-discontinued) Affordable Connectivity Program. The only "low-cost" safe harbor acceptable to NTIA, it would seem, is "free."

Recently, two trade association representing smaller and more rural ISPs have brought their concerns on this topic to NTIA. In a May 30, 2024 letter to Assistant Secretary Davidson, ACA Connects President and CEO Grant Spellmeyer identified "overly restrictive or burdensome requirements to offer and administer the 'low-cost service option'" as a potential deterrent to ACA Connects member participation in the BEAD Program – and instead encouraged approaches that "take into account the economic realities of providing service in more rural, sparsely populated areas" (seemingly such as the one embraced by Virginia) so that providers can realize "a sufficient return on its investment."

Similarly, in a letter dated May 21, 2024, NTCA – The Rural Broadband Association Chief Executive Officer Shirley Bloomfield warned that:

> An artificially low and arbitrary rate … could be unsustainable in many cases (especially across far-reaching rural areas) and thus more likely to discourage BEAD participation by small rural broadband providers – to the detriment of rural consumers most in need of service from committed providers with a vested interest and long-standing track record of performance in rural communities.

III. A Blind Preference for Fiber-Based Networks Will Lead to Wasteful Spending

As I wrote two years ago in "Future Guidance Can Fix NTIA's Flawed 'Fiber-First' Approach," the IIJA – rejecting the Biden Broadband Plan and its explicit bias in favor of so-called "future-proofed" (that is, fiber-based) networks – defined minimum speeds, and especially upstream speeds, in a manner wholly in line with the pro-competitive principle of technological neutrality:

> Rather than embrace a "fiber-first" strategy, the bipartisan IIJA incorporates far more realistic and reasonable thresholds: locations with access to Internet service at speeds less than 25 megabits per second (Mbps) downstream and 3 Mbps upstream (25/3 Mbps) are defined as "unserved," while locations where available speeds are greater than 25/3 Mbps but less than 100/20 Mbps are deemed "underserved." These thresholds strongly suggest a congressional intention to leverage robust competition between providers utilizing the full complement of viable distribution technologies – fiber, cable broadband, 5G, fixed wireless, satellite, and so on – to ensure that federal dollars are put to their most efficient use.

Similarly, the IIJA defines a "Priority Broadband Project" in broad, capability-focused language:

> [A] project designed to – (i) provide broadband service that meets speed, latency, reliability, consistency in quality of service, and related criteria as the Assistant Secretary shall determine; and (ii) ensure that the network built by the project can easily scale speeds over time to – (I) meet the evolving connectivity needs of households and businesses; and (II) support the deployment of 5G, successor wireless technologies, and other advanced services.

The BEAD Program NOFO, on the other hand, defines "Priority Broadband Projects" exclusively as "those that use end-to-end fiber-optic architecture" – and, in doing so, disregards clear congressional intent to leverage a wide range of distribution technologies to most efficiently address the unique challenges presented by each unserved location. It also disqualifies entirely offerings that utilize satellites or unlicensed spectrum to deliver service, no matter how fast the speed or how low the cost.

However, in the event that an end-to-end fiber network would be *extremely* expensive – a determination made in reference to an eligible entity's definition of an "Extremely High Cost Per Location Threshold" (EHCPLT) – NTIA will allow that eligible entity to reject a fiber-based proposal "if use of an alternative technology meeting the BEAD Program's technical requirements would be less expensive." (Eligible entities also may request waivers under certain circumstances.)

In other words, up to a certain point, eligible entities must prioritize fiber builds – without *any* consideration of the price tag – over more cost-effective proposals that utilize other distribution technologies. Only after the EHCPLT has been crossed may an eligible entity then base its funding decisions on a sound, fiscally responsible cost-benefit analysis … that is, if said eligible entity chooses to do so. As it turns out, when playing with the house's money – that is, taxpayers' money – eligible entities tend to go for the "gold-plated" option instead.

For example, Volume II of the Initial Proposal submitted to NTIA for approval by Colorado, a state about which I wrote in "Wasteful Duplication by Design: A Case Study on Overlapping Federal Broadband Subsidies," a May 2023 *Perspectives*, declares that "[c]ertain [fiber-to-the-home (FTTH)] proposals may still be selected *even if their cost exceeds the final EHCPLT value*" – and that "[t]he decision to choose an alternative technology to FTTH *will only be made if doing so would result in expanded coverage* of at least reliable broadband service" (emphasis added). In other words, not only does Colorado intend, in at least some instances, to ignore the bright line above which less costly non-fiber proposals are to be considered, it will require that those alternatives *also* provide greater coverage to prevail.

Similarly, Delaware, one of the eight eligible entities to have its Volume II approved by NTIA, embraces an "*absolute preference* for fiber-to-the-premises," "intends to limit its initial round of its BEAD grant funding to fiber," and will only establish an EHCPLT value (and thereby open the door to alternative technologies) "if the first funding round does not result in commitments to deploy to all unserved and underserved addresses in the State" (emphasis added). Again: Delaware "does not believe it will need to implement the EHCPLT" even before receiving bids from potential subgrantees – and still NTIA approved its Initial Proposal.

IV. Conclusion

The cascading levels of responsibility built into the BEAD Program open multiple doors through which devilish details – rate regulation, a fiber-first bias, and other elements of the Biden Broadband Plan that did not make it into the version of the Infrastructure Investment and Jobs Act passed by Congress – might slip and cause havoc. Whether through a statutorily mandated national broadband plan or merely diligent oversight and effective coordination by the executive and legislative branches, it is essential that extra-legal policy preferences do not jeopardize the successful achievement of the BEAD Program's goal: universal broadband connectivity subsidized in a fiscally responsible manner.

* Andrew Long is a Senior Fellow of the Free State Foundation, an independent**,** nonpartisan free market-oriented think tank located in Rockville, Maryland. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it.

Further Readings

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