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ONE HUNDRED EIGHTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

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July 9, 2024

The Honorable Alan Davidson
Assistant Secretary of Commerce for Communications and Information
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue N.W.
Washington, D.C. 20230

Dear Assistant Secretary Davidson,

We write to request all communications between the National Telecommunications and Information Administration (NTIA) and state broadband offices as it relates to pending Broadband Equity, Access, and Deployment (BEAD) Initial Proposals. The NTIA, as the agency responsible for distributing the \$42.45 billion in taxpayer funds Congress appropriated for BEAD, has stalled its approval for the vast majority of the 56 states and territories, undermining their ability to utilize the funding to invest in broadband expansion as Congress intended. It is essential that approvals of state BEAD proposals are not unreasonably or unlawfully being withheld, and, since the NTIA is exempted from requirements to publicly disclose its underlying review process,¹ it is essential that the NTIA be transparent with the Committee on Energy and Commerce regarding the program.

Congress appropriated an unprecedented \$42.45 billion through the Infrastructure Investment and Jobs Act (IIJA) for the NTIA to administer the BEAD program. The program was intended to ensure that all Americans, specifically those in unserved or underserved areas, have access to broadband.² The NTIA is responsible for managing and distributing this money to the states and territories.

¹ Infrastructure Investment and Jobs Act (IIJA), P.L. 117-158 § 60102(o)(2).

² IIJA § 60102; Broadband Equity Access and Deployment Program, Overview, Nat'l Telecommunications & Info. Admin. (last visited May 30, 2024), <https://broadbandusa.ntia.doc.gov/funding-programs/broadband-equity-access-and-deployment-bead-program>; Ling Zhu, *Broadband Equity, Access, and Deployment (BEAD) Program: Issues and Congressional Considerations*, CRS (June 15, 2023).

The IJA established a process for how states receive money from the NTIA for this program. First, each of the 56 individual states and territories (state entities) were required to submit an Initial Proposal explaining their proposed process for awarding the funds.³ The NTIA was then tasked with reviewing and approving each individual states entities' proposal, after which funds would be allocated to the state to award.⁴ Despite every state entity having submitted their initial proposals by the December 27, 2023, deadline,⁵ the NTIA has only approved 16 initial proposals as of the date of this letter.⁶ Due to the opaque nature of the NTIA's review and approval process, this Committee lacks the information necessary to assess why so few state entities initial proposals have been approved to move forward.

It is unclear to this Committee and the public how the NTIA is evaluating initial proposals or if the review process is objectively based. The IJA exempted the BEAD program from Freedom of Information Act (FOIA) requirements for "any action taken or decision made by" the NTIA related to its administration of the program. This relieves the NTIA of important transparency obligations to the public in how it reviews, approves, and eventually allocates the \$42.45 billion in taxpayer dollars.⁷ We are unaware of a single federal agency appropriated with even half that amount bestowed with any such FOIA exemption.⁸ Given the unprecedented exemption from transparency coupled with a record amount in funding, this Committee has a responsibility to ensure that both initial and final proposals submitted by state entities are properly evaluated and consistent with the intent of Congress when establishing the program.

Based on anecdotal evidence from different entities involved in the process, it appears that the NTIA may be evaluating initial proposals counter to Congressional intent and in violation of the law. Several Members of Congress have directly raised to you that the NTIA, through its review of initial proposals, is unlawfully regulating the rate of broadband through BEAD's low-cost service option in direct conflict with the IJA, which states: "Nothing 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."⁹ During Senate floor debate on the IJA, Members of Congress agreed that this language meant that "no rate regulation of broadband services would be authorized or permitted by the NTIA or the Assistant Secretary who leads the NTIA as part of the state broadband grant program."¹⁰

³ IJA § 60102(e)(3).

⁴ See Ling Zhu, *Broadband Equity, Access, and Deployment (BEAD) Program: Issues and Congressional Considerations*, CRS (June 15, 2023).

⁵ Jake Neenan, All 56 States and Territories Submit BEAD Initial Proposals, *BroadbandBreakfast* (Dec. 28, 2023), <https://broadbandbreakfast.com/all-56-states-and-territories-submit-bead-initial-proposals/>

⁶ BEAD Initial Proposal Progress Dashboard, *Internet For All*, <https://www.internetforall.gov/bead-initial-proposal-progress-dashboard> (last visited May 30, 2024).

⁷ IJA § 60102 (o)(2).

⁸ Communications with Cong. R. Serv.

⁹ IJA § 60102 (h)(5)(d); see Letter from Cathy McMorris Rodgers, Chair, H. Energy & Commerce, Robert E. Latta, Sub. Chair, Subcomm. on Communications & Technology, to Hon. Alan Davidson, Assistant Sec. Commerce (Oct. 3, 2023); Letter from Marsha Blackburn, Sen. U.S. Senate, et al. to Hon. Alan Davidson, Assistant Sec. Commerce (Mar. 8, 2024); Letter from Hon. Morgan Griffith, Rep., U.S. H. Representatives, to Hon. Alan Davidson, Assistant Sec. Commerce (Apr. 2, 2024).

¹⁰ 167 Cong.Rec. S5921-22 (2021) (emphasis added).

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States have reported that the NTIA is directing them to set rates and conditioning approval of initial proposals on doing so. This undoubtedly constitutes rate regulation by the NTIA. Indeed, one state publicly posted the NTIA’s feedback that the agency would not approve their initial proposal without “an exact price or formula” for the state’s low-cost option.¹¹ Without visibility into the approval process, Congress is unable to determine how widespread this practice is. When asked about this at oversight hearings, your responses have failed to provide clarity.¹²

Further, one state broadband agency officer publicly stated her frustration over everchanging NTIA guidance to receive approval: “it is frustrating, having-- they’ve never done it, we’re getting guidance that is constantly changing [...]”¹³ Similarly, a separate state broadband officer noted the ambiguity in what the NTIA is seeking in order to approve its BEAD proposal:

“We’ve been told that states know best and we are eager to get going [allocating BEAD funding], but some of the NTIA guidelines and requirements can make it challenging [...] We may need to apply for waivers because our definitions of broadband—and what is considered unserved and underserved—are different than BEAD.”¹⁴

This Committee is responsible for ensuring that the NTIA is not imposing onerous hurdles on state broadband agencies to receive its share of allocated broadband funding. We were pleased with your offer to cooperate with this Committee and your commitment to transparency at our May 15 hearing:

Mr. Walberg: Will you commit to providing transparent feedback to the states and this *Committee*, more so in the future? (emphasis added)

Mr. Davidson: As I say, we think we do better with transparency. We have endeavored to be transparent. I would like to—I certainly would welcome the chance to work with you on that.

¹¹ Commonwealth Connect, Broadband Equity, Access and Deployment Program, Initial Proposal Vol. 2, <https://dhcd.virginia.gov/sites/default/files/DocX/vati/ntiacuringround2changes-virginiabeadvolume2.pdf>.

¹² See, e.g., Oversight of the National Telecommunications and Information Administration: Hearing Before the Subcomm on Comm’n & Tech. of the H. Comm. on Energy & Com., 118th Cong. (Dec. 5, 2023) (“NTIA Oversight Hearing”) (exchange between Asst. Sec. Alan Davidson to Rep. John Joyce) (stating that the NTIA would give states flexibility on how to establish a low-cost option without ruling out setting an exact price.)

¹³ Broadband Breakfast on Jan. 31, 2024—Broadband Mapping and BEAD Challenges (Broadband Breakfast), <https://broadbandbreakfast.com/broadband-breakfast-on-january-31-2024-broadband-mapping-and-bead-challenges/> (1:20:13).

¹⁴ Doug Adams, Minnesota Broadband Director Builds on State’s Rural Funding Heritage, TELECOMPETITOR (Apr. 1, 2024), <https://www.telecompetitor.com/minnesota-broadband-director-builds-on-states-rural-funding-heritage/>.

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To effectuate your promises to this Committee and for us to better understand the NTIA's BEAD approval process, please provide the requested documents and written responses to the following no later than July 23, 2024:


- (1) All communications (e.g., memos, emails, electronic messages) between NTIA officials and state broadband offices regarding the review and approval process for all initial proposals. Please include all written feedback provided to states on their initial proposals, including pre-approval evaluations and curing edits.
- (2) The factors or conditions that are preventing state entities from having their initial proposals accepted.
 - a. Provide all instances where a state's initial proposal was not accepted without edits or initially rejected or required to be resubmitted due in part to the BEAD's low-cost option requirement pricing as a factor in the decision.
- (3) The reasons why communications between the NTIA and state broadband offices would not be made public.
- (4) A written commitment that a summary of any oral feedback from the NTIA to state agencies be documented and published on the NTIA's website. If a commitment cannot be provided, explain the reasons why it cannot.

Please contact the majority staff of the Committee on Energy and Commerce at 202-225-3641 if you have any questions regarding this request. Thank you for your attention to this matter.

Sincerely,



Cathy McMorris Rodgers
Chair
Energy and Commerce Committee



H. Morgan Griffith
Chair
Subcommittee on Oversight
and Investigations



Robert E. Latta
Chair
Subcommittee on Communications
and Technology