

# **BEST PRACTICES FOR EFFECTIVE BROADBAND EXPANSION**

**A GUIDE  
FOR STATE IMPLEMENTATION  
OF THE BEAD PROGRAM**



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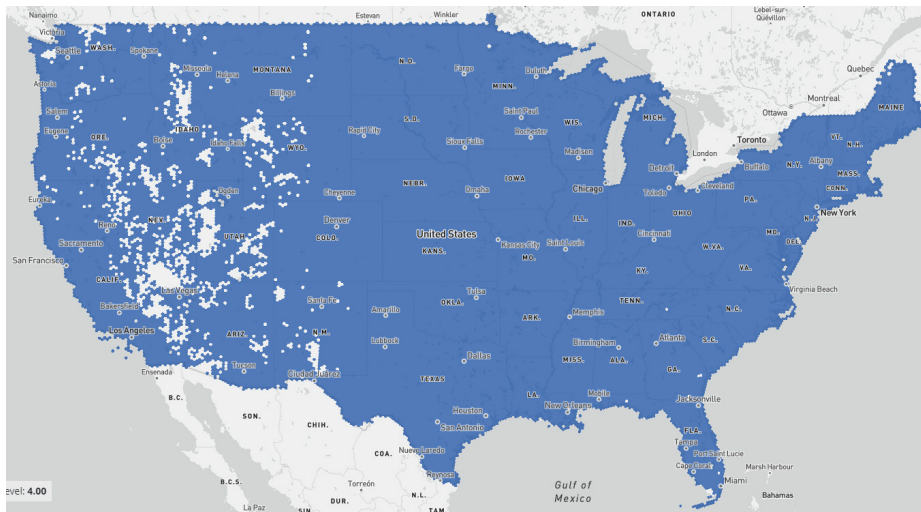
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# INTRODUCTION

Broadband buildout has been one of America's great success stories of the past few decades. Public policy is largely focused on solving problems, so policymakers tend to fixate on the bad, the insufficient, and the dysfunctional, rather than on what's working well. According to the Pew Research Center, the share of American adults who use the internet has risen from 52% in 2000 to more than 93% today.<sup>1</sup> This was only possible because of private sector investment in high-speed broadband. Since 1996, the private sector has invested nearly \$1.7 trillion in fiber, fixed terrestrial wireless, and, more recently, satellite internet infrastructure. The result has been a 77-fold increase in broadband use by American adults.



Nonetheless, some Americans remain unserved. Americans without service live chiefly in rural areas that are difficult to reach, expensive to build out to, and lack sufficient population density for an Internet Service Provider (ISP) to recoup their investment. The private

sector has made great strides in just the last few years: today, 72% of rural Americans say they have a broadband internet connection at home, up from 63% in 2016.<sup>2</sup> Despite this progress, rates of broadband access remain five to seven points higher among America's urban and suburban residents compared to its rural population.

Congress sought to address the problem through the bipartisan infrastructure package enacted in 2021. The Infrastructure Investment and Jobs Act (IIJA, Pub.L. 117-58) was signed by President Biden on November 15, 2021.<sup>3</sup> The act included \$65 billion in funding for high-speed broadband expansion. The lion's share, \$42.5 billion, will go to the Broadband Equity, Access, and Deployment (BEAD) program, a state block grant

1 According to Pew Research Center (2021), "97% of American adults use the internet." Available at: <https://www.pewresearch.org/internet/fact-sheet/internet-broadband>. Accessed January 2, 2020.

2 Vogels, E. (2021). "Some digital divides persist between rural, urban and suburban America." Pew Research Center. Retrieved from <https://www.pewresearch.org/fact-tank/2021/08/19/some-digital-divides-persist-between-rural-urban-and-suburban-america/>.

3 The Infrastructure Investment and Jobs Act, 2021, Bill No. 117-HR 3684, § 1 (2021). Retrieved February 28, 2023, from <https://www.congress.gov/bill/117th-congress/house-bill/17-58>.



program to build out high-speed internet connections to unserved communities. BEAD presents states with tremendous opportunity, for both good and ill. If state programs are well-designed and implemented, they could ensure that all residents have access to future-proof high-speed broadband internet at competitive prices. If they are not, we will doom ourselves to repeat previous efforts that resulted in duplicative infrastructure,

government-owned networks squeezing out more experienced private sector ISPs, and billions of taxpayer dollars wasted. Little progress will be made towards closing the digital divide.

This handbook can serve as a guide for your state to implement your BEAD allocation in line with best practices from around the United States based on decades of experience. To ensure that funds are not wasted and a competitive market is preserved, we recommend following five broad principles in designing and implementing your state's BEAD program:

1. Thoroughly understand and plan around federal administrative burdens
2. Rely on existing networks where possible
3. Prioritize unserved areas
4. Promote competition between providers and technologies
5. Avoid rate regulation

Each of these principles will be explored in-depth in its own chapter. Before proceeding, however, let us first fully illustrate the background of the legislation.

The bipartisan infrastructure bill came together when a group of 22 senators and their staffs engaged in months of complex negotiations. These negotiations resulted in a program that allocates a minimum of \$100 million to each state. It then distributes the rest of the \$42.5 billion based on the percentage of the total *unserved* U.S. population in each state. Additionally, 10 percent of the money is set aside for high-cost, geographically challenging areas, such as communities surrounded by mountains in West Virginia or Idaho, on islands off the coast of Florida or Maine, or on remote stretches of the Great Plains in Nebraska or Wyoming. The bill defines unserved areas as lacking internet



speeds of at least 25 megabits per second for downloads and 3 megabits per second for uploads (a.k.a. 25/3). The law also requires that new builds deliver internet speeds of at least 100 megabits per second over 20 megabits per second (100/20), that networks are future-proof so that they can easily be scaled up as technology continues to improve, and that bidding processes are technology-neutral, thereby preventing one form of internet service from being favored over another.

To avoid repeating past failures, Congress included three key provisions. First, the program is designed as a state-driven block grant, putting states in the driver's seat so those closest to the communities affected can tailor the program to their local needs. This design will avoid the top-down, one-size-fits-all approach that may be beloved in Washington but has doomed countless federal programs in the past. Second, the act requires all states to work off the same set of broadband coverage maps that are currently being updated by the Federal Communications Commission (FCC). This approach should prevent a repeat of past efforts where different federal agencies relied on different maps and duplicated efforts, wasting billions. Third, the law encourages prioritizing unserved and underserved (between 25/3 and 100/20) areas, but acknowledges that comprehensive builds may be the most efficient. This is intended to help maximize the funding's reach, particularly in rural, unserved areas where it is most needed.

Unfortunately, other provisions may undermine this effort. One of these requires BEAD to be administered through the National Telecommunications and Information Administration (NTIA) rather than the FCC. Even though the FCC is charged with updating the broadband coverage maps to serve as a guide, the NTIA has control over agency guidance in implementing the program. The agency recently released its Notice of Funding Opportunity (NOFO) for the BEAD program, which contains numerous departures from the law itself and strong suggestions that states violate its spirit.<sup>4</sup> For example, the NOFO explicitly prefers applications to build fiber connections over fixed wireless or satellite internet service, a violation of the tech neutrality provision. Additionally, the law prohibits NTIA from engaging in any form of rate regulation, which is effectively price-fixing for internet service. Nevertheless, the NOFO prohibits all data usage-based pricing options. Many existing providers offer these options in conjunction with different tiers of service. Prohibiting them is merely a back door to rate regulation. A group of thirteen Republican senators who voted for the IIJA, led by chief negotiators Susan Collins (R-Maine)

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<sup>4</sup> National Telecommunications and Information Administration, *Broadband Equality Access and Deployment Program Implementation, Notice of Funding Opportunity*, can be found at <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf>.

and Rob Portman (R-Ohio), sent a letter to the Secretary of Commerce expressing their displeasure at these direct and indirect violation of the statute and congressional intent.<sup>5</sup>

Because the FCC has yet to complete its new maps, states still have a window of opportunity to design programs that correct for NTIA's overreach. This guide will help inform your state of the opportunities, barriers, and pitfalls from previous and current acts of bureaucratic interference. The guide can also help assist your state in most effectively using the windfall it will receive for these projects.

One last note before proceeding: another provision in the IJA allows subdivisions of states, including cities, counties, and tribes, to design their own programs and apply for BEAD funding if their state does not submit an application of its own. This means that whether or not your state applies for BEAD funding, someone in your state will spend money on broadband. If you truly seek to be a wise steward of taxpayer dollars, it is in your interest to take advantage of this program and spend the money as efficiently as you can rather than letting someone else in your state control it. Better to have a comprehensive approach than a slapdash patchwork of municipal projects.

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<sup>5</sup> Letter to Sec. Raimondo available at [https://www.collins.senate.gov/imo/media/doc/letter\\_to\\_secraimondobeadnofoaug182022.pdf](https://www.collins.senate.gov/imo/media/doc/letter_to_secraimondobeadnofoaug182022.pdf)

# CHAPTER 1:

## NAVIGATING ADMINISTRATIVE BURDENS

“There are several areas, however, where the NOFO undermines or conflicts with congressional intent and the plain language of the law. Certain provisions go beyond the authority granted to NTIA and will discourage or deter broad provider participation.”

—Letter to Secretary of Commerce Gina Raimondo  
from 13 Republican Senators

In April 2022, the National Telecommunications and Information Administration (NTIA) released its Notice of Funding Opportunity (NOFO) for the Broadband Equality, Access and Deployment (BEAD) program. Senators who had negotiated the package immediately noticed several provisions that muddled, obscured, or even contradicted the letter of the infrastructure law. In a letter to Secretary of Commerce Gina Raimondo in August 2022, they noted several areas in which the NOFO departed from or openly defied the authorizing statute.<sup>6</sup>

NTIA has made it clear they intend to use their administrative authority to achieve the results they prefer, regardless of any basis in law. It is therefore essential to be aware of what is required by Congress and what is suggested by the federal agency distributing the funds. Congress put states, not NTIA, in the driver’s seat for the BEAD program. **To make best use of the funds, protect the taxpayer, and achieve results that will work for residents, states must assert their authority and be careful to avoid pitfalls recommended by the NOFO.**

### GUIDELINES VS REQUIREMENTS

Some of the NTIA provisions that senators identified as ignoring the letter of the law were rate regulation, tech neutrality, provider preferences, Digital Equity participation, workforce preferences, middle mile deployment, and the NTIA review process. While there are other provisions that merit discussion, these seven can serve as a starting point.

**Rate Regulation:** In Chapter 5 we will explain why rate regulation is a bad idea in both theory and practice. For now, we will look at how the statute and NOFO treat the issue. A rule of construction in the IJA states that “Nothing in this

<sup>6</sup> Benton Foundation, *Republican Senators Push NTIA to Implement Infrastructure Investment and Jobs Act of Congress*, <https://www.benton.org/headlines/republican-senators-push-ntia-implement-infrastructure-investment-and-jobs-act-congress> (last visited Feb. 28, 2023).



title may be construed to authorize the Assistant Secretary [of Commerce] or the National Telecommunications and Information Administration to regulate the rates charged for broadband service.” Additionally, Congress permanently authorized (but did not permanently fund) an emergency broadband voucher program that was originally created on a temporary basis during the COVID-19 pandemic. This Affordable Connectivity Program (ACP) provides up to \$30 per household per month to pay for internet service. The IJA also requires all broadband providers to offer a “low-cost service option” if they participate in the BEAD grant program. Congress therefore required participating providers to offer a low-cost option for low-income subscribers, provided federal funds to offset or fully pay for the service, and prohibited NTIA from setting rates. Because rates for internet service are so different across the country, Congress left it up to the states to decide what qualifies as a “low-cost option” in their communities. **States will be best served if they allow providers to offer rates that make sense in the local markets they will serve**, using the ACP voucher to guide their thinking, not direct it.

Despite these statutory requirements, the NOFO includes multiple attempts at back-door rate regulation, including suggesting a price point of \$30 per month to align with the ACP. This may make sense for some states, **but it is a suggestion, not a requirement, so states should avoid setting prices in their own programs**. The ACP voucher exists to help low-income subscribers shoulder the cost, not fix prices for everyone. The NOFO also prohibits all data usage-based pricing options, which many existing providers use to set different tiers of service. There is no basis for this requirement in the statute, and a state regulating rates by insisting that ISPs may not charge more money for faster internet is absurd on its face. States regulating rates in this way would likely discourage participation in the BEAD program by the private sector because ISPs would have to completely redesign their business models to comply, depriving states of the most experienced and reliable providers as they seek to expand service. Finally, the NOFO includes a confusing and unnecessary “middle-class affordability plan” requirement, which forces states to develop a strategy to ensure that broadband service is affordable for the middle class. This requirement also does not have any basis in the text of the NTIA.

Because this is a *requirement*, states must comply and attempt to fulfill it. States can fulfill this requirement by looking at the market’s overall price comparability and availability, using publicly available data from the Broadband Coverage Map

and other sources. States can also use the FCC’s “reasonable comparability” benchmark for the Universal Service Fund and argue in their applications that it should be applied here as well. Such a process would demonstrate that broadband internet service is already affordable for the middle class in your state and that no government action is necessary to keep it that way.



We further recommend that states communicate with local ISPs throughout the process of designing their programs, and especially on pricing. **It will also be good practice to encourage providers to offer similar rates in newly served markets as they do in legacy markets.** NTIA would be more inclined to accept a plan if ISPs are offering service for the same rate throughout the state, and ISPs should see it as in their interest to avoid the appearance of profiteering from government largesse.

**Tech Neutrality:** One of the most important principles of the IJJA was tech neutrality, which is the idea that the government should not discriminate against different technologies that can deliver broadband service when awarding grants. The entire purpose of the BEAD program is to enable internet connections where geography has inhibited them in the past. In many cases of broadband buildout prior to this program, it was too expensive to build fiber optic cables over physical barriers, such as running a cable over a mountain to reach a town in a valley. To reach such a town under the BEAD program, it may be most cost-effective to cover the expense of running a cable to the town. It is also possible that either no fiber line ISP is willing to shoulder the cost of maintenance or that another option, such as 5G internet from a nearby cell tower, is the best method. The peaks of the mountains may also block wireless signals to the valley, in which case satellite may be the answer. In Alaska, it is quite literally impossible to lay fiber over permafrost. **To ensure that subgrants are awarded to the providers able to deliver the best service at the lowest cost, states should seek waivers from NTIA that acknowledge on-the-ground realities of broadband expansion.** This includes considering not just who can build cheaply, but also who can maintain quality networks and service for years to come. While this may create extra paperwork for the state broadband office, it will ultimately be worthwhile to attract private-sector investment in needed projects.

The minimum speed requirement for new builds in the IJJA is 100 megabits per second for downloads and 20 megabits per second for uploads, also known as 100/20. Any technology capable of reliably delivering this speed to a given area should be considered and allowed to compete with other providers for the most cost-effective bid. The IJJA does not prioritize any particular technology, but instead prioritizes those providers who can deliver the required buildout speeds with consistency, have the ability to scale speeds up over time, and are able to help support the deployment of 5G and other advanced services throughout its useful life. The NTIA's NOFO contradicts the statute's priorities by explicitly stating that fiber is the only technology that can meet the definitions of a priority project. That is not the case. In many instances, fiber providers will be the first to tell you it simply is not feasible to build fiber to certain communities and will not even bid for the project. **Since NTIA's fiber preference is a requirement, states should identify where fiber providers are unable to build even with BEAD grants and what speeds other providers can reach in those places. States should then make their findings both public and very clear in their broadband plans and applications.**

**Provider Preferences:** NTIA was equally blatant in its NOFO's preference for certain providers over others. In the next chapter, we will go into more depth on why the private sector is much better at expanding internet service than non-profits or government-owned networks (GONs). The explicit preference that the NOFO gives to these providers, contrary to the text of the IJJA, is an impediment to expanding internet access across the United States. The IJJA requires NTIA to "distribute the funds in an equitable and nondiscriminatory manner" and to focus assessments of participating providers on their substantive qualifications, such as the technical, operational, and financial capability to provide the high-quality broadband services for the benefit of consumers. Even if you ignore all the known laws of economics and allow GONs and nonprofits to compete for BEAD grants, the NOFO should have guided states towards establishing a level playing field and a fair, competitive bidding process for all subgrant applicants. Instead, the NOFO favors certain bidders for reasons unrelated to capability or performance.

Specifically, the NOFO requires extra work to award grants to the private sector, which will likely account for most of the bids received by states in the first place. The NOFO requires states to justify their decisions to award grants to private sector ISPs, instead of GONs or nonprofits. It even goes so far as to "strongly encourage" states to waive existing state laws prohibiting GONs, even though preempting

those state laws is explicitly prohibited by the IIJA. Not only is this contrary to the letter of the law, but it will also have the effect of discouraging states from awarding grants to private sector ISPs.

**Because this is a requirement of the NOFO, we suggest drafting a standard explanation of why the private sector**



**should be trusted over GONs that can be plugged into any explanation NTIA requires.** States can also refer to a report put together by the National Taxpayers Alliance on failed GONs for evidence of their spotty history; states may find that some of the applicants for grants are mentioned in this document.<sup>7</sup>

**Digital Equity Participation:** Another program created by the IIJA is the Digital Equity Program, which makes funding available to help residents get online once they have internet access. Essentially, it is meant to increase adoption among the populations that have not historically had access to high-speed broadband. For many of this demographic, “digital literacy” might be a better term, since the problem is not availability of internet service but adoption – internet service is available, but they are not using it. This group generally lacks the skills to use advanced technology and often skews older, so the challenge can be solved by improving their familiarity with technology and getting them more comfortable using computers and smartphones daily. Still, “equity” is in vogue in Washington, D.C. these days, so equity it is.

The IIJA created both the BEAD and Digital Equity Program, but there is no requirement in the law that a state’s participation in one program depends upon their participation in the other. The NOFO, however, characterizes state participation in both programs as “essential” to bridging the digital divide. This depiction implies that states that do not choose to participate in the Digital Equity Program could be disadvantaged in their BEAD grant applications. The NOFO is ambiguous as to whether a state’s BEAD grant application will be considered unfavorably if it does not participate in the Digital Equity Program. A digital equity program may be useful in your state, but it should not be tied to the BEAD program since they are separate in the bill.

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<sup>7</sup> Taxpayers Protection Alliance, *GON with the Wind: The Failed Promise of Government Owned Networks Across America* (2020). <https://www.protectingtaxpayers.org/wp-content/uploads/Broadband-Report-May-2020-1.pdf> (last visited Feb. 28, 2023).

This provision is not a requirement, but it seems designed to guide states towards mandating Digital Equity participation as a condition of funding. **Because it is a suggestion, states should feel free to ignore this and steer clear of Digital Equity if it does not work for them.** If NTIA rejects your state’s bid because digital equity was not included, you could point out that it is not strictly required and is a separate pot of money unaffected by your BEAD program.

**Workforce Preferences:** Many of the specific workforce-related obligations set out in the NOFO go far beyond the IIJA as well. As a general rule, to protect the taxpayer, states should award grants to bidders who are able to deliver the best results at the lowest cost. This would include providers with the most cost-effective labor. Instead, the NOFO erects considerable roadblocks to ensuring swift deployment of broadband access to all Americans. For example, the NOFO authorizes States to prefer or even mandate a provider’s use of a “directly employed workforce,” as opposed to using contractors and subcontractors. Most large ISPs will have a directly employed workforce, but smaller ones that operate in rural areas are less likely to have a permanent construction staff. With labor shortages expected throughout the deployment process, states should allow subgrantees to be as flexible as possible with their workforces to deliver cost-effective and timely results.

Like they did with provider preferences, NTIA also imposed additional reporting requirements and administrative burdens on states that decide not to employ union labor. As a practical matter, the NOFO’s imposition of additional administrative burdens on subgrantees who do not employ union labor clearly favors applications from subgrantees who do. Different reporting requirements that have nothing to do with the technical peculiarities of broadband discriminate against workers who decide for themselves that they do not need a union. The added administrative burden to subgrantees that do not employ unionized labor will have a chilling effect on participation in the BEAD program, especially in states where unions are not common. This will make it harder to meet buildout deadlines, find qualified providers, and award grants to the most cost-effective bids. It is entirely possible that union labor will be the best option in some cases; if this is true, a union-labor bid should beat a non-union bid on its own merits, without NTIA putting their thumb on the scale through paperwork.

Had Congress wished to employ inefficient and expensive union labor for all broadband buildout projects, including for those in parts of the United States where unionized workers are hard to find, it would have required states to favor



union labor in the statute. Instead, the IJJA simply directs states to give priority to applicants who have historically complied with federal labor law. By putting its thumb on the scale in favor of union labor without statutory authority, the NTIA has not only violated congressional intent; it has also nakedly attempted to line the pockets of union bosses. As with provider preferences, we recommend drafting a standard explanation for why cheaper labor and lower-cost bids are favorable to the alternatives that can be used to explain multiple subgrants. The goal of BEAD was to bridge the digital divide, not create temporary construction jobs. It is therefore irresponsible for NTIA to require states to pay top dollar for labor when doing so can discourage investment and prevent buildout to certain areas.

**Middle-Mile Deployment:** The NOFO permits the use of BEAD funds to deploy Middle- Mile infrastructure in order to extend service to unserved and underserved locations, but also requires participating service providers to accommodate requests for interconnection outside of the planned deployment of such projects. This requirement is beyond what is in the statute and will discourage deployment of the very facilities necessary to bring service to these unserved and underserved locations. The IJJA includes the separate middle mile grant program to meet these interconnection needs, and BEAD funds may be used for middle-mile provided it is necessary to interconnect two disparate points in the same project. Requiring ISPs to build middle-mile infrastructure to every Tom, Dick, or Harry near their construction who asks is a ridiculous waste of resources. States and ISPs should work together on comprehensive deployment plans, not be held in thrall to individuals and groups who want a free ride off their efforts.

Unfortunately, this is a requirement not a suggestion. We recommend putting the same argument to NTIA found in this book, finding concrete examples of where nuisance interconnection requests derail promising projects, and not advertising that NTIA included that requirement. State broadband offices who advertise this part of the NOFO are asking for a deluge of nuisance applications.

**NTIA Review Process:** Finally, the NOFO creates a complex, nine-step, “iterative” structure and review process that is likely to mire state broadband offices in excessive bureaucracy and delay connecting unserved and underserved Americans as quickly as possible. For example, the planning sections on climate resiliency and system hardening for the useful life of the fiber contain multiple layers of research, reporting, and justification that are generally well beyond the focus or expertise of state broadband offices. These extraneous processes and reporting burdens will cause unnecessary delays in broadband deployment for



little corresponding benefit. Moreover, there is no limitation on the duration of conditions and obligations for the networks funded by BEAD, which is necessary to provide certainty.

There is precious little states can do to combat this bureaucratic nightmare, but the best advice is to carefully review their requirements and comply with them to the letter. If states are especially careful about complying with reporting requirements, it can lend more credibility to pushing back against some of the nonsense in the NOFO. States, after all, are sovereign entities – federal agencies are not. We recommend not flouting the rules but rather standing your ground on arguing what is best for your state based on well-known economic principles and your state’s specific local challenges.

## BUY AMERICAN



The IJA includes a provision that applies to the entire package (beyond just the broadband section) that requires materials for these projects to be made in the United States. The drafters of the broadband section clearly had a better understanding of the nation’s

fiber supply chain than whoever wrote the Buy American provision, which appears in another section of the bill. Buy American is certainly a noble sentiment, and states should always look to create jobs for their communities and improve our supply chain resiliency against China. As anyone running a business today can tell you, however, we have a long way to go before the United States has the industrial capacity to meet our needs. Particularly when it comes to fiber and other critical materials for broadband expansion, the United States simply does not produce enough to meet buildout deadlines.

It is understandable that Congress would seek to keep dangerous equipment manufactured by entities close to the Chinese Communist Party (CCP) out of U.S. networks. In requiring American-made equipment, however, Congress has risked exacerbating shortages of supplies that will result in delays and cost overruns. Hopefully Congress will consider revising this to a “Buy Friendly” requirement, where subgrantees are permitted to import supplies from trusted allies and partners to meet their needs while continuing to exclude manufacturers tied to the CCP. Indeed, Sec. 60201(g)(1)(D)(ii) of the IJA specifically prohibits the use of fiber optic cables manufactured in China, but it does not prohibit imports from other countries.

Fortunately, NTIA may grant waivers to states that allow subgrantees to import needed materials. Unless NTIA wants to create a national fiber shortage, they should grant waivers liberally. **To avoid delays and cost overruns associated with supply shortages, states should consult ISPs and suppliers, then apply for Buy America waivers that are narrowly tailored to meet their shortages.**

## STREAMLINING

States may want to consider waiving most taxes, fees, and permitting processes. Especially with regards to fees, it will not always be possible to waive them if an office integral to overseeing the program relies on processing charges to fund its operations. You might also consider whether your state’s tax code will treat these grants as gross income. Otherwise, a small, existing ISP that provides affordable service near unserved areas could be discouraged from applying for a grant that will bump them into a higher income tax bracket. This is how the federal tax code currently treats all grants of this type, so **to ensure that the money is not just getting kicked back to the state government and that there is no chilling effect from bracket creep, it would behoove most states to take a careful look at their own telecommunications taxes and fees.**

This oversight has yet to be addressed at the federal level, leading to the absurd situation where ISPs are required to pay federal taxes on their broadband grants from

BEAD and other programs. This requirement means that the total amount of money Congress appropriated is effectively much less than it appears on paper. If ISPs cannot use the full grant they are awarded, they will either run out of money mid-project, ask for much more than they need to make up the difference, or lose out to another provider who fails to realize the inflated cost that comes with taxing grants. States should look comprehensively at their tax codes and eliminate any excise or sales taxes that could significantly increase the costs of deployment.

One of the biggest areas of overregulation in federal and state policy are environmental reviews. NTIA's preliminary estimates indicate that environmental assessments for BEAD projects could take between nine months and a full year, following a nine-step iterative review process.<sup>8</sup> Given the five-year window for projects funded under BEAD, this could significantly delay deployment and cause subgrantees to miss important deadlines. While states cannot control the behavior of NTIA, they can streamline their own environmental review and other permitting processes. For example, states could automatically grant permits to deploy fiber in existing public rights-of-way, preempting onerous state or local regulations.

Many of the state and local regulations mentioned above have to do with telephone pole ownership and attachment rules. These vary widely state-to-state, but are often a source of extortion and self-dealing when GONs and co-ops are involved. Indeed, one of the issues the NOFO gets right is that pole attachment rules can be a major impediment to timely deployment, so states are asked to consider how to address these in their proposals. When poles that could be easily used for fiber line internet deployment are owned by public utilities, they will often charge ISPs excessive fees to attach. More problematically, they will often require ISPs to shoulder future maintenance and replacement costs as a condition of using the poles so they get a free ride going forward. States could consider imposing guardrails on government-owned utility poles, who are currently exempt from the same federal regulations that private pole owners have to follow.



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<sup>8</sup> National Telecommunications and Information Administration, "NEPA Review: Environmental Assessments," February 2023, [https://broadbandusa.ntia.doc.gov/sites/default/files/2023-03/NEPA\\_Review\\_Environmental\\_Assessments.pdf](https://broadbandusa.ntia.doc.gov/sites/default/files/2023-03/NEPA_Review_Environmental_Assessments.pdf)



These could include a “shot clock,” which would automatically grant a permit to attach if the government entity that owns the poles does not respond within a reasonable timeframe, or require equitable cost-sharing for government entities that work with ISPs to deliver broadband to their town.

There are also federal regulations of which states should be aware outside of the NOFO. In particular, NTIA is still considering to what extent it will require federal contracting and procurement obligations to attach to grants. If fully adopted, many of these rules would make it impossible for most commercial providers to participate, as they could require providers to re-bid sourcing after they receive a grant, prevent providers from retaining any income earned over partially funded facilities, or require systemic changes to existing accounting and reporting systems. States should push back on this by defining their subgrants as “fixed awards” – that they award a specific amount of money to a provider to help support a specific deployment, and any cost overruns are on the provider, not accrued back to the state. Ownership in funded facilities should remain in the providers. They should also permit providers to elect to be treated as “contractors” rather than “subrecipients” under the federal contracting rules. And they should provide that any reporting or accounting, particularly from public companies, may align with already public documents or filings.

## POTENTIAL LITIGATION

The purpose of this handbook is not to create litigation or encourage states to sue the federal government for their approach to enforcing the bill’s text. Rather, this document should serve as *policy* advice for lawmakers and administrators, not *legal* advice for plaintiffs. That said, it is possible that noncompliance with the diktats of the NTIA can result in legal challenges to the agency’s administrative decisions. Should you find NTIA’s preferences incompatible with the best interests of your state and have exhausted other avenues of recourse, you may find yourself in federal court regardless.

Know that in following the recommendations above, there is the possibility of legal disputes on the basis that NTIA exceeded its authority under the statute to set a number of these rules. The recent Supreme Court ruling in *EPA v. West Virginia* signaled that the current Court is skeptical of unelected bureaucrats exceeding their congressional mandates. An obscure provision of the IJA forces all challenges to the BEAD program’s administration to be heard in the United States District Court for the District of Columbia. No “judge-shopping” is possible. The statute also has a very narrow scope of possible review: it will be easy for NTIA to get legal challenges dismissed.

Given the five-year timeline to build out broadband, however, any bad ruling can be appealed with a request for expedited relief. In other words, the Federal Appeals Court for the District of Columbia Circuit or even the Supreme Court of the United States could be persuaded to take up the case immediately because there is a strict timeline to finish the projects subsidized by BEAD. No state should take this paragraph as legal advice; rather, it is a layman's outline of how the legal theory might run. After consulting the proper legal authorities (which we certainly are not), consider all of your options to maximize the number of consumers you are able to get online using the funds your state is allocated.

# CHAPTER 2: RELYING ON EXISTING NETWORKS

“Dozens of local governments have tried to build out broadband networks over the years. These massively subsidized efforts attracted corruption, did not deliver on promises, and where they did not fail outright, had to be propped up with even more tax dollars.”

—Grover Norquist, President of Americans for Tax Reform

Perhaps the most important consideration for state broadband offices and legislators in awarding grants through the BEAD program is who will build the proposed network. It may seem like an obvious question, but experience has shown that it is important to have principles and guardrails in place when making that decision. As often happens when a new program is suddenly flush with cash, there can be a temptation to “rethink” our society’s whole approach to internet service or experiment with government-owned networks (GONs). It is better to instead see this cash injection as a serious responsibility, something that requires sober stewardship rather than grand ambitions. But networks are complex: they cannot be built effectively by those who are attempting to do so for the first time – and customers won’t receive consistent service from those with no experience in meeting customers’ needs. Given that the private sector has invested so much and made such great progress in the last several years to close the digital divide, this is not the time to reinvent the wheel.

To that end, states should primarily rely on existing networks with a proven track record of successfully delivering service to their customers. After all, the original intention of the BEAD program was to identify areas where prohibitive costs stopped private sector ISPs from building out and give providers enough money to afford the final expansion. Small and large private-sector ISPs must consistently perform at high levels or lose their customers, and ISPs that have proven their sustainability should not be discriminated against just for turning a profit in the process. Existing private-sector networks are already best-positioned to extend their networks into nearby unserved areas. They furthermore perform better on cybersecurity and invest more than any other type of ISP in futureproofing. To meet the statutory requirements of the BEAD program, private sector ISPs are your best bet.

## EXPANDING FOOTPRINT

As mentioned above, the original intention of the BEAD program was to identify where costs prevented networks from building and give them enough money to afford the



final expansion. To the extent possible, this goal should be accomplished by extending and updating ISPs' existing footprints rather than building new networks from scratch. In most cases, this approach will be the most cost-effective because incumbent providers are self-sustaining from their market-rate service offerings while alternatives, like GONs, require continuous cash injections to stay afloat. However, states should be careful not to have such a narrow view that they create funding for patchwork, one-off extensions to nowhere, rather than help expand and support cohesive and efficient network builds. A holistic approach will be the most cost-effective use of taxpayer money. There are numerous examples, but one of the most egregious is KentuckyWired, the statewide GON in the Bluegrass State.<sup>9</sup> The public-private partnership was sold to taxpayers as a \$350 million expenditure that would be complete by the spring of 2016. The network did not go live until the spring of 2021. Worse yet, its budget suffers from repeated political disputes, and a report from the state auditor concludes that taxpayers will end up wasting around \$1.5 billion on this redundant network over its 30-year life.<sup>10</sup> The Taxpayers Protection Alliance has documented the tendency of GONs to cost more



<sup>9</sup> KentuckyWired, <https://kentuckywired.ky.gov/Pages/index.aspx> (accessed Feb. 28, 2023).

<sup>10</sup> According to Fitch Ratings, "Third Kentucky Wired Budget Dispute Reveals Continued Political Tensions Over P3" (Fitch Ratings, 28 Mar. 2022), <https://www.fitchratings.com/research/us-public-finance/third-kentucky-wired-budget-dispute-reveals-continued-political-tensions-over-p3-28-03-2022>.

than promised and collapse quickly in their 2020 report “GON with the Wind: The Failed Promise of Government Owned Networks Across the Country.”<sup>11</sup> The report found that GONs were “not insulated from the realities of the competitive telecommunications marketplace” but were actually unable to adapt to changing technological realities as smoothly as their private sector counterparts.<sup>12</sup>

## CYBERSECURITY

In the wake of the SolarWinds cyberattack, Brandon Wales, Executive Director of the Cybersecurity and Infrastructure Security Agency (CISA), warned that “[smaller communication entities] should not assume that they’re...not in the crosshairs of a more sophisticated nation state.”<sup>13</sup> As American Enterprise Institute scholar Shane Tews has argued “local governments are good at many things, but asking them to understand how to keep local networks safe and protect connections to the nation’s internet infrastructure is a stretch.”<sup>14</sup> Cyberattacks are only going to become more frequent in the coming years, and GONs are poorly positioned to contend with them.



Private sector ISPs, on the other hand, have decades of experience responding to cyberattacks and improving network security over time. A large portion of the \$1.7 trillion in investments that private ISPs have made since 1996 went to cybersecurity improvements. These ISPs compete with one another for customers, so

proven network security will continue to be a selling point for internet service in the coming years. GONs with no competitors do not have this same pressure to improve, and thus do not have the same expertise in doing so.

<sup>11</sup> Taxpayers Protection Alliance, *GON with the Wind: The Failed Promise of Government Owned Networks Across America (2020)*. <https://www.protectingtaxpayers.org/wp-content/uploads/Broadband-Report-May-2020-1.pdf> (last visited Feb. 28, 2023).

<sup>12</sup> *Ibid.*

<sup>13</sup> NextGov, “Ransomware Hackers Will Still Target Smaller Critical Infrastructure, CISA Director Warns,” (July 2022), <https://www.nextgov.com/cybersecurity/2022/07/ransomware-hackers-will-still-target-smaller-critical-infrastructure-cisa-director-warns/374953/>.

<sup>14</sup> Painter, Christopher. “More Than Networks, America Needs Better Cybersecurity.” *The Hill*, May 25, 2020, <https://thehill.com/opinion/cybersecurity/3608608-more-than-networks-america-needs-better-cybersecurity/>.

Entrusting BEAD grants to GONs risks creating a new digital divide where urban and suburban Americans enjoy a high degree of cybersecurity while rural Americans are vulnerable.

## FUTUREPROOFING

The IIJA also requires that new builds funded by the BEAD program be “future-proof” – that is, capable of handling high speeds as industry standards improve over time. It is therefore essential that states consider an ISP’s ability to scale up their networks without passing off the cost to taxpayers. As we’ve mentioned repeatedly, the private sector has invested more than \$1.7 trillion since 1996 to continuously offer faster, better, and safer internet. Fixed terrestrial wireless private-sector investment in 2021 topped \$35 billion – nearly enough to bridge the digital divide by itself – and that does not include fiber or satellite providers.<sup>15</sup> Providers have spent \$635 billion over the existence of the wireless industry to scale up to 5G, at the same time as cable providers upped their speed standards from 10/1 to 25/3 and now 100/20. **To ensure that new networks financed by BEAD funding remain sustainable without the regular cash injections that GONs will likely require and seek, states should rely primarily on private-sector investment.**

## A WORD OF CAUTION

We would be remiss if we did not mention one major problem NTIA’s NOFO creates for relying on proven networks. Despite the even-handed approach of the statute, the NOFO discriminates against the private sector by requiring states to provide written justification for awarding a grant to private sector rather than to a non-profit co-op or a GON. Be advised that this provision creates an additional administrative burden to relying on proven networks. Given the abysmal track record GONs have, it will likely be worthwhile for most states to shoulder the extra paperwork to get better results for their residents. See the previous chapter for more information on what that argument looks like. Please feel free to pilfer from this handbook for arguments that justify relying on existing networks, or any other point for that matter.

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<sup>15</sup> Council of Telecommunications Industry Association, 2022 Annual Survey (Sept. 2022), available at <https://api.ctia.org/wp-content/uploads/2022/09/2022-Annual-Survey.pdf>.

# CHAPTER 3: PRIORITIZING UNSERVED AREAS

*“You literally can’t lay fiber over permafrost.”*

—Jonathan Cannon, Policy Counsel for Technology and Innovation at the R Street Institute, 2023

In the text of the IJJA, states are required to prioritize unserved areas, then underserved areas, followed by community anchor institutions and other eligible uses. The justification for the broadband section of the infrastructure bill was to “close the digital divide.” The IJJA and the NOFO contemplate the ability to build once to address both unserved and



underserved areas, rather than piecemeal building. This approach will effectively make the program need-based. In fact, the funding formula in the law for allocating BEAD money is based on the proportion of unserved Americans that live in that state, according to the FCC’s National Broadband Map.<sup>16</sup>

Keeping the program focused on its original goal, however, may be a challenge. Past efforts to close the digital divide, such as the stimulus package in 2009, resulted in billions wasted, little progress at bridging the divide, and several cases of public corruption. With so much money available for broadband subsidies, political constituencies will compete for access to the funds. Nationally, Republicans believe that using BEAD funds to bring more internet access opportunities to their rural-skewing constituents is a political imperative. Democrats, on the other hand, are more interested in finding ways to direct funds to purple suburbs that already have some broadband service to curry favor with these independent voters and move them toward the blue column.

This is not to say that there are no well-intentioned policymakers behind these efforts – it is merely to point out that there are political incentives to use the funds fecklessly to win votes, even if there are simultaneous political incentives to use the funds judiciously. The best antidote to this will be to embrace a data-driven design based on where the funds are truly needed, balanced with a goal of creating efficient builds that avoid paying providers to build over the same area twice to reach unserved and underserved communities separately. With the Federal Communications Commission set to finalize its National Broadband Map this June, states should actively engage in the process by

<sup>16</sup> Federal Communications Commission, *BroadbandMap*, <https://broadbandmap.fcc.gov/home> (last visited Feb. 28, 2023).



encouraging their residents to double-check coverage statements and challenging inaccuracies to ensure no one who is unserved will be missed. With accurate data available to the FCC, the commission could ensure that states with the largest unserved populations will receive the funds to which they are entitled under the law. If not, funds will be diverted to areas where coverage already exists because bad faith policymakers need to buy votes.

Once data and funding levels are finalized, states should make sure their execution of their broadband plans are not ad hoc or slapdash. States should use the unprecedented amount of data available from the private sector and average citizens to develop a holistic plan that comprehensively assesses areas in need and allocates funding accordingly. **To use BEAD funds most efficiently, states should engage on the FCC's mapping effort, think holistically about all their unserved areas, and plan to allocate funding accordingly.**

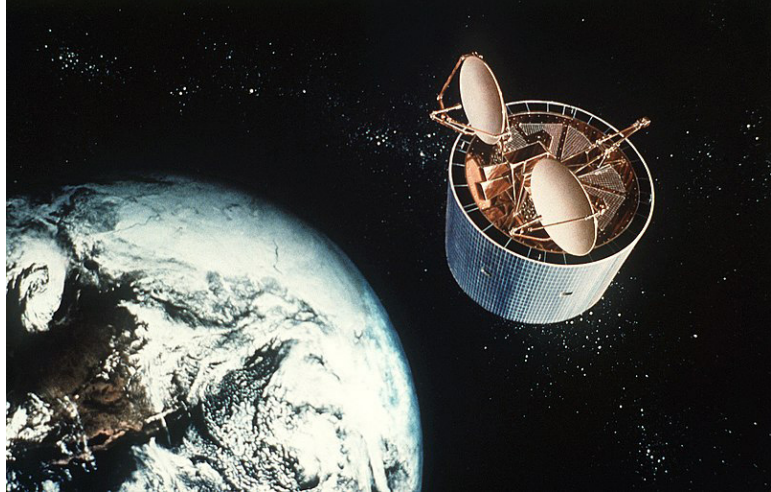
## HURDLES TO EXPANSION

While this handbook mostly steers clear of excessively technical concepts, one key micro-economic principle that should be front of mind for legislators and broadband officials is the so-called hurdle rate. The hurdle rate is a rule-of-thumb rate of return necessary to justify a business's investment in a project, according to the individual investor. It is not a strictly objective measure, merely a tendency of investors to expect a certain rate of return to make the investment worth it. This rate will also differ by industry, the availability and price of capital, and the riskiness of the project. Businesses will only fund projects which have anticipated returns above the hurdle rate, and the rate rises with higher interest rates, higher project costs, or greater uncertainty. As hurdle rates rise, businesses reduce investments in new projects.

Hurdle rates are especially relevant to prioritizing unserved areas because the purpose of BEAD is to reduce costs for ISPs that build out to expensive areas with low rates of return. Essentially, the BEAD program's success depends on states effectively offsetting the factors that increase the hurdle rate. States should strive to understand the hurdle rates for their local broadband markets and reduce costs accordingly. Successful broadband programs will use BEAD subgrants to reduce overhead, which would help to improve the hurdle rate outlook for ISPs trying to reach new customers. Accounting for hurdle rates will incentivize investment; failure to do so will discourage investment.

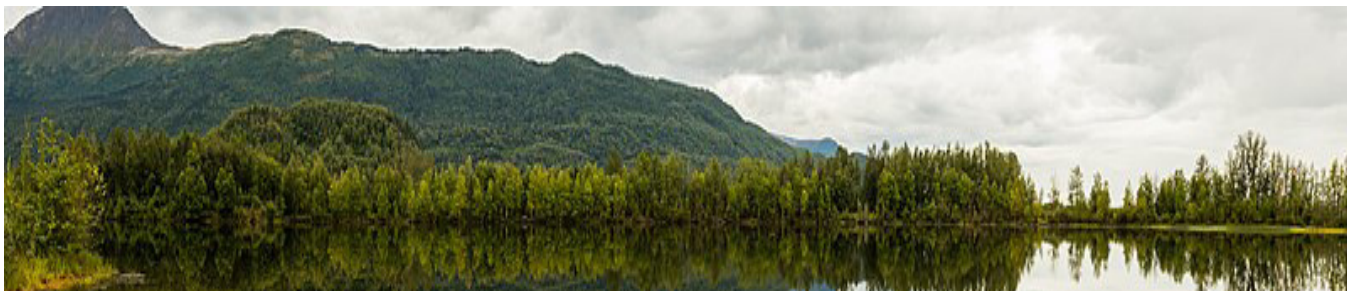
## TECH NEUTRALITY

One of the most important principles of the IJJA was tech neutrality, which is the idea that the government should not discriminate against different technologies that can deliver broadband service when awarding grants. The entire purpose of the BEAD program is to enable internet connections where geography has inhibited them in the past. In many cases, it was too expensive to build fiber optic cables over physical barriers, such as running a cable over a mountain to reach a town in a valley. To reach such a town under the BEAD program, it may be most cost-effective to cover the cost of



running the cable to the town, but it is also possible that no fiber line ISP is willing to shoulder the cost of maintenance. In these cases, pursuing another option is the best method, such as 5G internet from a nearby cell tower. The peaks of the mountains may also block wireless signals to the valley. In that case, satellite may be the answer.

**Subgrants should be awarded to the providers who are able to deliver the best service at the lowest cost to taxpayers, and focus not just on who can build cheaply, but on providers who are prepared to maintain their networks and serve customers for years to come.**





# CHAPTER 4: PROMOTING COMPETITION

*“...Where effective competition can be created, it is a better way of guiding individual efforts than any other.”*

—F. A. Hayek, *The Road to Serfdom*

It ought to be uncontroversial to say that market competition results in better products and services at lower prices. Market competition, after all, has been the basis of America’s economy since our foundation and free market economics have resulted in the US economy becoming a major global superpower in just 200 years. As states design broadband expansion programs, they should do so with an eye towards promoting competition among bids for grants and enabling competition among providers once the digital divide is closed.

A competitive bidding process will stretch taxpayer dollars as far as possible, since private-sector bidders will compete to submit the most cost-effective grant proposals. Unless they are controlled by corrupt political machines that shower taxpayer dollars on well-connected friends, states will tend to favor grant proposals that complete projects at the lowest cost to the state. As private bidders will compete with each other to gain new customers by deploying new broadband connections, private sector businesses will have a strong incentive to use their grants in the most efficient way possible. As discussed in Chapter 2, government-owned networks tend to operate inefficiently. **Competitive bidding between nonprofit co-ops, GONs, and private ISPs will keep unstable GONs out of the program, force the GONs that do apply to develop cost-effective plans with clear goals, and ensure that all successful bids use tax dollars as efficiently as possible.**

It is also important to consider a state program’s long-term effects on competition. After deployment grants help to bridge the digital divide and ISPs recoup their investments, competition must be possible in the new market. As with patent and copyright law, giving a private entity exclusivity in a marketplace sometimes makes sense to recover expensive R&D investments they have made up front. Likewise, given that the IIJA requires a 25% match from ISPs in most cases to give them skin in the game, ISPs that reach unserved customers may enjoy



a period of exclusivity to make back this investment. The IJJA also allows for up to 20% overbuilding as necessity dictates to reach certain customers. These exceptions aside, states should avoid protectionist policies that keep different technologies or business models out of a newly-served market, or they will risk severe price inflation over time from a lack of competitive pressure.

The state should not pick winners and losers in the broadband industry, as doing so will invite corruption, cronyism, and inefficiency, and could even drive private ISPs out of business by underselling them. An ISP that is operating successfully has already made substantial capital expenditures to reach its current customers. They therefore charge rates that will allow them to recover their investment over time. A subsidized competitor is insulated from the costs that the incumbent has already paid, and so they can afford to charge lower rates to draw in the old ISP's customers, ultimately crushing competition in the area when the incumbent is unable to keep up.

As we have mentioned multiple times, the private sector has expanded coverage to more than 90% of Americans. Market competition has driven ISPs to reach as many customers as possible and have an interest in reaching all potential households. During the same period, competition between large and small ISPs and between different technologies has kept the price of broadband internet affordable for the average American family. **State grant programs should promote competition among providers to keep consumer costs low, while balancing these concerns against ISPs' need to recoup investments.**

The purpose of the BEAD program is to overcome the final hurdles to providing broadband internet to all Americans, not to correct for perceived private-sector failures in delivering service. Generally, the only unserved corners of the United States are areas where geographic barriers or low population density make it impossible to profitably deliver service, since it would take unacceptably long to recover the capital expenditure needed to reach the few potential customers who live there. BEAD should therefore give ISPs the resources they need to reach these customers, deliver service, and collect revenue. It should not pick winners and losers by subsidizing competitors to operational ISPs or serve as a slush fund for politically connected constituencies.

## TECH NEUTRALITY

Although we covered how important tech neutrality is for reaching unserved areas in the previous chapter, it also plays an important role in ensuring long-term competition without overbuilding. As mentioned, the BEAD NOFO significantly departed from the

text and legislative intent of the law by directing states to explicitly favor fiber over other technologies. This approach will make sense in many cases, but it will not always be the most cost-effective use of tax dollars. There will be some unserved areas with significant geographic challenges, such as small towns in mountainous states like West Virginia, where a satellite provider may be able to beam service into homes at a lower cost than it would require laying fiber over a mountain. Similarly, it is quite literally impossible – both physically and legally – to lay fiber over permafrost to reach remote parts of Alaska. In many of these cases, fiber providers may not even be interested in bidding due to the enormous logistical headaches required to reach a small number of customers.

Robust competition between different technologies exists in America today, and we are better served for it. The fiber industry continues to offer reliably fast internet service, 5G cell service enables wireless carriers to compete with fiber at a high level, and now satellite internet alternatives are racing to offer their own service. Each technology has its own advantages as well. Fiber is usually considered the gold standard in the industry because it is so reliable and consistent. However, cell carriers offer fixed-terrestrial wireless internet that can more easily reach certain remote areas and is currently getting faster since the advent of 5G technology. Satellite alternatives are still young but show much promise because they will require the lowest cost to build out once there are enough satellites in orbit to grant global coverage.

To ensure that long-term competition is possible after helping to finance buildout, states should honor congressional intent by restoring tech neutrality to their grant programs. Doing so will not only enable more alternatives to rise and compete on a level playing field to deliver the best product at the lowest cost, but it will also enable competing technologies to move into newly served areas to prevent monopolies from forming and put downward pressure on price.

## OVERBUILDING

One of the most counter-productive mistakes that states can make is wasting tax dollars on duplicative infrastructure, also known as overbuilding. It is essentially subsidizing a competitor to an ISP that is already delivering service to its customers. A properly balanced approach to rural broadband expansion will enable competition but not directly subsidize competitors to existing providers. As mentioned above, some overbuilding may be necessary and is allowed up to 20% of a local market to reach customers. When allowed to go too far, however, overbuilding can result in GONs getting subsidies to undersell private sector ISPs, driving them out of business and destroying competition in the long run. This did not work well when the Tennessee Valley Authority bankrupted

Wendel Wilkie's power company, which trapped thousands of customers in a government program that continues to need regular bailouts from the federal government. We have no reason to believe that this approach will suddenly work now. Worst of all, overbuilding results in an unacceptable waste of taxpayer dollars by building duplicative infrastructure where Americans are already served by high-speed broadband.

A key exception to this rule is when overbuilding is necessary to reach unserved areas. It is not hard to imagine a case where an ISP is willing and able to build out to an unserved community, but only if it can pass through a served community to get there. Recognizing this, the IJA allows for both interconnection of served areas to build holistic infrastructure and overbuilding of up to 20% of an existing market. **States should be cognizant of the occasional need for overbuilding and allow it where it improves efficiency and promotes competition.** Incorporating a small degree of overbuilding is not only necessary but can also make your state's program more cost-effective overall.

# CHAPTER 5: AVOIDING RATE REGULATION

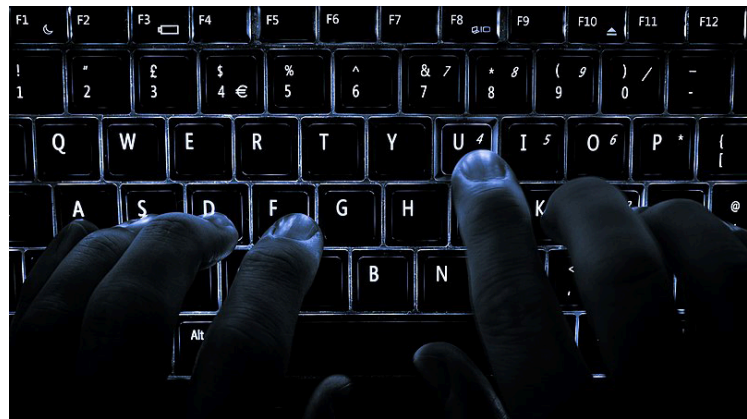
*“Fundamentally, there are only two ways of coordinating the economic activities of millions. One is central direction involving coercion...The other is voluntary cooperation of individuals: the technique of the marketplace.”*

—Milton Friedman, “The Relation Between Economic Freedom and Political Freedom”

In the previous chapter, we discussed the importance of competition to keep prices low. In this chapter, we address one of the easiest ways to destroy the positive effects of free-market competition: rate regulation. Put simply, rate regulation is price fixing for internet service. It is not called “price fixing” because the term has become unpopular, but price fixing it is. Rate regulation involves the government regulating (i.e. setting, adjusting, and ultimately “fixing”) the monthly rates consumers pay for internet service (i.e. “prices”).

## WHY RATE REGULATION FAILS

The price of a product or service must not be set by the government and must be set by the decentralized interplay of supply and demand. While most people would not articulate it in such abstract terms, almost everyone understands that you cannot demand a high price if you have a lot of something nobody wants, and you cannot



put something on sale that everyone wants if you only have a few units. If the government forces a store to sell a popular but scarce product at a low price, like the U.S. government did with gasoline in the mid-70s, they will run out. If the government forces a store to sell a replaceable but plentiful product at a markup, like the U.S. government did with produce in the mid-30s, no one will buy their stock.

As consumers who love a good deal, we may enjoy paying artificially low prices set by the government. That is, as long as we happen to be first in line to get the product before they run out. It may not be pleasant to pay a store owner’s higher price, but that price proves to retailers that customers want the product. This market-based information prompts them to pay their suppliers more for new units to move, which signals to

suppliers that they can move more units at a higher price. The profits made by suppliers and retailers prove to potential competitors that the product is popular, driving them to jump into the market. Having more competitors in a market naturally increases the supply, thereby lowering prices for consumers. Innovators watch these market realities unfold and figure out new ways to deliver the same product at an even lower cost to undersell the incumbents. Consumers benefit in the end from a free market allowed to function freely.

This economic phenomenon is easy to visualize with a tangible product, but for some (especially, it seems, those with master's degrees in public policy) it becomes harder to imagine with a non-physical service. As any business owner will tell you, however, providing a service also carries overhead costs. In the case of internet service, ISPs expend enormous capital laying fiber lines, building towers, and launching satellites to reach their customers. They also have continuing maintenance and upgrade costs to ensure that service is not interrupted and to keep up with competitive pressures from improving technology. The internet service itself relies on maintaining servers so that they can run 24/7, which also costs money. Therefore, ISPs must be able to react to real-time changes in these costs and the market. If they are unable to freely adjust their rates, they may be forced to provide the service at a loss. This practice can only last for a short time before the ISP goes out of business. Thus, rate regulation fails to provide cheap internet on a long-term basis.

When designing state broadband programs, one should also keep in mind that market failure due to rate regulation is not happening in a vacuum. The situation described above is unlikely to happen because ISPs are aware of market dynamics and, if subjected to rate regulation as a condition of participating in the program, will probably avoid the program altogether. Indeed, few policies could do more to chill ISPs from accepting BEAD subsidies than to deprive them of the reward for doing so: new customers paying market rates for broadband.

## WHY RATE REGULATION IS UNNECESSARY

While rate regulation is terrible policy in both theory and practice, it is also unnecessary given the current state of the broadband market. NTIA's NOFO may have suggested a \$30 per month price point to align with ACP (Affordable Connectivity Program), but ISPs have already largely rearranged their pricing tiers this way. ISPs generally love the ACP because it gives them reliable customers paying a





steady rate who might otherwise struggle to pay the bills each month. They want these new customers, and they will not get them charging over \$30 per month, since doing so would exhaust the limits of their federal voucher. ISPs have therefore reconfigured their tiers of service to align with what these customers can afford. They do not need to be told to do so, robbing them of their flexibility to adjust these prices to new market realities.

Despite this, some may still mistrust these companies and fear they will jack up rates for other customers outside of the lowest tier of service as soon as they get the chance. Perhaps this suspicion seems reasonable, but the reality is that rates for broadband service have fallen by nearly 50% since 2015 without government interference. In 2022, internet prices fell nearly 15% despite widespread inflation in nearly every other sector.<sup>17</sup> A well-designed state broadband plan will avoid these pitfalls by avoiding rate regulation altogether.

## BACK DOORS TO RATE REGULATION

For all the reasons we just covered, Congress rightly prohibited federal rate regulation in the IJJA. A rule of construction in the IJJA states that, “Nothing in this title may be construed to authorize the Assistant Secretary [of Commerce] or the National Telecommunications and Information Administration to regulate the rates charged for broadband service.” Additionally, Congress permanently authorized (but did not permanently fund) an emergency broadband voucher program that was originally created on a temporary basis during the COVID-19 pandemic. This ACP provides up to \$30 per household per month to pay for internet service. The IJJA also requires all broadband providers to offer a “low-cost service option” if they participate in the BEAD grant program. Congress therefore required participating providers to offer a low-cost option for low-income subscribers, provided federal funds to offset or fully pay for the service, and prohibited NTIA from setting rates. Because rates for internet service are so different across the country, Congress left it up to the states to decide what qualifies as a “low-cost option” in their communities. States will be best served if they use their discretion to allow providers to offer rates that make sense in local markets, using the ACP voucher to guide their thinking, not direct it. Rates should probably be comparable between areas with funded facilities and those without, and states can work amicably with providers to achieve this. Members of Congress, like most Americans, know that it makes no economic sense for an ISP to accept a subsidy to reach customers that will lose money serving.

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<sup>17</sup> Menko, Arthur, “2022 Broadband Pricing Index.” USTelecom. Available at <https://itgportal.ustelecom.org/research/2022-bpi/>

Unfortunately, the same cannot be said for NTIA. Their NOFO includes multiple attempts at back-door rate regulation, including suggesting a price point of \$30 per month to align with the ACP. This price may make sense for some states, but it is a suggestion, not a requirement, so states should avoid setting prices in their own programs. If \$30 is the natural going rate for broadband service, the market will arrive there without the “help” of the government. The ACP voucher exists to help low-income subscribers shoulder the cost, not fix prices for everyone. The NOFO also prohibits all data usage-based pricing options, which many existing providers use to set different tiers of service. There is no basis for this requirement in the statute. A state regulating rates by insisting that ISPs may not charge more money for faster internet is facially absurd. Such a requirement would likely discourage private sector participation in the BEAD program because ISPs would have to completely redesign their business model. A lack of private sector participation would thereby deprive states of the most experienced and reliable providers available as they seek to expand service.

Finally, the NOFO includes an extralegal “middle-class affordability plan” requirement. This requirement forces states to develop a strategy to ensure that broadband service is affordable for the middle class. There is also no basis in the statute for this requirement, either. **Because this is a requirement, states should fulfill it by collecting publicly available statewide data on median household income and the price of broadband service offerings. Then they can compare the two figures in the state’s application to NTIA using the FCC’s “reasonable comparability” benchmark for USF.** This process would demonstrate that broadband internet service is already affordable for the middle class in the state and that no government action is necessary to keep it that way. This could also be an opportunity to challenge the legality of an NTIA requirement, but we do not encourage anyone to take legal action without due consideration.

# CONCLUSION

As we said in the beginning, broadband buildout has been one of America's great success stories of the past few decades. While the private sector's expansion to unserved areas will continue apace, Congress has decided the last few unserved corners of the country will get some help from the federal government to overcome persistent barriers. The \$42.5 billion BEAD program is a great opportunity to provide internet access to residents of your state. Conversely, if state programs are poorly designed, taxpayer money will be wasted.

The foregoing advice should be seen as just that: advice. Remember above all that you know your states and communities better than anyone in Washington, D.C. We recommend that you use your best judgement to apply the advice in this book to your state's unique needs. Obviously, most of the ideas in this handbook are universal, such as the importance of free market competition, the application of NTIA's rules, and prioritizing unserved areas. Still, the worst thing you can be for your state is too be rigid or inflexible to see the little wrinkles of each situation.

Remember as well that this handbook is not exhaustive. There will be situations that we do not account for and NTIA will come up with more rules as the process unfolds. Our best advice is to know your state, know your needs, and know where to look when dealing with something novel. Consult the footnotes of this handbook for sources that go more in-depth on specific points. For example, the Taxpayer Protection Alliance's catalogue of failed GONs can assist you in understanding the different ways these types of ISPs fail. The Pew Research Center has some of the best statistics on internet adoption and availability rates.

Finally, a quick reminder that this money will be spent with or without your input. If a state refuses its BEAD money, a city, county, or tribe therein can apply in its place. Responsible public servants will make sure they get a say in how this money is spent and steer it in a cost-effective direction. With this and the five principles of the handbook in mind, you will better position your state to win the future and serve as many residents as possible.

Our last word of advice: ONWARD!

AMERICANS  
*for* TAX REFORM

Digital Liberty