



January 13, 2022

The Honorable John Thune
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Thune:

On behalf of National Taxpayers Union (NTU), the nation's oldest taxpayer advocacy organization, I am most grateful for your December 6, 2022 letter inquiring about NTU's views on the appropriate use of federal dollars for broadband deployment. This has long been a topic of great concern to NTU and I am honored to respond to your request. I will address your questions below, in order.

Infrastructure Investment and Jobs Act [IIJA] -specific Issues:

- 1. As part of the IIJA, Congress established a technology-neutral approach for the BEAD [Broadband Equity, Access, and Deployment] program. Do you believe NTIA [National Telecommunications and Information Administration] followed Congress' intent in establishing a technology-neutral approach? If not, should Congress consider amending the IIJA statute to make it more explicit that all technologies are allowed to participate? If so, how?**

In contrast to Division F, Title I of IIJA, the NTIA explicitly states that "With respect to the deployment of last-mile broadband infrastructure, the Program prioritizes projects designed to provide fiber connectivity directly to the end user." Yet within the law, many of the other grant requirements are explained in great detail. Below from the final text is the definition for broadband infrastructure, which does not assign weight to or exclude other types of broadband delivery.

BROADBAND INFRASTRUCTURE.—The term "broadband infrastructure" means any cables, fiber optics, wiring, or other permanent (integral to the structure) infrastructure, including wireless infrastructure, that—(A) is capable of providing access to internet connections in individual locations; and (B) is an advanced telecommunications capability, as defined in section 706(d) of the Telecommunications Act of 1996 (47 U.S.C. 1302(d)).

In certain situations, other broadband solutions may be more cost effective while delivering the mandated levels of broadband service under IIJA. In low-density population areas or mountainous regions, fiber deployments may become substantially more expensive to taxpayers. NTU would want to provide greater assurance that the current language in the Notice of Funding Opportunity (NOFO) like on page 38 item 11, while technically allowing for broadband deployments other than fiber, doesn't functionally lead to states excluding other technologies. Further, the waiver process which includes

NTIA approval may either slow down implementation significantly or lead to Eligible Entities and/or subgrantees designing their grant processes or builds exclusively on fiber, when that could greatly drive up the per-subscriber cost in certain use cases or lead to the avoidance of Extremely High Cost Per Location areas. While NTU agrees that fiber will play a very important, dominant role in this effort, there are few NTIA guidelines on what an appropriate Extremely High Cost Per Location Threshold might be. Several subsections of the statute, 47 USC 1702, should be amended, including under section (a) Definitions, under subsection 2. I, to add in language requiring NTIA keep its own grant requirements technology-neutral, or under General Program Requirements under section (g) to add stipulations for states not to exclude technology other than fiber. Alternatively, there could be a Congressionally-mandated level for Extremely High Cost Per Location Thresholds, pegged at a percentage above national broadband deployment costs for or statutory removal of the NTIA's involvement in granting approvals for states to use technology other than fiber for priority broadband projects.

From the NOFO footnotes, this language was not included in the final legislation and is the agency's interpretation of bill text cited:

A project that will rely entirely on fiber-optic technology to each end-user premises will ensure that the network built by the project can easily scale speeds over time to meet the evolving connectivity needs of households and businesses and support the deployment of 5G, successor wireless technologies, and other advanced services. See Infrastructure Act § 60102(a)(2)(I). See also Section IV.B.7.b.i of this NOFO.

To conclude, while NTU recognizes that IJA can be interpreted in a manner to prefer fiber-based deployments, a fiber-first NOFO may effectively become a fiber-only program without sufficient guardrails to protect federal taxpayers' funds.

2. In the BEAD Notice of Funding Opportunity (NOFO), there are detailed reporting requirements on subgrantees who do not use a unionized workforce or a project labor agreement. As a practical matter, do you think this favors certain providers over others? Does Congress or NTIA need to take further action to remove this requirement?

The NTIA should avoid adding onerous requirements against Congressional intent when developing their reporting requirements, such as on page 91, and program criteria for grantees and subgrantees. Many of the weights it places on specific criteria in its NOFO represent extraneous and unauthorized provisions that will either significantly slow down broadband deployment or are otherwise non-germane to the policy goals of the broadband program.

Some of the most egregious reporting differences and grant criteria include the favoring of unionized workforces and project labor agreements for subgrantees. Many of the most remote areas for which this legislation seeks advanced broadband deployment will not have sufficient local or unionized workforces to implement these types of requirements. Negotiating with new unions could also significantly add to delays in implementation as well.

Congress should amend the law to state that no federal agency may specially weight criteria that is not part of the agency's statutory duties when developing, publishing, or releasing NOFOs while awarding federal funds unless explicitly authorized by law and through the comprehensive listing of specific factors in said law.

Related to this idea, there should be a Congressionally mandated percentage limit on the amount of funding that can go to non-deployment expenditures for grantees and subgrantees. Without such a cap, there could be significant diversions of funds for purposes that will not bring quality broadband to more unserved and underserved communities.

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

NTU emphatically believes the government should not compete with private businesses in delivering crucial services. Examining other instances of government-run services competing with private sector business, such as the U.S. Postal Service's long standing woes, makes clear that government-owned networks (GONs) are not the answer. For more than a decade, [NTU has warned policymakers](#) at all levels of government about the perils of GONs. Time and time again, such networks have squandered public dollars and left taxpayers holding the bag. Indeed, a [2017 University of Pennsylvania study](#) found that more than half of networks in the sample were cash-flow negative, indicating an inability to operate sustainably or pay back the substantial debt leveraged to build the expensive network infrastructure. Only two of the twenty in the study were on track to pay back their debt within the lifespan of the network. While in the short term, municipal broadband may seem like a creative solution, all too often taxpayers will be left with serious liabilities. Furthermore, in many municipalities, there's a lack of technical knowledge on how to build, maintain, and upgrade networks effectively. Finally, with pole attachment issues being a major concern for many potential subgrantees, GONs may exercise their ownership of poles to impede broadband progress even beyond their service area, because pole access is similar to railways in that it can bridge multiple areas together. Like a railway holdout, a GON that does not allow proper access could either drive up costs significantly or slow down implementation to a standstill.

4. One of the provisions of the IIJA requires products and materials used for broadband projects to be produced in the United States. Given the current supply chain issues, should Congress consider modifying this obligation or otherwise clarify this provision?

While "Buy America" provisions may be well-intentioned, in practice they create inefficiencies that drive up costs and delay project construction. NTU recommends eliminating such domestic sourcing requirements from IIJA entirely. However, we are also supportive of reasonable reforms that help use taxpayer dollars more efficiently. Currently it appears that there's a statutory waiver process available for petitioning as part of the Buy America title of IIJA. Congress should remove these requirements entirely or modify this provision to add a process for the Assistant Secretary to grant waivers if the required technology or materials at the required domestic content is not available at a reasonable cost. Driving up per-user costs dramatically or slowing down rollout for Americans does not seem aligned with the intent of Congress in developing this law.

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

NTU believes that government transparency keeps the executive branch accountable to Congress and the American people. Without this important ability to understand the reasoning or decision making process of bureaucrats and appointees, the public suffers a grave disservice in positive governance. Of crucial

importance will be the ability to access information on how these NOFOs are being produced and whether they are written in consultation with groups that may be exercising undue or inappropriate influence over the criteria for awarding federal taxpayer funds.

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

Apart from the above, there are many other technical issues that Congress may wish to address. For one, there are numerous instances where NTIA has introduced onerous criteria or opportunities for misuse of taxpayer funds without Congressional authorization. One such aspect is in the significant diversity requirements under Section V. f., which could divert funds to “community organizations” or labor unions in an irresponsible manner. Congress should increase controls on the accountability of federal funds and stipulate that the funding must directly go to well-defined broadband job training or reasonable access purposes and for no other purpose.

The NOFO should also clarify that the requirement for future cash flow estimates and other financial analyses is not for the entity-level, but rather for the project level. This ensures that the requirement will not unduly burden participants of a larger or publicly-traded nature.

Additionally, there should be established controls over the prioritization of eligible uses of federal funds. To list a few examples from the NOFO, prisoner education, broadband subsidies, “digital navigators”, and device purchases, qualify as eligible use of grant funds. However, the stipulation that grant funds must be spent first on deployment is only backed by language in the NOFO that states “if an Eligible Entity has a plan to deploy service to all unserved and underserved locations within its jurisdiction, it may pursue non-deployment initiatives using BEAD funds before or while deployment projects are underway.” This could potentially lead to major issues where an Eligible Entity has a cursory plan and overspends federal taxpayer dollars on “free” devices like iPhones or expensive laptops, or on non-germane activities, like community development or union activity.

Adding in more stringent requirements for federal taxpayer funds to be spent first and foremost on broadband deployment will help curb grantee waste on ancillary activities. Federal restrictions on the approved types of devices and creation of more guidelines will also help more individuals get access to the internet instead of potentially wasting funds on frivolous purchases. The use of reasonable vouchers, setting cost-per-device at an inflation adjusted basis, or creation of a list of approved devices on a yearly basis could all be viable options. In our experience, the bedrock for effective oversight of taxpayer dollars – before any oversight personnel even get to work – consists of clear, consistent accounting and expenditure rules communicated regularly and directly to all entities.

Here, Senator Thune, I will also make a special plea to you and your colleagues on behalf of whistleblower protections surrounding BEAD and other broadband programs. Specifically, the BEAD NOFO states that “Recipients, sub-recipients, and employees working on this grant award will be subject to the whistleblower rights and remedies established under 41 U.S.C. § 4712” – a statute which, as you know, prohibits retaliation, discharge, and other forms of reprisal against individuals who disclose information concerning waste, abuse, mismanagement, and violations of law with federal grants, subgrants, and contracts. This type of firsthand information is invaluable early input that can help to correct flaws in a program’s execution before its complete fiscal failure becomes inevitable. Despite this legal protection, however, and the requirement that BEAD recipients and sub-recipients inform

employees and contractors of their rights under 41 U.S.C. § 4712, Congress's leadership is essential in ensuring these protections work for taxpayers. I urge you and your colleagues to make clear in any oversight hearings, any follow-up communications with NTIA, and in any other public settings where federal broadband grants are discussed, to affirm your strong support for 41 U.S.C. § 4712. I can assure you that if Congress makes whistleblower protection a greater priority, taxpayer protection will likewise become a greater priority in this program.

General Broadband Issues:

1. As noted above, there are over 130 programs supporting broadband access across 15 agencies.

a. To date, which of these programs do you believe has had the most success in delivering broadband services to truly unserved areas?

Although the FCC's Rural Digital Opportunity Fund (RDOF) is the largest operational program, the agency with the longest and strongest track record is most likely the USDA. In particular, the [RECONNECT program](#), the [Infrastructure Loan program](#), and the 2013 [Broadband Initiatives Program](#) have made headway into rural areas. However, without more granular knowledge of current broadband access and programmatic success similar to the [USDA's map of services](#), it is difficult to compare the outcomes across agencies. Perhaps in conjunction with developing the current broadband access map for the new IJJA funding, Congress should mandate the creation of a cross-agency map with all available grantee data merged into one database.

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

Congress should endeavor to restrict future general federal block grants, like Community Development Block Grants, from being used on broadband projects due to the complexity of this particular type of infrastructure's development and the ability to overbuild if there is not sufficient record or programmatic mapping of outcomes. Congress should also consider mandating the creation of a whole-of-government broadband strategy and centralizing authority over broadband under NTIA. There should also be a unified and regularly updated definition of broadband across programs and a taxonomy of the various goals of these programs, including: rural deployment, underserved communities, educational/community institutions, access goals, and others. The Office of Management and Budget (OMB) should develop a scoring program that will critically evaluate each funding program for their effectiveness on remoteness of user, per-user acquisition cost, and implementation failures or issues based on agency management. Moving funds from unsuccessful types of grant programs to successful initiatives is only possible once clear criteria are determined.

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

Congress should merge the Department of Education's programs with the NTIA's IJJA programs since they have substantially similar secondary goals – to assure key community centers like schools have high speed internet access. Additionally, Treasury's COVID programs might be better served by working under the NTIA's umbrella. These separately governed COVID-era programs should have their remaining funds rolled up under the administration of the IJJA funds

since efforts will be duplicative, or under the USDA as more technical experience exists there. Older grants that still receive appropriations should be moved under the NTIA umbrella while still mandating the consultation of the previous agency. New broadband grants should not be placed under other agencies moving forward.

2. What specific reforms and constraints should Congress consider to ensure federal funds are not being awarded where providers are receiving other federal or state broadband funding support?

In addition to the stipulations on page 26 and 75 of the NOFO, in the future Congress could mandate for grantees, prior to a final award or disbursement of remaining sums, a grantee cross-check across BroadbandUSA's list of federal programs and all available state mapping of the [NBAM](#). Additionally, it could require a statement under penalty of a significant fine or reduction of funding that the grantee or subgrantee is not aware of another project covering that area. Adding stronger language to the requirements for waivers for building where funds have been committed would also be helpful to curb wasteful overbuilds. This would add further checks and balances and incentives for other parties to research potential duplication. In addition, a robust challenge process that works for a grantee should be a major initiative to replicate in other states. Challenges can be moderated by implementing a process whereby if a challenger does not provide service to the area in question within a timeframe, they will be disqualified from challenging for a certain time period.

3. Should Congress take additional action in response to concerns that broadband funding may be used to overbuild existing service? If so, what reforms and constraints should be implemented?

Similar to the answer for the above question, a robust challenge process based on the current mapping or an enhanced map should be implemented. If the [American Community Survey](#) was altered or added more granular questions on broadband access, perhaps the dataset could be improved. Areas that are currently under deployment commitments should not be considered underserved or unserved. Incentivizing boots-on-the-ground data collection in remote areas as a requirement prior to receiving further funding past an initial stage could also ensure quality data and reporting and save more taxpayer dollars in the long run.

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

Price fixing has never been an effective tool of government. From President Nixon's failed inflation-fighting strategies during the 1970s, to the price-fixing regulations of the early 2000s [California energy markets](#), to the Inflation Reduction Act's scheme to manipulate prescription drug prices, these strategies create perverse incentives for the private sector which usually lead to negative externalities. Congress should amend the IJA to note that the funding conditions cannot include any weighting or preferencing of a grantee or subgrantees' creation or guarantee of an extended price ceiling or freeze or otherwise create an immovable price point on broadband service or failure to do so.

5. Should Congress take additional action in response to concerns that broadband funding may be conditioned upon recipients imposing some form of "net neutrality" mandates upon broadband

services, whether or not such mandates are explicitly denominated "net neutrality?" If so, what reforms and constraints should be implemented?

Congress should amend the IJA to make explicit that the funding not be conditioned or affected in any way by net neutrality by grantees or subgrantees. The requirements sections for either party could be amended, or NTIA could be restricted from promulgating any criteria with the effect that treatment of varying types or normal speed variances of internet traffic cannot be an eligible condition for altering an entity's funding amount or ability to win an award.

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

In some respects, it is too early to tell, especially since many of the current 50 or so broadband programs were created during the COVID pandemic and afterwards. All broadband-granting agencies should be brought into the fold, including the Department of Commerce and Department of Education. As mentioned previously, there should be a national strategy on broadband and a single entity coordinating funding. Creation of a whole-of-government broadband grant map will help coordination; however I would be remiss not to note the usefulness of the [BroadbandUSA funding guide](#) and [map](#).

7. Should Congress take steps to increase the transparency of agencies when allocating and disbursing broadband funds? If so, what steps should Congress take?

First, Congress should remove FOIA exemptions that could prevent watchdog organizations from understanding fiscal patterns and processes in funding decisions. Secondly, Congress should mandate that all grantee and subgrantee expenditures are based on a publicly available budget, and when disbursed to a single entity over a dollar amount cap – perhaps \$1 million – be reported to the federal government. This will add transparency to the amount of funding going to community groups and unions for political reasons. Finally all grant awards should be available on a searchable public and consolidated database along with information on grant status, subscriber counts, population density, per-subscriber cost, execution timelines, and cost to taxpayers.

8. What, if any, permitting regulations at the federal level are impeding broadband deployment?

Congress should encourage agency modification or legislatively remove barriers to deployment on federal lands and highways for this particular use case. Processing of broadband-related permitting should be expedited particularly when related to National Environmental Policy Act (NEPA) considerations. [Similar legislation](#) was introduced by former Senator Orrin Hatch (R-UT) in 2017. [Another bill](#) by Rep. Jared Huffman (D-CA) dealing with keeping fees reasonable for telecommunications access on public lands more generally was introduced in 2019.

Congress should also focus on releasing more spectrum from government-only use to the private sector since this could help boost other methods of broadband deployment.

9. Does the FCC presently possess sufficient authority to preempt state and local requirements that may unreasonably impede the deployment of broadband networks? If not, what steps should Congress consider to address the unreasonable impediments?

Congress should analyze whether to add statutory requirements for grantees to include in their submitted plans a requirement to list any particular state or local laws that could impede their broadband deployment and an action plan to reduce their impact on the rollout.

With regards to pole permitting, FCC and Congress should look to carefully consult with broadband providers and all stakeholders to better understand and address any existing challenges to providing service to underserved or unserved populations in target regions for this law. If indeed there is sufficient consensus to alter the existing rules, then the focus should be on streamlining the process and reducing government barriers to rural deployment, for all providers (see below).

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

Similar to language on item 14 of the Initial Proposal Requirements on page 32 of the NOFO, Congress could examine adding a requirement that governments receiving funds under these programs should allow subgrantees reasonable prioritization for either exempted, reduced fee, or otherwise streamlined public right-of-way access in order to build underground, create antennae, or place other important network infrastructure.

Restricting the use of nongermane and unauthorized criteria, such as local labor requirements, union labor, and project labor agreements for NTIA to evaluate and approve programs will also help drive down costs. In their comments to the NTIA, the [International Brotherhood of Electrical Workers](#) rightly sees this program as a potential gold mine for their members. However, their gain would come at the cost of taxpayers and the consumers who live in the many states and regions whose localities will not have a sufficient union population to fill these needs.

Furthermore, as answered earlier in Question 4, waivers for Buy America requirements will be crucial when addressing cost requirements for deployment.

I would also mention the necessity, not only for broadband providers but also for the entire private sector, for Congress to provide long-term stability to the Tax Code by extending or making permanent a number of pro-growth provisions in the 2017 Tax Cuts and Jobs Act. NTU has provided several [communications](#) about specific priorities for Congress in this regard. One key TCJA provision for broadband development will be making R&D expensing permanent. We also strongly urge elimination of the corporate minimum tax that was enacted as part of the Inflation Reduction Act or, at a minimum, continuing to provide favorable tax treatment to spectrum license purchases, which help to expand broadband access.

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

Similar to NTU's response to Question 9, the FCC and Congress should look to carefully consult with broadband providers and all stakeholders to better understand any existing challenges (e.g., fast-tracking disputes) to providing service to underserved or unserved populations in target regions for this area of

law. Addressing such challenges, if a strong consensus can be reached to identify them, will require a targeted approach that considers the long-term implications from a variety of stakeholder viewpoints.

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

Although NTU does not engage directly in cybersecurity issues, we believe, in order to ensure taxpayer funds are not wasted or misused, that Congress should continue to weigh national and cybersecurity concerns against the potential slowdown of broadband expansion as the implementation of the IJJA funding continues. Congress should also push for as much use of secure technology as feasible when developing future programs. Grantees should be mindful of cybersecurity concerns as they develop any new web assets to document internet access for individuals or institutions within their regions.

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

Maintaining the 2018 Restoring Internet Freedom Order should be a key concern for the Senate when exercising its right to confirm presidential nominees. It should also be a priority to transform this order into statute since it has led to reduction of regulatory burdens, higher speeds on average, and innovation within the broadband industry.

Congress should also focus on reauthorizing the FCC's spectrum auction authority and releasing more valuable spectrum for private sector use. Additional spectrum will aid in broadband expansion through empowering more fixed wireless internet service providers.

Senator Thune, these comments should only be regarded as the beginning of what will hopefully be a series of in-depth discussions between your staff and NTU. We are eager to assist in this regard. Should you have any questions about the recommendations in this letter, please do not hesitate to reach out to me (president@ntu.org) or my colleague Nicholas Johns (njohns@ntu.org), who has led our response effort to your request. Thank you for your consideration.

Sincerely,

Pete Sepp
President