

United States Senate

June 11, 2024

Alan Davidson
Assistant Secretary
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Ave. N.W.
Washington, DC 20230

Dear Assistant Secretary Davidson,

I write today regarding your pressure campaign on states through the Broadband Equity Access and Deployment (BEAD) Program to regulate the rates of broadband service. The BEAD program was authorized to expand broadband to unserved and underserved areas of the country. Yet, your alarming actions to set rates of service provided through the program will lead to fewer people served and less competition. Most importantly, using the BEAD program to implement any rate regulation is unlawful.

Recently, it has come to my attention that your agency has conditioned federal funding on a policy requirement that violates congressional intent. In fact, the authorizing legislation that created the BEAD program expressly stated when referring to the BEAD program that “Nothing in this title may be construed to authorize the Assistant Secretary or the National Telecommunications and Information Administration to regulate the rates charged for broadband service.”¹ Yet, it has been revealed through communications between the State of Virginia and your agency, that you are aggressively insisting that the state “require broadband providers offer a rate for the low-cost option at a pre-set or pre-determinable price certain as a condition to receipt of any BEAD funding.”²

As part of its Volume II Initial Proposal, the State of Virginia submitted its low-cost option in accordance with statute, which held states can develop their own proposal of low-cost broadband service options. By all objective measures, Virginia has satisfied statutory requirements by necessitating providers not only submit the price of their low-cost service option at the time of the application, but also demonstrate how their established low-cost service option is affordable based on comparative market analysis. Further, by tying rates to market analysis, Virginia’s

¹ 47 U.S.C. § 1702(h)(5)(D); *see also* Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 60102(g)(5)(D), 135 Stat. 429, 1201 (2021) (“IIJA”).

² Virginia Department of Housing and Community Development, Commonwealth Connect, Initial Proposal Volume 2, <https://dhcd.virginia.gov/sites/default/files/DocX/vati/ntiacuringround2changes-virginiabeadvolume2.pdf> (including responses from NTIA).

approach prohibits providers from inappropriately setting low-cost rates, which NTIA has stated as a goal of BEAD. Revealingly, NTIA's latest feedback in its so-called "curing process" seems to provide that meeting statutory requirements is in fact not satisfactory and that the only low-cost option acceptable must be established as "an exact price or formula" in order to receive funding.³ In requiring this, your agency is now conditioning BEAD funding on a set price, effectively rate regulating service providers and willfully violating the law.

As you are aware, your agencies' actions on rate setting of broadband service run afoul of longstanding federal precedent with regards to internet rate regulation. As part of classic common carrier regulations, rate regulation has traditionally applied only to public utilities in monopoly industries—of which broadband providers do not qualify.⁴ In fact, even when the government previously attempted massive expansion of power in the broadband industry, the Federal Communications Commission (FCC) intentionally forbore *ex ante* rate regulation as part of its efforts to impose draconian Title II Net Neutrality rules on internet providers.⁵

It is more concerning that you potentially misled members of Congress on your agency's willful violation of the law during a recent hearing in front of the House Committee on Energy and Commerce.⁶ When faced with questions regarding NTIA's authority to set rates, you stated that NTIA is "acting with fidelity to the statute" and that you are giving states "a lot of flexibility" in how they set or define rates.⁷ Additionally, you provided that you are "not engaging in rate regulation" and that since BEAD is voluntary no state has to participate, but if they do participate "there are a lot of requirements" including setting particular rates as a condition of funding.⁸ This claim is baseless as it is clear that the BEAD program is a voluntary grant program and yet Congress still provided statutory language prohibiting rate regulation. If the will of Congress was for NTIA or states to condition BEAD participation on providers agreeing to regulation of their rates, it would not have enacted such a provision explicitly prohibiting it.

What was once an important outreach, communication and technical assistance tool with NTIA for states, NTIA's curing process has become described by some states as "opaque" and has "turned into something of a black box."⁹ As of the date of this letter, only nine states and the

³ *Ibid.*

⁴ See, e.g., *N.Y. State Telecomms. Ass'n, Inc. v. James*, 544 F. Supp. 3d 269, 282 (E.D.N.Y. 2021) ("[R]ate regulation is a form of common carrier treatment."); see also *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Further Notice of Proposed Rulemaking, 84 F.C.C.2d 445 ¶ 13 (1980) ("A particular variant of market intervention is the economic regulation of monopoly firms that have come to be considered 'public utilities'. . . . In general, the economic regulation of public utilities has traditionally included control over entry into the market, some degree of price control, the specification of both quality standards and conditions of service, and, usually, an obligation to serve all customers requesting service under reasonable, non-discriminatory terms.").

⁵ See *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 ¶¶ 451-452, 499, 508 (2015) ("2015 Title II Order").

⁶ See *C&T Hearing: The Fiscal Year 2025 National Telecommunications and Information Administration Budget* <https://www.youtube.com/watch?v=n9Dv8oOLKAw>

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Adam Bender, *State BEAD Plans Could Look Much Different After NTIA Curing*, Communications Daily (Feb. 7, 2024), <https://communicationsdaily.com/article/2024/02/07/state-bead-plans-could-look-much-different-after-ntia-curing-2402060081>.

District of Columbia have been approved, leaving 41 states, including my home state of Missouri, languishing for months as you continue to devise a covert strategy to implement rate regulation as a condition of federal funding under the BEAD program. As Missouri continues to work through the curing process on its Initial Proposal Volume II, I will monitor their development to ensure your adherence to the rule of law is maintained in considering their proposal.

As a member of the Senate Committee on Commerce, Science, and Transportation, the committee with direct oversight authority of NTIA, it is my priority to hold this Administration accountable for its propensity to act with impunity. As Secretary Raimondo stated recently at a Senate Appropriations Committee hearing, this Administration is “decidedly not engaging in rate regulation.”¹⁰ Yet, when talking about balancing the requirements of no rate regulation with maintaining an affordable low-cost, the Secretary said that the Commerce Department isn’t requiring states propose a specific “\$30 or \$40 option”, but that states “have to satisfy us” of what is a low-cost option to get approved.¹¹

If you and Secretary Raimondo continue to pursue this strategy of double talk that NTIA is simply giving preference to states that agree to a specific price and not mandating a specific rate, please know that I, along with colleagues on the committee, plan to use the fullest extent of our oversight authority to hold you accountable.

Sincerely,



Eric S. Schmitt

United States Senator

¹⁰ See *A Review of the President’s Fiscal Year 2025 Budget Request for the Department of Commerce*
<https://www.appropriations.senate.gov/hearings/a-review-of-the-presidents-fiscal-year-2025-budget-request-for-the-department-of-commerce>

¹¹ *Ibid.*