

**BEFORE THE  
DEPARTMENT OF COMMERCE  
NATIONAL TELECOMMUNICATIONS AND INFORMATION AGENCY  
WASHINGTON, DC 20230**

In the Matter of	)	
	)	
Tailoring the Application of the Uniform Guidance	)	Docket No. 230622-0154
To the BEAD Program; Request for Comments	)	NTIA-2023-0007
	)	

**COMMENTS OF TECHFREEDOM**

Pursuant to the Notice and Request for Comment (“RFC”) released by NTIA in the above-referenced docket,<sup>1</sup> TechFreedom submits the following comments.

**I. About TechFreedom**

TechFreedom is a nonprofit think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity.

We have filed comments related to broadband deployment at various agencies,<sup>2</sup> highlighting that the federal government’s commitment to close the digital divide is unique.

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<sup>1</sup> Tailoring the Application of the Uniform Guidance to the BEAD Program; Request for Comments, Notice and Request for Comment, 88 Fed. Reg. 42918 (proposed July 5, 2023) [hereinafter RFC]. The RFC set the comment date as August 4, 2023. These comments are timely filed.

<sup>2</sup> TechFreedom Comments on Infrastructure Investment and Jobs Act Implementation (Feb. 4, 2022), <https://techfreedom.org/wp-content/uploads/2022/02/TechFreedom-Comments-2-4-22.pdf>; TechFreedom Reply Comments on Empowering Broadband Consumers Through Transparency (Mar. 24, 2022), <https://techfreedom.org/wp-content/uploads/2022/03/TechFreedom-Reply-Comments.pdf>; TechFreedom Comments on Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment (June 27, 2022), <https://techfreedom.org/wp->

BEAD provides possibly the last chance to deliver broadband to the hardest to reach places in America. But we have also cautioned federal agencies that the money allocated may not be enough to do the job unless program rules are written to maximize efficiencies and minimize waste, fraud, and abuse.<sup>3</sup> If the rules are not written correctly, existing broadband providers—those entities in the best position to reach the most rural areas—may choose not to participate because of uneconomic “strings” attached to this federal money.

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content/uploads/2022/06/TechFreedom-Comments-Pole-Attachment-6-27-22.pdf; TechFreedom Reply Comments on Facilitating Interagency Coordination of Broadband Deployment Funding (Aug. 16, 2022), <https://techfreedom.org/wp-content/uploads/2022/08/TechFreedom-Reply-Comments-Interagency-Coordination-8-16-22.pdf>; TechFreedom Comments on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination (Feb. 21, 2023), <https://techfreedom.org/wp-content/uploads/2023/02/TechFreedom-Comments-on-FCC-Nondiscrimination-NPRM-2.21.23.pdf>.

<sup>3</sup> TechFreedom Comments on Infrastructure Investment and Jobs Act Implementation, *supra* note 2, at 2, 21 (“Mapping efforts must be the highest priority; otherwise, the \$42.45 billion BEAD money will be wasted, and in many cases spent to overbuild and compete with existing commercial broadband networks, doing nothing to actually close the Digital Divide.”) (“If not administered properly, the country will find that, for all the money spent, little progress has been made in actually closing the Digital Divide . . . The amount of money already committed to broadband deployment should have already closed the Divide . . .”); TechFreedom Comments Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, *supra* note 2, at 4 (“Congress has allocated well more than the \$80 billion that the FCC predicted in 2017 would totally close the Digital Divide, and that doesn’t include the \$79.4 billion invested by private companies in broadband in 2020 alone. Clearly the shape of the cost curve must differ significantly from what the FCC thought just five years ago.”); TechFreedom Reply Comments on Facilitating Interagency Coordination of Broadband Deployment Funding, *supra* note 2, at 2 (“If the remaining Americans without access to broadband are to be served, all government agencies must work together to maximize the reach of the unprecedented federal dollars now allocated for broadband deployment. Interagency sharing of data regarding current, planned, funded, and future broadband deployment is a must to avoid wasting taxpayer dollars.”); TechFreedom Comments on Implementing the Infrastructure Investment and Jobs Act, *supra* note 2, at 48 (“From reviewing its rules related to access to multiple tenant environments (MTEs), to assisting states and localities related to ‘expediting government permitting and facilitating access to poles and public and private rights-of-way,’ to completing its pending rule-making on pole replacements, to making 5G deployment easier, to better spectrum policy, and administering the various funding programs it administers, there is much positive work the FCC could be doing to close the digital divide.”).

## II. Discussion

The RFC acknowledges the challenge this nation faces in providing broadband to the most inaccessible regions of America, even with over \$42 billion available in the BEAD program for new deployment:

Moreover, as discussed above, incentives for broad participation are needed to address the unique challenges for which the BEAD Program was created to solve. Unserved and underserved areas present significant barriers for service, as evidenced by the lack of existing high-speed internet infrastructure even after decades of the Federal efforts to expand broadband deployment in these areas. Indeed, the lack of a sustainable business case—namely a business case that generates a reasonable return on investment—is a core problem the BEAD Program is designed to address. The program income rules will in many cases prevent providers from earning a reasonable return on investment during the period of performance, and would not address the economic conditions that have stunted investment in these areas.<sup>4</sup>

After announcing how most of the \$42 billion will be apportioned to individual states,<sup>5</sup> NTIA faces the problem that traditional funding rules may provide massive disincentives to existing broadband providers. These providers have already invested \$1.9 trillion of private capital from 1996-2020.<sup>6</sup> In almost each instance, for existing broadband providers, the BEAD money will go toward expanding their existing networks into areas where there simply is no economic basis for deployment because of the cost, low population density, or even low demand for service. These new facilities will be integrated into larger

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<sup>4</sup> RFC, *supra* note 1, at 42921.

<sup>5</sup> See *Fact Sheet: Biden-Harris Administration Announces Over \$40 Billion to Connect Everyone in America to Affordable, Reliable, High-Speed Internet*, THE WHITE HOUSE (June 26, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/26/fact-sheet-biden-harris-administration-announces-over-40-billion-to-connect-everyone-in-america-to-affordable-reliable-high-speed-internet/>.

<sup>6</sup> TechFreedom Comments on Infrastructure Investment and Jobs Act Implementation, *supra* note 2, at 3 (citing Mike Saperstein, *2020: Broadband Providers Pump Another \$79.4 Billion Into America's Connectivity Infrastructure*, USTELECOM (Sept. 22, 2021), <https://www.ustelecom.org/2020-broadband-providers-pump-another-79-4-billion-into-americas-connectivity-infrastructure/>).

networks, making nearly impossible the implementation of many of the conditions imposed by the Office of Management and Budget’s “Uniform Administrative Requirements, Cost Principles, and Audit requirements for Federal Awards” (“Uniform Guidance”).<sup>7</sup> We detail below how these disincentives can be avoided.

**A. Question 1: Profit Restrictions Should Not Apply to Operations of Broadband Networks Constructed Using BEAD Grants**

The first question posed by the RFC regards the Uniform Guidance’s restriction on federally funded grantees from “profiting” from the grant.<sup>8</sup> The RFC is not completely clear as to how it defines “profit” or when a limitation on “profits” should apply. States should select subgrantee proposals based on competitive bidding procedures that reward efficiency and cost-effectiveness, which could include a limitation on the amount of profit that can be built into a proposal.<sup>9</sup> In short, proposers should not be able to profit directly from their capital expenditures (CapEx) (i.e., the proposal should represent the full cost to deploy, but should not include a profit directly from that deployment).

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<sup>7</sup> See Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. Chapter I, Chapter II, Part 200, et al., <https://www.federalregister.gov/documents/2013/12/26/2013-30465/uniform-administrative-requirements-cost-principles-and-audit-requirements-for-federal-awards>.

<sup>8</sup> “The Uniform Guidance allows Federal awarding agencies to adjust requirements to a class of awards when approved by OMB. Pursuant to this authority, NTIA proposes to seek from OMB an exemption from the Uniform Guidance’s requirements for recipients and subrecipients to retain program income without restriction, including retaining program income for profit. NTIA would also seek conforming changes to the award terms in light of Section B.05 of the DOC ST&Cs. NTIA seeks comment on this proposal.” RFC, *supra* note 1, at 42921.

<sup>9</sup> See RFC, *supra* note 1, at 42921 (“Competition for a given set of locations will reduce the level of grant funding required on a per location basis. Efficient funding levels will in turn create opportunities for Eligible Entities to ensure that broadband network facilities are deployed to all unserved and underserved locations within their jurisdiction, and potentially pursue eligible access-, adoption-, and equity-related uses.”).

After construction, however, there should be no restrictions on the ability of the subgrantee to receive a profit from the operation of the portion of their network built with a BEAD grant.<sup>10</sup> Subgrantee recipients will have to fund the ongoing operational expenses (OpEx)<sup>11</sup> for the areas being deployed using BEAD funding. They will shoulder the risk that revenues in these areas will not even meet OpEx requirements.<sup>12</sup> To the extent that the subgrantee recipient is able to turn a profit on that part of their network, they should be allowed to keep it. Even requiring existing providers to account for the profit/loss of a particular part of their network would introduce regulatory compliance costs that would either scare providers away from participating or would result in such compliance costs being passed down to consumers in the form of higher broadband monthly charges.

### **B. Questions 2 & 3: Awarding Fixed Amount Grants**

Questions 2 and 3 of the RFC relate to whether the BEAD program allows Eligible Entities to award fixed amount grants.<sup>13</sup> TechFreedom supports this approach. Subrecipient

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<sup>10</sup> Given the fact that virtually all areas that are to be built out using BEAD funding have not previously received broadband precisely because existing carriers could not close the business case for such deployment, it is highly unlikely that there is substantial profit to be made from these areas alone.

<sup>11</sup> See NTIA, ECONOMICS OF BROADBAND NETWORKS 2 (2022), <https://broadband.usa.ntia.doc.gov/sites/default/files/2022-03/Economics%20of%20Broadband%20Networks%20PDF.pdf> (“OpEx is the day-to-day (ongoing) cost to run and maintain a network to provide services. OpEx can include power, network maintenance, middle mile and/or core Internet transit fees (if any), sales and marketing, customer support, rent, and other business operation expenses.”).

<sup>12</sup> *Id.* at 2 (explaining the “take rate” of broadband as “Percentage of customers with access to the network who choose to subscribe. Take rate can be hard to predict and is a driver of uncertainty for providers due to various barriers to consumer adoption and competitive offerings.”).

<sup>13</sup> RFC, *supra* note 1, at 42922 (“Question 2: As further addressed below, NTIA proposes to seek from OMB the necessary exceptions to the Uniform Guidance rules to allow Eligible Entities to issue

grants *should* be in fixed amounts rather than some form of “cost-plus” awards which build in both some form of profit and the ability of subrecipients to come back seeking more money. Eligible Entities should set up their competitive rules such that applicants clearly state how much it will cost *them* to deploy into unserved and underserved areas. Any other approach would have two devastating consequences: First, it would engender all manner of waste, fraud, and abuse, as applicants can lowball their applications, but then make that back up with downstream requests for increases. Second, and more importantly; such a system would require holding back a substantial amount of the \$42 billion set aside for the BEAD program to cover cost overruns. Failure to embargo a substantial percentage of the \$42 billion could then result in projects that would have to be abandoned, half-built, because the applicant underbid its actual costs, leaving nothing of the \$42 billion to cover cost overruns.<sup>14</sup>

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fixed amount BEAD Program subawards of any amount for broadband infrastructure projects. Is it reasonable to assume that the subgrantee selection process, as specified in the Bipartisan Infrastructure Law and BEAD NOFO, will ensure that each project has ‘measurable goals and objectives’ and provide ‘a reasonable estimate of actual cost’. Question 3: The Uniform Guidance prohibits the use of fixed amount awards or subawards in programs requiring mandatory cost sharing or match, as is the case in the BEAD Program. NTIA thus proposes to seek from OMB an exemption for the class of subawards identified in sections 60102(f)(1), (2), and (4) of the Bipartisan Infrastructure Law from the prohibition on the use of fixed amount awards in programs requiring mandatory cost sharing or match.”).

<sup>14</sup> For this reason, TechFreedom suggests that the NTIA not allow Eligible Entities to adopt rules that permit subrecipients to come back with “budget revisions” that would increase the amount of the award as contemplated by Question 15. RFC, *supra* note 1, at 42924. Any such flexibility must be tempered with the knowledge that any upward changes in subrecipient budgets would have to come out of the state’s overall BEAD allocation—Eligible Entities cannot be allowed to come back to the NTIA and seek additional funding to cover the budget revisions. Eligible Entities should be allowed to adopt rules that provide for some changes to subrecipient plans, so long as such changes do not increase the overall budget and continue to meet overall program requirements of serving all unserved households within the project area.

### C. Question 5: Mechanisms for Payment

The RFC asks in Question 5 whether the NTIA should “specify through guidance or a special award condition the form in which fixed amount subawards by Eligible Entities should be paid.<sup>15</sup> TechFreedom believes that the NTIA should look to how the FCC has structured payments in the Rural Digital Opportunity Fund (RDOF),<sup>16</sup> wherein the FCC is providing over \$20 billion over ten years for broadband deployment in some of the most difficult and expensive areas in the nation. Recipients of RDOF funding are required to meet verifiable deployment milestones in order to receive continued funding from the Universal Service Administrative Company (USAC), which administers the program.<sup>17</sup> Such deployment milestones are typical in other broadband deployment programs as well, and broadband providers are familiar with these types of programmatic requirements.<sup>18</sup> NTIA should seek OMB guidance in establishing a similar approach for BEAD. The suggestion in the RFC that all funds should be held until project completion<sup>19</sup> is both unnecessary and will result in fewer qualified applicants.

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<sup>15</sup> *Id.*

<sup>16</sup> *See Auction 904: Rural Digital Opportunity Fund*, FCC, <https://www.fcc.gov/auction/904> (last visited July 31, 2023).

<sup>17</sup> *See Rural Digital Opportunity Fund*, USAC, <https://www.usac.org/high-cost/funds/rural-digital-opportunity-fund/> (last visited July 31, 2023).

<sup>18</sup> *See, e.g.*, U.S. DEP’T OF AGRIC., COMMUNITY CONNECT GRANT PROGRAM APPLICATION GUIDE-FY 2023 23 (2023), <https://www.rd.usda.gov/media/file/download/ccapplicationguidefy23.pdf> (“A construction build-out schedule and project milestones, showing the time-frames for accomplishing the Project objectives and activities on a quarterly basis (Schedule F-1). This schedule should list all the major network build-out phases and milestones to demonstrate that the network deployment will be completed and the grant purposes will be fulfilled within the designated grant period.”).

<sup>19</sup> RFC, *supra* note 1, at 42922 (suggesting that subrecipients receive “one payment at award completion.”).

**D. Question 8: Waiving the Specific Procurement Requirements of 2 CFR Part 200.**

TechFreedom agrees with the RFC that the NTIA should seek a waiver from OMB of the Uniform Guidance’s requirement that Eligible Entities utilize the procurement mechanisms described in 2 CFR 200.318-320 and 200.324-326.<sup>20</sup> Eligible Entities need sufficient flexibility to administer their subrecipient grants such that strict adherence to the Uniform Guidance would be counterproductive. So long as Eligible Entities certify that their competitive bidding requirements are fair, and NTIA agrees after reviewing their plans, the procurement rules should be waived.

**E. Question 9: The Federal Interest Period Should Reflect the Actual Technology Deployed**

In Question 9, the NTIA proposes a Federal Interest Period (effectively the amortization schedule) of the hardware funded by a BEAD grant to be 20 years, “which is consistent with the expected useful life of fiber optic cables.”<sup>21</sup> Yet IJJA was designed to be technology-neutral, giving Eligible Entities and subrecipients flexibility in what technology to deploy.<sup>22</sup> Some of those technologies, such as fixed wireless, may have an amortization period far shorter than 20 years. As such, the Federal Interest Period should be aligned to

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<sup>20</sup> *Id.* (citing 2 C.F.R. §§ 200.318-320, 200.324-326).

<sup>21</sup> *Id.* at 42923.

<sup>22</sup> *See* Letter from Thirteen U.S. Senators to Gina M. Raimondo, Secretary of Commerce, Regarding the BEAD Program at 2 (Aug. 18, 2022), [https://www.romney.senate.gov/wp-content/uploads/2022/08/letter\\_to\\_secraimondobeadnofoaug182022.pdf](https://www.romney.senate.gov/wp-content/uploads/2022/08/letter_to_secraimondobeadnofoaug182022.pdf) (“Technology Neutrality: In a letter to you in February, several Senators expressed the importance of the ‘all of the above,’ technology-neutral approach for connecting our nation . . . The NOFO contradicts this by explicitly stating that fiber is the only technology that can meet the definitions of a priority project. That is not the case. Never in the legislation did Congress stipulate that one technology was able to meet these needs above any other.”).

the specific technologies approved by Eligible Entities in awarding subrecipient grants, not a blanket 20 years, as suggested in the RFC as an alternative approach.<sup>23</sup>

**F. Question 11: Recordkeeping Requirements for BEAD Should Align with Industry Standards**

In Question 11, the RFC asks whether the NTIA should apply the equipment and inventory rules in 2 C.F.R. § 200.313 to BEAD subrecipients.<sup>24</sup> While it is important that subrecipients use the equipment paid for by BEAD grants for the purposes proposed in their applications to the applicable Eligible Entity, the BEAD program itself should not impose new and costly accounting requirements or encumbrance limitations on subrecipients that are different from their normal operations. TechFreedom supports the alternative proposal set forth in the RFC to allow subrecipients to certify to using standard commercial practices.<sup>25</sup> Such an approach would minimize new regulatory costs and not require existing broadband providers new accounting procedures that differ from industry norms.

**G. Question 14: Eligible Entity Audits**

TechFreedom supports the proposal in the RFC to allow Eligible Entities to “to determine the form and frequency of audits from commercial subrecipients. Under such an approach, each Eligible Entity can prescribe and enforce any such audit requirement it deems sufficient for its own compliance requirements as recipients of BEAD awards.”<sup>26</sup>

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<sup>23</sup> RFC, *supra* note 1, at 42923 (“Alternatively, NTIA seeks comment on whether to issue a schedule defining the Federal Interest Period as the useful life for different categories of BEAD-funded personal property.”).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

Given the overall structure of BEAD, which places the day-to-day implementation responsibilities on Eligible Entities (*e.g.*, states and territories), it makes perfect sense to allow each state to decide how it will conduct audits of its subrecipients. Absent a glaring deficiency in a proposed audit structure, the NTIA should not dictate to each Eligible Entity precisely how to conduct audits under the program. Presumably, each state already has well-established audit systems for other grants that can be adapted to auditing BEAD grants. Creating wholly new systems would be expensive and counterproductive to meeting the program goals of maximizing broadband deployment to unserved and underserved areas.

### **III. Conclusion**

The Uniform Guidance rules play an important part in combating waste, fraud, and abuse, in government grant programs. In this instance, however, given the prospective players involved (existing broadband providers with well-established industry and other regulatory compliance obligations), strict adherence to these rules is at least counterproductive, and at most could drive away some companies in the best position to actually close the digital divide. NTIA should avoid this by seeking targeted waivers of the Uniform Guidance rules as proposed by the RSC.

Respectfully submitted,

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