Insight

The NTIA's Big BEAD Update

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Executive Summary

- The National Telecommunications and Information Administration (NTIA) released an updated Notice of Funding Opportunity (NOFO) for the Broadband Equity, Access and Deployment program – which provides $42.5 billion to states to connect unserved Americans – largely eliminating regulatory burdens that could inhibit participation in the program and add costs to deployment.
- Specifically, the updated NOFO eliminates a variety of labor, climate change, network neutrality, stakeholder engagement, and affordability requirements, and would require states to adopt technology-neutral rubrics for weighing different deployment options.
- Many of the changes incentivize the deployment of broadband at the lowest cost, but NTIA should also be careful to implement these changes in a manner that does not force states to wholly reset their processes, adding delays to deployment.

Introduction

In June, the National Telecommunications and Information Administration (NTIA) released and updated Notice of Funding Opportunity (NOFO) for the Broadband Equity, Access and Deployment (BEAD) program, a broadband deployment subsidy created in the Infrastructure Investment and Jobs Act (IIJA). The updated NOFO eliminates or reforms many of the conditions imposed by the Biden Administration that went beyond the program's statutory requirements.

Specifically, the updated NOFO covers three main aspects of the program. First, it removes many of the requirements unrelated to the goals of providing broadband to unserved Americans such as those related to labor, climate change, network neutrality, stakeholder engagement, and affordability. Second, it requires states to adopt a technology-neutral

framework that relies on objective, performance-based metrics when determining which broadband projects to fund for each unserved area. Finally, it largely leaves existing designations for unserved areas but requires states to consider areas served if they have unlicensed fixed-wireless services meeting the technical standards that BEAD requires.

As the NTIA begins to implement these changes and works with states to reform their respective programs, it should be careful not to add unnecessary costs and delays to implementation. More than half of the states had completed the initial subgrantee selection process. Moreover, the long challenge process for unserved locations has largely concluded. Changes to the program would force these states to reconsider previous decisions and could add delays if not implemented efficiently.

The BEAD Program

BEAD is a $42.5-billion program passed as part of the IIJA. Congress intended the BEAD program to address gaps in broadband deployment and ensure that all Americans can access high-speed broadband internet service. Congress required that states prioritize funding to areas that are considered unserved (meaning areas lacking broadband at speeds of 25 Mbps down/3 Mbps up) before funding projects in areas with existing coverage. These unserved areas were tied to Federal Communications Commission (FCC) broadband maps, but states implemented a challenge process to contest determinations made about whether a location has broadband. These priorities and processes are designed to ensure that funding is focused on connecting unserved areas and not overbuilding existing networks.

Congress also set specific performance requirements for projects receiving BEAD support, most notably a bandwidth threshold of 100 Mbps down/20 Mbps up. Theoretically, these requirements ensure that funding goes to building networks that can remain functional as the needs of Americans shift and demand for broadband continues to increase.

Despite the fairly straightforward mandate from Congress, the Biden Administration imposed additional requirements largely unrelated to connecting unserved Americans on states as they developed their programs. Most notably, the NTIA created a preference for fiber to the home (FTTH), stating it was the best technology for unserved areas. It also required that states craft a middle-class affordability plan, coordinate with unions, and impose a variety of network neutrality requirements. Regardless of the relative merits of these policy determinations, they add risk and cost to broadband providers that sought to participate in the program, resulting in a significant walkback of these provisions announced by the NTIA this month.

NOFO Changes and Goals

The updated NOFO refocuses the program on Congress' initial goal of providing the best connectivity at the lowest cost to unserved and underserved Americans. The update has three main facets: removing requirements unrelated to broadband deployment, imposing a technology-neutral rubric, and requiring states to consider as served locations receiving fixed wireless service that meets the technological standards of the program.

The largest portion of the NOFO focuses on eliminating regulatory burdens imposed by the previous administration. First, the NOFO eliminates the non-statutory requirements related to labor, employment, and workforce development, requiring only that providers certify their compliance with federal labor and employment laws. Second, the NOFO eliminates the climate-resilience requirements of the original plan from the Biden Administration, requiring only that providers establish risk-management plans for infrastructure reliability and resilience. Third, it eliminates open access and network neutrality requirements. Fourth, it eliminates a variety of local coordination and stakeholder engagement provisions such as consultation requirements with representatives of various demographic and "identity-based" interest groups, most notably including tribal nations. Fifth, it eliminates requirements that favor non-traditional providers such as municipalities and political subdivisions. Sixth, it eliminates middle-class affordability plan requirements. And finally, it eliminates specific rate-regulation for the low-cost plan requirements in the initial law; participating providers must offer a low-cost plan, but states cannot set the rate that the providers offer.

In addition to removing these regulatory burdens, the NOFO requires states to adopt a technology-neutral plan that allows any service that meets the performance requirements of the IIJA to participate in the program. The previous administration created a preference for projects using end-to-end FTTH, making it difficult for alternative technologies such as fixed wireless or low-earth orbit satellites to fill coverage gaps, even if they met the technological standards and could cover more households at a lower cost. The updates eliminate this preference and instead require states to examine only whether a project would provide service at speeds of at least 100 Mbps download and 20 Mbps per second upload and has latency less than or equal to 100 milliseconds.

Finally, the NOFO would require states to update their coverage maps and allow for unlicensed fixed-wireless providers to challenge existing determinations that an area is uncovered. During the initial implementation phase of BEAD, identifying unserved areas required the most time of any process due to the wait for FCC maps and a lengthy challenge process. This was designed to ensure only those areas truly without coverage would be eligible to receive BEAD support. The updated guidance allows for some additional challenges to occur, and requires states to update their existing maps, but doesn't widely

reopen the challenge process.

Final Considerations for the NTIA and Congress

The changes implemented by the NTIA will likely result in more providers participating in the program and lowering the costs for connecting unserved Americans, but they also necessarily delay the actual deployment of the infrastructure. Almost half the states had finished their provider selection process, and as a result, these changes will reopen bidding and require many states to alter ongoing processes, adding costs and delays.

The NOFO accounts for some delays, and many of the requirements adopted attempt to mitigate delays. For example, with the updated technology-neutrality language and the elimination of requirements that added costs to projects, new providers may be able to participate in the program, and existing bidders could offer a lower price. Rather than redo the entire bidding process, the NOFO only requires that states implement at least one additional "benefit of the bargain" round that would permit all applicants to offer the best and final bid. Similarly, in determining which areas are considered served, the NOFO only requires that unlicensed fixed-wireless providers (which now can be considered as a suitable service if they meet the technical standards) challenge prior to the benefit of the bargain round, rather than relitigate the challenge process entirely.

These policies can help mitigate additional delays to states that have made significant progress on BEAD, but undoubtedly challenges and additional delays will arise as states navigate the updated NOFO. The NTIA and Congress should be careful not to repeat similar mistakes of adding unrelated requirements to the program or imposing rules that create delays for states as they implement the program. The NTIA should also consider adopting additional categorical exemptions currently allowed by the FCC to NEPA review that allow projects to bypass costly environmental review.

Finally, while limiting consultation requirements makes sense, the NTIA may want to ensure that states continue to engage in open dialogue with tribes, as many of these projects will affect tribal lands.

Conclusion

The Biden Administration sought to implement a variety of policy proscriptions on states and providers that were largely unrelated to the primary objective of getting unserved Americans connected to the Internet. With the updated NOFO, NTIA has made several changes to BEAD designed to lower costs and encourage widespread deployment of broadband services. As it implements these changes, it should be careful not to add unnecessary delays caused by the relitigation of every program aspect.