United States Senate
WASHINGTON, DC 20510

August 18, 2022

The Honorable Gina M. Raimondo
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, DC 20230

Dear Secretary Raimondo:

The Infrastructure Investment and Jobs Act (IIJA) is an important example of a bipartisan accomplishment. One of the IIJA's many provisions that will have a significant impact on communities across the country is the $65 billion investment in broadband. This investment will help connect all Americans to high-quality broadband service.

The National Telecommunications and Information Administration's (NTIA) recent Notice of Funding Opportunity (NOFO) for the $42.45 billion Broadband, Equity, Access, and Deployment (BEAD) program accurately reflects key aspects of Congress' direction to deploy these resources effectively. For example, the NOFO directs the prioritization of funds first to unserved areas, and then to underserved areas, just as the law instructs. It also takes into consideration enforceable commitments by providers to expand broadband infrastructure to unserved areas under existing federal programs to avoid duplicative federal spending. Additionally, it asks States to streamline permitting processes and allow cost-effective access to poles, conduits, easements, and rights-of-way, which will also help accelerate broadband deployment.

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. This undermines our shared goal of delivering broadband service to all Americans as soon as possible. In particular, we are seeking changes to the following provisions:

- Rate Regulation: As part of the IIJA, Congress authorized specific initiatives to support broadband affordability. First, we established the Affordable Connectivity Program (ACP) at the FCC, which allows eligible households to apply a $30 monthly benefit to *any* internet service offering. Second, participating providers must offer a low-cost broadband service option for eligible low-income consumers. The bipartisan negotiators were also deliberate to prohibit the NTIA, or any other federal agency, from regulating rates of broadband service. For that reason, the law includes an explicit prohibition of government actions that would otherwise interfere with broadband prices and terms in connection with participation in the BEAD program. The law clearly states: "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." In your recent testimony before Congress on April 27, 2022, you recognized this express prohibition on rate regulation. You also noted that State plans to address affordability may not involve rate regulation.

The NOFO, however, appears to open the door to rate regulation by imposing several requirements not included in the law. The NOFO even suggests a price point of $30 dollars for states to adopt for low-cost options. This appears to be an attempt to pressure Eligible Entities to set rates deemed appropriate by NTIA. Additionally, the NOFO prohibits all data usage-based pricing options, which many existing providers use in conjunction with different tiers of service. This requirement could discourage provider participation by conditioning grants on substantial changes to their current practices. Additionally, the NOFO states that, "each Eligible Entity must include in its Initial and Final Proposals a middle-class affordability plan to ensure that *all* consumers have access to *affordable* high-speed internet." A "middle-class affordability plan" is a new term that does not appear in the law. Asking States to pursue various strategies for achieving this new objective, including by requiring "providers receiving [BEAD] funds to offer low-cost, high-speed plans to all middle-class households using the BEAD-funded network," is another indirect form of rate regulation. Elsewhere, the NOFO requires States to review the affordability of a 1 Gbps symmetric service and 100/20 Mbps service as part of their prioritization for program scoring. That requirement is also not part of the law.

Congress did not invite States to adopt rate regulations that the statute plainly prohibits, nor can NTIA go beyond the statutory affordability initiatives in the law. Unfortunately, the NOFO does not fully conform to this clear limitation and, if NTIA or States move in this direction, it could deter participation in the BEAD program. We therefore urge NTIA to rescind or correct these portions of the NOFO and make clear to States that rate regulation of broadband service is prohibited under this program.

- <u>Technology Neutrality:</u> 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 IIJA states that any provider that can reliably provide 100/20 mbps is qualified to participate. Further, the law prioritizes those providers who can deliver the buildout speeds we require 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 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. Fiber, fixed wireless, and cable providers have all demonstrated an ability to reliably serve customers at the 100/20 mbps required speed, an ability to scale up service over time, and an ability to support deployment of other advanced telecommunication services.

- <u>Special Preferences for Certain Providers</u>: The IIJA 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. Thus, the NOFO should guide States to establish 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. For example, it requires that Final Proposals include a description of efforts undertaken by States to ensure the participation of "non-traditional broadband providers," such as municipalities or political subdivisions, cooperatives, non-profits, Tribal Governments, and utilities. It also requires States to explain awards made to traditional broadband providers when one or more non-traditional provider has submitted a competing proposal to serve an area. The NOFO goes so far as to "strongly encourage" States to waive existing State laws governing public sector "non-traditional broadband providers," even though preempting those State laws is prohibited by the IIJA.

These preferences are not only inconsistent with the IIJA, but also will deter State broadband offices from selecting the provider that is best equipped to deliver broadband to unserved and underserved households. NTIA should remove these preferences from the NOFO and adhere closely to the qualification standards set forth in the law.

- <u>BEAD and Digital Equity Participation</u>: 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 be dependent upon the other. The NOFO, however, characterizes State participation in both programs as "essential" to bridging the digital divide. This 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.

  To provide greater certainty to States and better conform to the law, NTIA should revise the NOFO to clarify that a State's participation in one of these programs will not affect participation in the other, and that only the parameters set forth in the statute will be used to prioritize applications by eligible entities or by participating service providers.

- <u>Workforce Preferences</u>: We agree with the NOFO's requirement that States should ensure that participating service providers are compliant with federal labor and employment laws and should promote the creation of new broadband-related jobs. Many of the specific workforce-related obligations set out in the NOFO, however, go far beyond those objectives. Instead, they erect 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.

  It has been widely reported that expected shortages in skilled technicians and other workers could delay broadband deployment. In January 2021, the eleven largest telecom trade associations wrote a letter to the White House and Congress saying that the industry will need an additional 850,000 man-years of trained fiber technician labor between now and 2025 to keep up with demand. The NOFO— in addition to the Administration's requirements for all projects totaling over $35 million to enter into project labor agreements—risks exacerbating this labor-shortage challenge by imposing new labor-related obligations and preferences that will make it even harder for participating providers to find and employ workers who are not only capable of doing the job but also satisfy these additional extraneous requirements. NTIA should eliminate those obligations and preferences that could have this deleterious effect.

- 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 IIJA includes the separate middle mile grant program to meet these interconnection needs. NTIA should remove this requirement as it has no basis in the law and imposes additional burdens on participating service providers, which will slow deployment and negatively affect participation in the BEAD program.

- Unnecessary Burdens in the NTIA Review Process: 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 typically well beyond the focus or expertise of State broadband offices. We are concerned that 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. We therefore urge NTIA to remove any non-essential bidding processes and research and reporting requirements, and instead focus on rules that prioritize swift review and deployment. At the very least, NTIA should clarify that such conditions and obligations only apply to areas and facilities funded by the program.

There is much to applaud in the NOFO, and we commend you, Assistant Secretary Davidson, and the rest of the Department of Commerce on this monumental work. Nonetheless, we are hopeful that NTIA will expeditiously publish revisions and clarifications to the NOFO to address the above concerns to ensure that the IIJA's implementation will be consistent with the congressional intent, allow deployment as swiftly as possible, and benefit the consumer.

Thank you for your attention to these important matters.

Sincerely,

Susan M. Collins
United States Senator

Rob Portman
United States Senator

Roger Wicker
United States Senator

James E. Risch
United States Senator

Michael D. Crapo
United States Senator

Charles E. Grassley
United States Senator

Thom Tillis
United States Senator

Deb Fischer
United States Senator

Kevin Cramer
United States Senator

Richard Burr
United States Senator

Bill Cassidy, M.D.
United States Senator

Roy Blunt
United States Senator

Mitt Romney
United States Senator