

October 23, 2023

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

Dear Secretary Raimondo:

We, the undersigned advocates for responsible government, write to express our concern with the Biden Administration’s blatant disregard for Congressional intent in its attempts to impose price controls on broadband Internet access service.

These attempts exhibit a pattern of behavior whereby Administration officials say one thing while doing the opposite. In the Infrastructure Investment and Jobs Act (IIJA), Congress spoke its bipartisan will: there shall be no rate regulation of broadband. Indeed, the bill as signed by the president included an amendment expressly prohibiting rate regulation¹. It is alarming that despite the letter and spirit of the law, and multiple statements from Administration officials opposing rate regulation—including statements under oath—that the National Telecommunications and Information Administration (NTIA) continues to impose price-setting measures through the Broadband Equity, Access, and Deployment (BEAD) program.

In questions for the record following his confirmation hearing, NTIA Administrator Alan Davidson assured multiple Senators that he believed the IIJA gave his agency no authority to engage in rate regulation.² He was unequivocal in a response to Senator John Thune (R-SD), “I agree that the IIJA statute does not allow NTIA to engage in rate regulation in the BEAD program. In addition, history has shown us that rate regulation is not the most effective policy for ensuring affordable services.”³

In a recent Senate Commerce Committee hearing, Senator Thune asked you to commit to “not require states to include specific price points for broadband offerings in their BEAD plans.”⁴ You responded, “Yes, we do not require that. I want to be clear. We are not rate regulating, we are not price setting, and we are not requiring states to do that.”⁵ This is consistent with an answer you gave to Senator Thune at a hearing in April of last year, where you said, “As you

¹ S.Amdt.2137 to H.R.3684, The Infrastructure Investment and Jobs Act of 2021 (Pub.L. 117-58; 135 Stat. 429), <https://www.congress.gov/amendment/117th-congress/senate-amendment/2137>. The provision appears at Sec.60102(h)(5)(D)

² See: “Questions for the Record – Minority, Oversight of the National Telecommunications and Information Administration,” *U.S. Senate Committee on Commerce, Science and Transportation*, (Jun. 9, 2022), <https://www.commerce.senate.gov/services/files/EBE01489-2198-4183-A6CC-0EE2E5D7EB7D>

³ Ibid.

⁴ “Question of Senator Thune, CHIPS and Science Implementation Act,” *U.S. Senate Committee on Commerce, Science and Transportation*, (Oct. 4, 2023), <https://www.commerce.senate.gov/2023/10/chips-and-science-implementation-and-oversight> at 1:33:56

⁵ Ibid at 1:34:06

know, the statute expressly prohibits rate regulation. ... I was heavily involved in negotiating that so I understand the limits and we will comply with the statute.”⁶

We appreciate these public commitments from you and Administrator Davidson, but actions speak louder than words. The first sign of a disconnect between Congress’s written word and NTIA’s implementation of the law was the Notice of Funding Opportunity (NOFO) that the agency released last year. The NOFO required states to include a “middle class affordability plan,” even though Congress included no such requirement in the statute.⁷ While Administrator Davidson has, on multiple occasions, stressed that states will have “flexibility” in implementing BEAD plans pursuant to the NOFO⁸, in practice, that has not been the case. Last month, in a Q&A session on Virginia’s BEAD plan, Chandler Vaughn, Broadband Policy Analyst at Virginia Department of Housing and Community Development, indicated that the state sought the flexibility *not* to rate regulate gigabit broadband plans. However, NTIA communicated that the state *must* do so. He said, “We were pointed back to the NOFO and politely told that that was the way we are to score affordability criteria ... how close you are to a hundred dollars on that price point.”⁹

In other words, states are required to rate regulate—and NTIA will make sure they do so.

This example from Virginia is just one exhibit in a disturbing trend of the Administration flouting Congress’s will on rate regulation. NTIA’s recent *ex parte* submission to the Federal Communications Commission (FCC)—urging the Commission to adopt a radical “disparate impact” standard on digital discrimination that would give the FCC authority to take enforcement actions against broadband providers based on price differences¹⁰—is further evidence that the Administration is pursuing rate regulation despite assurances otherwise.

The FCC itself is engaging in a similar shell game. In announcing the agency’s attempt to revive so-called “net neutrality” regulation, Chairwoman Jessica Rosenworcel said, “No how, no way” in response to allegations that the proceeding is a stalking horse for rate regulation.¹¹ Yet, the

⁶ “Department of Commerce Fiscal Year 2023 Budget Priorities,” *U.S. Senate Committee on Commerce*, (Apr. 27, 2022), <https://www.commerce.senate.gov/2022/4/commerce-committee-announces-hearing-on-commerce-dept-budget-priorities-with-sec-raimondo>

⁷ “Notice of Funding Opportunity – Broadband Equity, Access, and Deployment Program,” *National Telecommunications and Information Administration*, (May, 2022), Available at: <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf>

⁸ “Oversight and Reauthorization of the National Telecommunications and Information Administration,” *U.S. House Committee on Energy and Commerce*, (May, 23, 2023), <https://www.youtube.com/watch?v=vn0QTanaUC0> at 56:15, 108:58 and 2:01:35

⁹ “Question & Answers, BEAD Initial Proposal Volume 2 Input Session,” *Virginia Department of Housing and Community Development*, (Sept. 5, 2023), available at: <https://youtu.be/Y1wzTOLrQmU?t=2679>. Virginia subsequently revised its plan to chart its own course on middle class affordability.

¹⁰ “Ex Parte Comments of the National Telecommunications and Information Administration,” *Federal Communications Commission*, (Oct. 6, 2023), <https://www.fcc.gov/ecfs/document/100674533858/1>

¹¹ Remarks of Chairwoman Rosenworcel at the National Press Club, *Federal Communications Commission*, (Sept. 26, 2023), https://www.youtube.com/watch?v=E_kVxQ5DCA

plain text of the FCC’s Notice of Proposed Rulemaking proposes rate regulation for broadband in paragraph 104.¹²

Closing the digital divide is a challenge worthy of pursuit, and American taxpayers have committed unprecedented resources to achieving this end. With over \$100 billion committed to broadband deployment through various programs, it would be scandalous and unconscionable for the effort to fail. Yet, with all the challenges facing the industry, from workforce shortages to inflation, the Administration is imposing extra-statutory conditions and regulations that will deter participation and raise costs even further.

NTIA is a subsidiary of the Department of Commerce. It is your duty to exact necessary oversight over the agency to ensure that its implementation of programs is faithful not only to the letter of the law, but to your sworn testimony and that of Administrator Davidson. We urge you to take the necessary steps to undo rate regulation, including by making clear to states they are prohibited from rate regulating and rejecting any BEAD plans that include price setting of any kind. We appreciate your consideration.

Sincerely,

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¹² “Safeguarding and Securing the Open Internet; WC Docket No. 23-320,” *Federal Communications Commission* (Sept. 28, 2023), <https://www.fcc.gov/document/proposing-reestablished-open-internet-protection> at para. 104

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