



March 29, 2024

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

RE: Management Alert from the U.S. Department of Commerce's Office of Inspector General; Final Memorandum No. OIG-24-015-M, Dated Feb. 29, 2024

Dear Secretary Raimondo:

On February 29, 2024, the Office of Inspector General (“OIG”) for the U.S. Department of Commerce delivered the above-referenced management alert to Alan Davidson, Assistant Secretary of Commerce for Communications and Administrator of the National Telecommunications and Information Administration (“NTIA”).¹ The undersigned associations respectfully request that the Department disregard this report because it ventures far afield of any process or oversight concerns within the province of inspectors general and instead merely echoes the preferences of selected industry segments on policy determinations that are squarely within the province of NTIA’s decision-making.

Background on the Development of Program Rules

To understand why the OIG report is atypical as a matter of oversight and is instead more reflective of the policy positions taken by a small group of individual stakeholders, it is necessary to describe the process by which the relevant program rules were developed. As context, our associations are among the many stakeholders that engaged with NTIA in the process of implementing the Broadband Equity, Access, and Deployment (“BEAD”) program, and with Congress and the Administration prior to that in the development and ultimate enactment of the Infrastructure Investment and Jobs Act (“IIJA”). In passing the IIJA, Congress defined a “priority broadband project” as one designed to: (1) promote networks that meet certain “speed, latency, reliability, consistency in quality of service, and related criteria as the Assistant Secretary shall determine,” and (2) “ensure that the network built by the project can easily scale speeds over time . . . to meet the evolving connectivity needs of households and business” and “support the deployment of 5G, successor wireless technologies, and other advanced services.”²

¹ Memorandum for Alan Davidson, Assistant Secretary and Administrator, NTIA, from Arthur J. Scott, Jr., Asst. Inspector General for Audit and Evaluation, OIG, U.S. Dept. of Commerce, Management Alert: *Challenges Industry Stakeholders Face with Broadband Deployment*, Final Memorandum OIG-24-015-M (Feb. 29, 2024) (“OIG Report”).

² IIJA, Pub. Law 117-58 (2021), at § 60102(a)(1)(I).

In turn, after receiving input from more than 550 stakeholders, NTIA released a Notice of Funding Opportunity (“NOFO”) that prioritized projects “that will rely entirely on fiber-optic technology to each end-user premises,” finding this to be the only network technology capable of satisfying the several elements of the IIJA’s definition.³ To be clear, this prioritization does *not* mean that only fiber technology will receive BEAD funds, but rather that for projects up to a certain cost (the Extremely High-Cost Per-Location Threshold or “EHCPLT”), fiber will be preferred over alternative technologies. NTIA provided States and Territories with flexibility to set their own EHCPLT levels, subject to NTIA review, but the agency encouraged these authorities “to set the [EHCPLT] as high as possible” to maximize “use of the best available technology.”⁴

As a separate matter in the NOFO, NTIA crafted rules identifying which locations would be eligible for broadband funding because they are “unserved.” Here again, the starting point was the IIJA, which defined “reliable broadband service” as “broadband service that meets performance criteria for service availability, adaptability to changing end-user requirements, length of serviceable life, or other criteria, other than upload and download speeds, as determined by the Assistant Secretary in coordination with the Commission.”⁵ In turn, NTIA found that this statutory term should be defined to mean broadband service that is accessible to a location via a variety of technologies, including fiber, cable modems, copper, and terrestrial fixed wireless technologies using either entirely licensed or a hybrid of licensed and unlicensed spectrum.⁶

The Content of the OIG Report – and its Shortcomings

These two policy concerns – NTIA’s approach to setting an EHCPLT and its definition of reliable broadband service – are among the “proposed actions for change” identified in the OIG Report. Specifically, the report indicates that unnamed “industry stakeholders” expressed concern to OIG that “the EHCPLT requirement narrows opportunities for non-fiber applicants because the threshold could be set so high that alternative technologies to fiber are never an option.” The report indicates that these same “industry stakeholders” informed OIG “that consequently, the EHCPLT provision discourages other technology providers, limits the pool of applicants, and decreases competition.” The report concludes its “analysis” of this provision by citing yet again the input of these “industry stakeholders” and recommending that “NTIA should consider leveling the playing field for fixed wireless and unlicensed spectrum by modifying the BEAD NOFO to allow states and territories a choice of technology that best fits their needs.”⁷ Similarly, highlighting the input of apparently just one “industry stakeholder,” the OIG Report recommends that NTIA “ensure limited overbuilding in locations with reliable broadband services and locations using unlicensed spectrum or satellite broadband service.”⁸

³ BEAD NOFO, at 42 and n. 9.

⁴ *Id.* at 13.

⁵ IIJA, at § 60102(a)(2)(L).

⁶ BEAD NOFO, at 15.

⁷ OIG Report, at 3-4.

⁸ *Id.* at 4.

There are at least two significant concerns with respect to these conclusions in the OIG Report. First, to the extent that the OIG Report purports to capture industry perspectives on the BEAD program, it falls far short in presenting a comprehensive depiction of such viewpoints. While NTIA received input from more than 550 stakeholders for the NOFO, the OIG appears to have consulted with a mere fraction of those parties representing a narrow set of interests. It is not clear which “industry stakeholders” constituted the universe of entities that secured an audience with the OIG, but it is odd that the input of a number of the most active stakeholders (such as the undersigned) were excluded from that consultation – and it is problematic, to say the least, that the recommended changes in the OIG report largely echo the policy positions of this selected subset of stakeholders without any acknowledgement whatsoever of contrary positions held by *other* “industry stakeholders” on these policy decisions as reflected in the voluminous record before NTIA.

Second, it is problematic that the OIG Report focuses on policy matters and raises no concern on matters of typical agency oversight, such as whether NTIA failed to follow a required process or failed to seek sufficient public input. At its core, the report second-guesses *policy* decisions that the agency made and that a selected subset of stakeholders apparently still does not like. NTIA considered these same arguments and reached reasoned conclusions on how to implement the IIJA and advance its goals based upon a substantial record of public input. Presumably the “industry stakeholders” that were the subject of OIG’s outreach participated in these comment processes to express their views, and they presumably have continued to make their views on these matters known in all possible venues and jurisdictions, including before the States and Territories tasked with implementing the BEAD program under NTIA’s oversight.⁹ In this regard, the OIG Report identifies no critical flaws in agency process and instead reads more like an amplification of selected policy perspectives and an effective “request for reconsideration” on behalf of certain stakeholders.

The undersigned associations appreciate the value of an independent OIG in ensuring that federal agencies fulfill their missions through proper processes and effective management of programs. In this instance, however, the OIG Report ventures far afield of fundamental oversight obligations and wades into policy debates based upon an inadequate understanding and assessment of the complete record before the agency. For these reasons, the undersigned associations disagree with the conclusions of the OIG Report and respectfully request that the Department disregard it as work continues to implement the BEAD program consistent with the directives of the IIJA.

⁹ It is peculiar that one of the OIG recommendations is for NTIA to modify the BEAD NOFO “to allow states and territories a choice of technology that best meets their needs.” *Id.* The BEAD NOFO does not preclude States and Territories from technology choices; to the contrary, the BEAD NOFO specifically and expressly allows each State and Territory to set its own EHCPLT, with the mere admonition that this should be set at a level to maximize to the extent possible priority broadband projects as called for by Congress. Indeed, the undersigned associations are well aware of efforts underway in many States and Territories by certain “industry stakeholders” to lobby these jurisdictions to set lower EHCPLT levels so that fewer fiber projects will be prioritized. Moreover, each State and Territory is permitted to define its own minimum project area, which can further mitigate the impact of the EHCPLT by allowing parties to serve smaller geographies at more economical cost.

The Hon. Gina Raimondo

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Sincerely,



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