

[INSERT DATE], 2023

Alan Davidson
Assistant Secretary of Commerce for Communications and Information
National Telecommunications and Information Administration
United States Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230

**Re: Waiver request of “prior enforceable commitments” rule under the NTIA’s
Broadband Equity, Access, and Deployment (BEAD) program**

Assistant Secretary Davidson:

As the Director of the Alabama Department of Economic and Community Affairs (ADECA), the Authorized Organization Representative for the State of Alabama and the agency responsible for the successful design and implementation of Alabama’s BEAD program, I am writing to request a partial waiver of the “prior enforceable commitments” rule under the BEAD program.

This rule requires Eligible Entities to exclude from their BEAD-eligible funding locations “any location that is already subject to an enforceable federal, state, or local commitment to deploy qualifying broadband” as of the date that the Eligible Entity’s challenge process is concluded.¹ I am urging you to find that the circumstances surrounding this request warrant use of the discretion explicitly granted to the Assistant Secretary in the BEAD Notice of Funding Opportunity to waive this rule where a state can demonstrate that a waiver is necessary to achieve the goals of the BEAD program.²

As discussed below, a waiver of this requirement narrowly applied to locations subject to enforceable commitments through the Rural Digital Opportunity Fund (RDOF) of the Federal Communications Commission (FCC) is necessary to achieve the goals of the BEAD program by

¹ National Telecommunications and Information Administration, U.S. Department of Commerce, Notice of Funding Opportunity, Broadband Equity, Access, and Deployment Program, 36.

² *See id.* at 37 (stating that the Assistant Secretary “may waive such treatment of locations or areas with prior enforceable commitments at the request of the Eligible Entity in cases where the Eligible Entity can demonstrate to the satisfaction of the Assistant Secretary that such treatment of such locations or areas is necessary to achieve the goals of the program”).

facilitating the ground-breaking work of Alabama's extensive state broadband planning, mapping, and funding programs to achieve universal broadband service in the state.

The FCC has authorized RDOF funding for 149,381 locations to be served by sixteen different internet service providers in Alabama. As part of its planning efforts, ADECA has determined that eliminating RDOF locations from BEAD-eligible areas may place these unserved communities, many of which are rural or predominantly low-income, at risk of being left further behind. ADECA believes that the uncertainty regarding the design, status, and progress of these RDOF projects warrants a waiver to allow these locations to be considered as unserved and, therefore, eligible for BEAD funding.

The RDOF program framework puts funded projects on a significantly longer timeline than BEAD funding milestones. RDOF grantees have at least six, and in some cases up to eight years, to complete their project builds while BEAD funding must be distributed, and projects completed, generally within four years from receipt of a subgrant award.³

In Alabama, roughly 82% of RDOF identified locations may not be served until the end of 2028, leaving these currently unserved communities waiting for meaningful broadband access for almost eight years after bidding awards were announced. This timeline also means that it may be well outside the BEAD funding deadlines before ADECA discovers an area where an RDOF grant recipient defaults or fails to fully satisfy its deployment obligations. A waiver will, in part, ensure that communities experiencing a provider default can be considered for alternative sources of broadband funding that will support disadvantaged and vulnerable communities in their work to improve and expand broadband access.

It has also been challenging to identify and confirm the locations that are subject to RDOF enforceable commitments. The FCC's framework creates a gauntlet of milestones that have resulted in a shifting landscape of enforceable commitments, including voluntary provider defaults of previously-committed locations and FCC-directed revisions to the lists of awarded and eligible locations.

Even once the FCC has completed its final authorization process, the number of locations included in an authorized funding area may change due to the ongoing risk of post-authorization provider defaults and the FCC's planned reassessment of eligible areas at the six-year RDOF program milestone. Without a waiver, communities with commitments for RDOF broadband funding, and eliminated from BEAD funding consideration as a result, may suddenly find themselves with no possibility of broadband funding or improved broadband access at any time in the near future.

To further exacerbate the harm to these communities, the FCC does not have a mechanism to reassign or re-bid these areas that are subject to default or revision, providing no recourse for future program funding and possibly creating fragmented and isolated pockets of unserved

³ *Id.* at 18.

households and businesses that will not attract sufficient private investment for future broadband improvements.

Finally, it is important to acknowledge that the RDOF program rules do not provide sufficient enforcement mechanisms and penalties to mitigate the risks to unserved communities from provider defaults, lengthy timelines, and revised funding areas.

Most RDOF recipients will not begin to submit annual progress reports showing substantive progress until next March, do not have an enforceable milestone commitment until December of 2025, and will not be subject to FCC risk mitigation and enforcement actions until after March of 2026. Even if a recipient misses a report deadline or milestone commitment, the verification and enforcement actions will generally only result in increased oversight, more detailed quarterly reporting, and/or temporary withholding of some payments (which will then be fully released when the provider catches up on its obligations). The FCC also has the discretion to waive many of the enforcement penalties or to extend compliance and project completion deadlines, thus creating additional uncertainty and delay.

Therefore, it appears that poor performance or non-compliance will rarely result in significant penalties, such as defaults or release of the areas for other funding, and will likely provide little incentive to avoid defaults on current enforceable commitments leaving the unserved community with little recourse to receive its completed project.

To mitigate the risks to these vulnerable and unserved communities created by the RDOF program framework, I urge you to find that the requested waiver is in the public interest and necessary to ensure that ADECA can reach all unserved areas in Alabama with reliable, qualifying broadband service. This waiver is not intended to prevent an RDOF recipient from completing its program obligations and enforceable commitments. Instead, this waiver will allow ADECA to continue its outreach to Alabama internet service providers and coordinate these enforceable commitments and program design elements to ensure effective and efficient federal funding opportunities and support for universal broadband access in Alabama.

Thank you for your consideration of this waiver request, I welcome the opportunity to discuss this important issue further.

Sincerely,

Kenneth W. Boswell, Director
Alabama Department of Economic and Community Affairs