



LUMMI INDIAN BUSINESS COUNCIL

2665 KWINA ROAD • BELLINGHAM, WASHINGTON 98226 • (360) 312-2000

Assistant Secretary Evelyn Remaley
National Telecommunications & Information Administration
United States Department of Commerce
1401 Constitution Ave., N.W.
Washington, D.C. 20230
broadbandusa@ntia.gov

RE: Lummi Indian Business Council Comments on Tribal Broadband Connectivity Program

Dear Assistant Secretary Remaley:

The Lummi Indian Business Council (Lummi) offers the following comments regarding the administration and implementation of the Tribal Broadband Connectivity Program (“TBCP” or the “Program”) by the National Telecommunications & Information Administration (“NTIA”) as set forth in the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (“Act”).

I. OVERVIEW

Tribal Nations have been disproportionately impacted by the Coronavirus pandemic. While data on these impacts continues to emerge throughout the course of the ongoing pandemic, it is clear that Tribal Nations have suffered disproportionately on numerous fronts, including: impacts to the health of members; the economies of Tribal governments, individuals, and businesses; and the education of Tribal members, specifically children. In all cases, a lack of adequate digital infrastructure and resources has played a major role in exacerbating these impacts.

Many Tribal communities are located in rural areas that lack access to adequate broadband connectivity. In most cases, existing broadband infrastructure and capacity is inadequate to support activities such as distance learning, remote work, or telehealth. As a result, Tribal members suffer the impacts of a digital divide. The TBCP provides a much-needed opportunity for Tribes to access the resources required to repair this digital divide by developing broadband infrastructure capable of reaching Tribal membership and providing adequate speeds to support essential activities.

Section 905 of the Act includes: definitions related to eligibility of recipient entities; equitability of awards; impacts of projects to unserved areas; requirements related to Tribal lands; eligible

uses of funds; and other programmatic criteria. Lummi Nation recognizes that although Tribal governments and entities share many factors in common, each Tribal government and entity also possesses unique cultures, histories, circumstances, factors, and perspectives that should be considered by NTIA in the development and implementation of the Program. As such, Lummi urges NTIA to adopt a flexible approach to administering the TBCP so as to facilitate the highest and best outcomes for Tribes. Lummi also provides the following comments regarding the issues identified by NTIA through the Tribal consultation process and other matters.

II. LAWFUL INTERPRETATION

Sec. 905 (a) (7) defines “eligible service area” as “a census block in which broadband service is not available” and continuing to reference household requirements and FCC maps, including those maps developed in conjunction with the Rural Development Opportunity Fund (“RDOF”).

Sec. 905 (b) (1) appropriates funding in the amount of \$1,000,000,000 “for grants under subsection (c).” Sec. 905 (c), the “Tribal Broadband Connectivity Program” does not include in any subsection or subpart any reference to “eligible service area” or any eligibility criteria, requirement, or any other provision that makes reference to or includes a dependency upon “eligible service area.” The criteria set forth in Sec. 905 (c) only require that funds be used “to expand access to and adoption of broadband service on Tribal land; or remote learning, telework, or telehealth resources during the COVID-19 pandemic” (Sec. 905 (c) (1)) and be used for eligible uses identified under Sec. 905. (c) (5) including “broadband infrastructure deployment,” “affordable broadband programs,” “distance learning,” “telehealth,” “digital inclusion efforts,” and “broadband adoption activities.”

The definition of “eligible service area” set forth in Sec. 905 (a) (7) is only utilized in three (3) instances throughout the Act outside of its definition clause. The first instance occurs in Sec. 905 (a) (4) where “eligible service area” is incorporated in the definition of “covered broadband project.” The term “covered broadband project” is only utilized in eight (8) instances throughout the Act outside of its definition clause. Both the second and third instances of use of “eligible service area” and all instances of “covered broadband project” are found solely within subsections of Sec. 905 (d). Sec. 905 (d) sets forth the “Broadband Infrastructure Program” that is funded in the amount of \$300,000,000 by Sec. 905 (b) (2).

It is clearly apparent from the plain language of the Act that the intent of Congress was not to limit funding under Sec. 905 (b) (1) and Sec. 905 (c), the Tribal Broadband Connectivity Program funding, in any way with regard to the terms “eligible service area” and “covered broadband project.” These criteria plainly apply solely to funding under Sec. 905 (b) (2) and Sec. 905 (d), the Broadband Infrastructure Program. Lummi strongly urges NTIA to adopt a lawful interpretation of the Act that aligns with the plainly spoken intent of Congress.

In order to ensure that such a lawful interpretation of the Act is undertaken by NTIA, Lummi further recommends that NTIA:

1. Immediately, by no later than February 12, 2021, issue a public statement to Tribes identifying that NTIA:
 - a. Will not utilize the “eligible service area” or “covered broadband project” criteria in any way in relation to the TBCP funds or TBCP projects; and
 - b. Will not utilize any of the maps referenced in Sec. 905 (a) (7) (A), including the RDOF maps or any maps that establish service levels or Federal funding on the basis of any census blocks or areas in any way in relation to the TBCP funds or TBCP projects; and
2. Ensure that the Program guidance contained within the Notice of Funding Opportunity (“NOFO”) to be issued by NTIA with respect to the TBCP clearly aligns with such a lawful interpretation of the Act.
3. Advocate on behalf of Tribes to the FCC and other relevant Federal agencies and Congressional parties for RDOF maps and other similar census data to be “shelved” with respect to Tribes until 2024, to allow Tribes a window of opportunity to access and utilize the TBCP funds as intended by Congress.
4. Advocate on behalf of Tribes to the FCC, States, and Congressional parties for the immediate reversal of all ETC census designations on Tribal lands and free conveyance of all such rights to the respective Tribes unless and until such rights are transferred or surrendered by a resolution of the governing body of the Tribe.

III. ELIGIBILITY

a. ELIGIBLE PROJECTS

NTIA seeks input to “ensure that the priorities for tribal nations are represented,” in the implementation of the Program. NTIA further notes that this input is essential considering the “broad eligibility” outlined in the Program. Lummi applauds NTIA’s efforts and goals for the Program and the transparency and good-will it has exhibited thus far (especially considering the taxingly short timelines NTIA has faced). Further, Lummi agrees that certain aspects of the Program are broadly applicable. That said, Lummi submits that both the clear language of the Act and its inherent structure note the legislative intent for the Program to be principally utilized for “broadband infrastructure deployment.”

Sec. 905(c)(5), which describes the “eligible uses” for the Program, begins by stating that “[a]n eligible entity may use grant funds made available under this subsection for – (A) broadband infrastructure deployment, including *support for the establishment of carrier-neutral submarine cable landing stations*[,]” (emphasis added). This “eligible use” differs significantly from the

remaining five, both in regard to specificity and tangibility. Further, the development of requisite broadband infrastructure necessarily supports the remaining listed eligible uses (“(B) affordable broadband programs [...]; (C) distance learning; (D) telehealth; (E) digital inclusion efforts; and (F) broadband adoption activities.”).

Language and requirements specific to broadband infrastructure deployment appear throughout the Act. For example, Sec. 905(c)(8) stipulates that an eligible entity awarded grant funds for “new construction of broadband infrastructure, [...] shall prioritize projects that deploy broadband infrastructure to unserved households.” Further, understanding the unique nature of infrastructure development the Act states that “[t]he Assistant Secretary may extend the period under clause (i) for an eligible entity that proposes to use the grant funds for construction of broadband infrastructure[,]” as long as certain requirements are met.

In addition to the evident language and stipulations specifically concerning broadband infrastructure deployment, the “establishment of carrier-neutral submarine cable landing stations” is the only explicit example of an eligible use project provided. The Act’s focus on cable landing stations is understandable given the central role they play in spurring all facets of broadband connectivity. Over 90% of all transmitted internet data travels through some amalgamation of the 380 submarine cables that currently crisscross the globe. These cables, which can be thousands of miles long, transmit extraordinary amounts of data at incredible speeds, some in excess of 250 terabits per second (this is equivalent to transferring three times the data in the entire catalogue of the Library of Congress per second). Both structurally and in practice, submarine cables serve as the foundation and starting point of all internet services, and they must land at specialized cable landing stations in order provided data capacity for a nation’s networks.

Establishing submarine cable landing stations on Tribal lands is the first, and an essential, step in ensuring that Tribes have access to reliable and affordable broadband connectivity. Not only do they serve to provide fundamental broadband infrastructure, but they are also the only proven means available to connect remote native populations. For example, Tribes on the Pacific coast, the Atlantic coast, Alaskan Native Communities, and Native Hawaiians, can be provided internet services by tapping into existing cables off their shores so long as they have the requisite landing facilities. Further, as new cables are laid, these facilities can serve to connect Tribal communities directly to one another, with landing stations on the continental US linking with Alaska Native and Native Hawaiian communities.

Tribally owned/operated submarine cable landing stations also have significant ancillary benefits. Cable landing stations not only provide revenue in themselves, but they also drive substantial economic growth in surrounding areas as they lead to the development of nearby data centers and other network driven facilities. Also, cable landing stations provide outsized impact,

providing broadband connectivity and improved broadband performance to considerable geographic areas and the overall National network. Relatedly, developing landing stations on tribally owned Federal trust land provides greater security for the broader US network, the significance of which has only increased as the US Military and Federal Government continue to focus on the national security aspects of submarine cables. Finally, tribally owned submarine cable landing stations empower Native peoples to provide internet services for themselves and other unserved populations. The COVID-19 pandemic has shed a spotlight on the fundamental need for reliable and affordable broadband internet in virtually all aspects of life, and the digital divide faced by many minority groups has never been more apparent. Tribally owned/operated submarine cable landing stations allow Tribes to transition from customers to providers and grants them the opportunity to provide internet services not only to their members, but also to unserved Native and non-Native populations on a significant and economically efficient scale.

The text and drafting of the Act demonstrate Congress' intent that the Program address the lack of broadband infrastructure which serves as the core cause of the digital divide facing Indian Country and many other minority groups. As such, Lummi implores NTIA to strongly consider Congress' intent to support broadband infrastructure deployment when implementing the Program. With the development of needed infrastructure, specifically carrier-neutral submarine cable landing stations, Tribes will finally have the ability to control their own data security and access going forward, and to ensure secure broadband access is provided to countless unserved households.

Specifically, Lummi recommends that:

1. NTIA consider the development of requisite program guidance specific to "broadband infrastructure deployment," and the establishment of carrier-neutral submarine cable landing stations.
2. NTIA interpret the definition of "Tribal Land" as provided in Sec. 905(a)(13) broadly, so as to include all lands necessarily effected by an "eligible use" project. This should not only include effected Tribal Lands held by the applicant Tribe, but also all other Tribal and non-Tribal lands and unserved households inherently impacted by an "eligible use" project.
3. NTIA consider the potential that an eligible use project may contribute to national or inter-state "qualifying broadband service" supplied to "unserved households," and should not arbitrarily limit the definitions or applications of these terms to geographic boundaries identified solely on the basis of the location of Tribal Land, the area of a project construction site, or any geographic boundary without regard to the total geographic scope of the resulting broadband network.

4. NTIA consider the overall bandwidth capacity of any broadband service in the determination of the total number of “unserved households” that may be supplied with “qualifying” service by the broadband network.
5. NTIA consider, in relation to any potential competitive methodologies related to this section, the following factors:
 - a. The presence of existing or planned submarine cables;
 - b. Economic demand of the submarine cable industry with respect to the proposed project;
 - c. The ability of the applicant entity to expeditiously complete the proposed project within timelines corresponding with known industry demand and Program requirements;
 - d. The level of technical expertise possessed or retained by the applicant entity with respect to the complexity and scope of the proposed project and the technical requirements of the industry; and
 - e. The capacity of the proposed project to generate sufficient continuing revenue to render the project sustainable in consideration of projected ongoing operations and maintenance costs.
6. NTIA should consider the potential for coordination of efforts, facilitation of partnerships, or other advocacy on behalf of recipient Tribal entities in relation to other public or private entities, including Federal agencies, the US military, States, counties, municipalities, and private industry entities to whatever extent possible and appropriate in order to ensure that opportunities for mutual benefit of the partner entities are realized and potential barriers are avoided.

b. ELIGIBLE ENTITIES AND APPLICATION REQUIREMENTS

NTIA has requested that Tribes provide input regarding the eligible entities outlined in the Act and relevant application procedures. In response, Lummi recommends that NTIA adhere to the definition of “eligible entity” provided in the Act. As to the application process, Lummi suggests that the Act’s requirement that “an eligible entity [...] may submit only 1 application,” as set forth in forth in Sec. 905(e)(2)(C), be strictly enforced. Further, NTIA should require that each application be accompanied by a resolution or other formal authorization of the respective governing body of the related “Tribal Government,” as defined by Sec. 905(a)(12). Finally, applications should be limited to a single application per Tribal Government, irrespective of the type of entities (e.g., Tribal Government, Tribal College or University, Department of Hawaiian Homelands, Tribal organization, or Native Corporation) that may serve as the recipient of funds. Such an approach will necessarily “ensure that the priorities of tribal nations are represented.”

In cases in which applicants are joined into a consortium, partnership, joint venture, or other group, Lummi recommends that NTIA differentiate from “primary” applicants and “supporting”

parties. Entities that receive primary or significant ancillary benefits, are responsible for performance of project deliverables in accordance with an application, have control of funds, or are joined with the primary applicant through contract, agreement, or other business arrangements should be required to supply a resolution as identified above, which certifies the intent of the participant Tribe to act as a primary applicant, and should be henceforth treated collectively as a single applicant and barred from additional individual applications. However, this should not preclude Tribes not meeting the above criteria from supplying letters of support to primary applicants, and such letters of support should not preclude the issuing Tribe from submission of an individual application.

IV. EQUITABLE DISTRIBUTION

NTIA has requested that Tribes provide input regarding the “best method for achieving an equitable distribution.” Lummi recognizes the unique and important needs of Tribal Nations and recommends that NTIA consider the following points in the determination of an equitable distribution methodology, especially as it relates to the total number of unserved households which will benefit from a given project.

As discussed, fundamentally, the Program seeks to expand broadband connectivity to unserved households on Tribal Lands to as far-reaching, efficient, and sustainable an extent as possible. While a billion dollars represents a significant investment, it is not sufficient to address all aspects of the digital divide facing Indian Country and must therefore be utilized to develop infrastructure and other projects that will efficiently and effectively provide broadband services at scale. As noted, the plain language of the Act states that “an eligible entity may use grant funds [...] for (A) broadband infrastructure deployment, including support for the establishment of carrier-neutral submarine cable landing stations.” This and other specific language prevalent throughout the Act demonstrate that it is intended to facilitate projects of this type. But such projects necessarily differ from some of the other “eligible uses” identified in the Act, both in regard to scale and scope of benefit. Whereas funding for local projects that benefit a single Tribe can have an impact for that Tribe’s members, development of essential broadband infrastructure can provide broadband access to substantial numbers of Tribal and non-Tribal unserved households.

Given the inherent nature of and dire need for Tribal broadband infrastructure development, the Act’s commitment to facilitate such development, and the significant benefit infrastructure development will provide to numerous Tribes and unserved households, Lummi urges NTIA to consider the unique character of these projects when implementing the Act. Relatedly, equitable distribution determinations related to infrastructure development should primarily be driven by the overall effects of the proposed project and related factors. For example, where the population of Tribal members may be a particularly relevant factor in accomplishing an equitable

distribution with respect to Sec. 905(c)(5)(C) – Distance Learning or Sec. 905(c)(5)(D) – Telehealth, total households served will be a more relevant factor with respect to Sec. 905(c)(5)(A) – Broadband Infrastructure Deployment. Finally, Lummi notes that, overall, extremely limited funding has been allocated specifically for development of Tribal broadband infrastructure despite its need, whereas additional Federal and State funding is available to support certain other “eligible uses” discussed in the Act.

In consideration of the above, Lummi recommends that NTIA:

1. Apportion no less than fifty percent (50%) of the available Program funds to those eligible uses identified under Sec. 905(c)(5)(A) – Broadband Infrastructure Deployment;
2. Adopt a competitive process for applications seeking funding for eligible uses identified under Sec. 905(c)(5)(A);
3. Primarily provide funding for eligible uses identified under Sec. 905(c)(5)(A) through the adopted competitive process (as opposed to broad formulaic or standardized distributions); and
4. Evaluate such competitive applications in a manner that takes into consideration the total positive impact of the proposed project to the applicant Tribe’s unserved households, other Tribal unserved households that will benefit, and non-Tribal unserved households that will be served (as well as additional factors provided in prior sections).

For any portion of funds that are distributed on the basis of a formula methodology, Lummi recommends that NTIA accept Tribal certified enrollment and membership data, and also consider other available data relevant to other eligible uses, including LIHEAP data (Sec. 905 (c) (5) (B)), data related to school-aged children and members enrolled in remote education programs (Sec. 905 (c) (5) (C)), Indian Health Service formula funding (Sec. 905 (c) (5) (D)), and Tribal workforce telework needs (Sec. 905 (c) (1) (b) and (c) (5) (F)), among other considerations.

V. UNSERVED AREAS

a. TRIBAL LAND

As discussed, Sec. 905(c)(1) states that Program funds shall be utilized “to expand access to [...] broadband service on Tribal land.” Lummi recommends that NTIA not interpret this section in a limiting sense. While expansion of access to broadband service on Tribal Land should qualify project eligibility, it should not limit project scope.

Many Tribes are geographically separated from the broadband infrastructure necessary to deploy adequate broadband on Tribal lands, at times by large distances or irregular terrain. Development

of infrastructure to bridge such geographic gaps should be considered an allowable use of funds, even if the required infrastructure is geographically contiguous to or separated from Tribal lands, but nevertheless has the effect of expanding access to broadband service on Tribal Land.

Additionally, many Tribes recognize that a significant proportion of enrolled Tribal members may reside within areas contiguous to Tribal Land. While the Act does allow the Assistant Secretary to designate lands that are “near, adjacent, or contiguous to reservations” as Tribal Land, it bases such determination solely on the “financial assistance and social service programs[...] provided to Indians [in those areas] because of their status as Indians.” An Act that is designed to facilitate the broad expansion of internet services to unserved households should not be limited to these unreliable statistics, and Tribes should be able to exercise their sovereignty and self-determination to self-certify the extent to which a proposed project serves Tribal Land. Further, development of infrastructure that serves to expand access to broadband both on Tribal Land and in contiguous areas where a meaningful proportion of enrolled Tribal members reside should be considered a permissible use of funds.

b. UNSERVED HOUSEHOLDS

Sec. 905(c)(8) states that “an eligible entity shall prioritize projects that deploy broadband infrastructure to unserved households.” The term “unserved” is defined by the Act as a “household [that] lacks access to qualifying broadband service.” While “qualifying broadband service” is defined by the Act, the phrase “lacks access to” is not. Lummi urges NTIA to consider several factors when determining what “lacks access to” entails under the Act, including overall functional network capacity and affordability of service. For example, as it relates to network capacity, a household that technically has access to broadband internet is still unserved if the existing network does not have the requisite bandwidth to add customers without sacrificing utility and effectiveness. Additionally, in regard to affordability of service, a household that has access to broadband is still, constructively, unserved if it cannot affordably access such services.

Lummi, in concurrence with myriad other Tribes, must stress that the service provider maps and Federal Government data that purports to demonstrate which areas, populations, and households are unserved are wildly and prohibitively inaccurate. Many of these maps are deeply flawed for a variety of reasons, including because they were created without any Tribal input or consultation with tribal governments in the first instance. This inaccurate data has continually inhibited Tribal development of broadband services and significantly exacerbated the digital divide facing Native Communities. As such, Lummi strongly urges NTIA to allow an applicant Tribal Government to self-certify the unserved households that will be served by a proposed project with its own data and maps. Tribes, as sovereign governments, are in the best position to be able to identify their own unserved households.

Additionally, Sec. 905 (c) (8) references “projects that deploy broadband infrastructure to unserved households.” The phrase “deploy broadband infrastructure to” is not defined by the Act. Lummi urges NTIA to consider several factors when determining what “deploy broadband infrastructure to” entails under the Act, including the freedom of Tribes to exercise sovereignty in determining a need for a more economically viable and sustainable “middle-mile” broadband solution than existing solutions and the dilemma and challenge many Tribes face when considering the viability of “last-mile” solutions in the absence of viable or sustainable “middle-mile” solutions. In cases where a “middle-mile” project is a necessary prerequisite to supply adequate, economically viable, and sustainable broadband service to Tribal lands in support of future “last-mile” solutions, Tribes should not be denied inclusion of the number of “unserved households” that may derive future benefit from such a “middle-mile” project, even if such a project does not include a “last-mile” component. The establishment of a meet-me point, hub, or other such facility on “Tribal lands” that improves the total bandwidth available to the Tribe or renders such bandwidth economically viable should suffice to meet the requirement of “deploy[ing] broadband infrastructure to unserved households.”

VI. OTHER MATTERS

Lummi is in agreement with the numerous other Tribes that voiced concerns that any form of match requirement may be an undue barrier to entry to Tribes, especially with consideration of the devastating financial and economic impacts that Tribes across the nation have recently suffered as a result of the Coronavirus pandemic. Lummi therefore urges NTIA to not require match as an eligibility determinant. However, Lummi also recommends that NTIA consider the allowance of voluntary match, and the allowance of match in the form of pre-award costs according to the requirements of 2 C.F.R. Sec. 200.458 subject to prior approval of NTIA. Lummi also agrees with other Tribes that current or preexisting ownership or rights of use of underlying rights of way or easements contemplated in project applications should not be a limiting criteria for Tribal applications, provided that such applications demonstrate a feasible plan to acquire access to such rights of way or easements.

The Lummi Nation appreciates your consideration of these comments¹.

Respectfully,



Lawrence Solomon, Chairman
Lummi Indian Business Council

¹ Lummi Nation further supports the testimony given by the Quinault Indian Nation.