

# Seneca Nation of Indians

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## PRESIDENT'S OFFICE

February 22, 2021

The Honorable Douglas Kinkoph  
Associate Administrator  
National Telecommunications and Information Administration  
U.S. Department of Commerce  
Washington, DC 20230

RE: Comments on Implementation of the Tribal Broadband Connectivity Program

Dear Associate Administrator Kinkoph,

Please accept the comments herein on behalf of the Seneca Nation in response to your letter dated February 2, 2021 in which you seek input on the implementation of the Tribal Broadband Connectivity Program ("TBCP") established by Section 905(c) of Title IX, Division M of the Fiscal Year 2021 Consolidated Appropriations Act, P.L. 116-260 ("Act"). Before proceeding to our substantive comments on implementation of the TBCP, we want to be on the record that the timeframe in which the National Telecommunications and Information Administration ("NTIA") conducted consultation with Tribal Governments was insufficient and inadequate. NTIA provided less than two weeks for consultation. That is not sufficient time in which to consult with Tribal Governments on how to implement a brand new program focused on broadband connectivity on Tribal Lands. The Seneca Nation, like most other Native Nations, has been focused on responding to and mitigating the impacts of the COVID-19 virus within our community. Congress passed the Act in late December and we expected NTIA to begin consultation in January rather than in February and Native Nations should not be penalized for the agency's inaction. We understand that NTIA needs to get the notice of funding availability out within sixty days of when the Act was signed into law, but believe that Congress would rather the agency take the time to properly conduct meaningful consultation rather than rush consultation on the implementation of a new \$1 billion program.

The Seneca Nation is located in what is now Western New York. We have multiple territories, but the bulk of our more than 8,000 citizens primarily live on the Cattaraugus Territory and the Allegany Territory. The COVID-19 pandemic hit us hard. Our citizenship is more susceptible to complications from COVID-19 because of our pre-existing health conditions, particularly the fact that half of our adult population suffers from Type II diabetes. We lost several Seneca citizens due to the virus. Our commercial enterprises from which we generate most of our government revenue had to fully shut down for a few months and still only remain partially open. Our Cattaraugus Territory lacks any quality broadband service, and our schoolchildren and citizens living on that Territory often had to come to our Administrative building in order to access broadband. Telework, telehealth and distance learning are not available to us because of a lack of broadband infrastructure, equipment and devices. It is a problem that we struggled with for years in trying to address but have been unable to because of the high cost of broadband infrastructure and a lack of interest by local private carriers to invest in infrastructure on our lands. We have been advocating for Congress to create a TBCP for the past few years and appreciated when Congress finally included provisions in the Act. Thus, we believe Congress created the TBCP with the Seneca Nation in mind.

NTIA's consultation materials seek input on specific issues and we provide input on each issue below:

#### **Topic 1: Program Eligibility (Who & What)**

Congress included a broad definition of what constitutes an Eligible Entity for the TBCP, but we do not believe Congress intended to treat all Eligible Entities the same. Section 905(a)(8) defines Eligible Entity to include Tribal Governments, tribal colleges and universities, certain Native Hawaiian entities, tribal organizations and Native Corporations. The definition of Tribal Government only includes those Native Nations on the list published by Interior pursuant to the Federally Recognized Indian Tribe List Act. By distinguishing federally recognized Tribal Governments from other Native entities, we believe Congress intended to include some deference to Tribal Governments in the implementation of the TBCP. Thus, we advocate that NTIA prioritize funding to Tribal Governments over other Eligible Entities. We think this is consistent with the government-to-government relationship between the federal government and Tribal Governments.

Additionally, to ensure that any Eligible Entities are properly consulting and coordinating with Tribal Governments, we advocate that NTIA not consider any applications from Eligible Entities unless those applications include some documentation from the Tribal Government that exercises jurisdiction over the Tribal Land that the Eligible Entity intends to serve indicating that the Tribal Government supports the application. The TBCP is set up to provide grants for the expansion of broadband service on Tribal Land or the expansion of access to and adoption of remote learning, telework, or telehealth resources during the COVID-19 pandemic. We believe Congress intended to prioritize services provided on Tribal Lands, which is defined in Section 905(a)(14). We understand that many Native Nations may not be able to focus on developing an application for the TBCP and Native leaders may be preoccupied with the day-to-day activities of the COVID-19 pandemic. But, in order to prevent any conflicts, an Eligible Entity should be required to show some level of support from a Tribal Government as a part of its application.

We also agree with NTIA's question about whether each Tribal Government should be limited to one application for all Eligible Entities. We think each Tribal Government's application can include multiple projects, but support the idea of one application for each Tribal Government that incorporates any Eligible Entities. Doing this will help NTIA prevent any duplication of funding or services and holistically evaluate each application. Thus, a tribal college's project will need to be included in the application of the Tribal Government. The exception would be for Native Hawaiian entities, but Congress specifically provided for a 3% set-aside for Native Hawaiians because Congress understood that they needed to be treated differently from Tribal Governments.

With regards to Eligible Uses, Section 905(c)(5) describes what is considered an Eligible Use and we advocate that NTIA broadly interpret the language. Given that the TBCP was created by Congress to address the COVID-19 pandemic, applicants should be able to include any projects and costs since January 2020, which is when Congress recognized the pandemic to have begun in the United States. Legislation currently pending in Congress entitled the American Rescue Plan frequently refers back to January 2020 and we think NTIA should incorporate that date into the TBCP.

We also advocate that NTIA clarify that TBCP funds can be used to supplement other federal program funding for ongoing projects. The Seneca Nation could not wait for Congress to enact the TBCP and applied for and received funds from the U.S. Department of Agriculture for broadband construction. However, the project costs have significantly increased during the COVID-19 pandemic in part because of supply chain disruptions and high demand for the workers and companies that perform this work. We believe Congress intended TBCP funds to be used to help cover such increased costs for ongoing projects. Allowing applicants to supplement versus duplicate existing federal funding should be clarified as an Eligible Use.

Additionally, Tribal Governments should be able to include as a part of their applications reimbursement for any Tribal Government funds used towards Eligible Uses since January 2020. Native Nations could not wait for Congress to enact the TBCP in order to start addressing our broadband connectivity problems. Thus, we began using our own funds to start projects while we waited for Congress to act. These funds could have been used for other COVID-19 mitigation and response activities. Given the shortfall in revenue to all of our government programs due to the COVID-19 pandemic, we believe Congress intended for us to include any costs for Eligible Uses back to when the pandemic began in January 2020. Allowing Tribal Governments to be reimbursed will free up critically needed government funds that we can use for other COVID-19 activities.

Lastly, NTIA should clarify that Eligible Uses for broadband infrastructure deployment includes all aspects of the project including the backhaul network, middle mile and last mile portions of the project. Congress is serious about getting new broadband deployment into Indian Country and that cannot happen without all aspects of the project being considered as an Eligible Use. We think this is particularly true given Congress' language prioritizing deployment to unserved households.

## **Topic 2: Equitable Distribution**

The language of Section 905 makes clear that every applicant shall receive an award. Thus, NTIA's question is how to ensure equitable distribution of the \$1 billion given that every application should receive something. Congress specifically set aside 3% for Native Hawaiians so they already have their equitable distribution. Congress also allowed up to 2% to be used by NTIA and the Department of Commerce for administrative purposes. So, that leaves 95% of the \$1 billion to be equitably distributed amongst Eligible Entities. As we indicated above, we believe that Tribal Governments should get prioritization and each Tribal Government should only submit one application that includes all eligible projects. To ensure an equitable distribution of funds, we believe that NTIA should sort all applications by the Tribal Lands intended to be served, connect those Tribal Lands to the respective Tribal Governments, and try to fund a proportional amount of the projects associated with each Tribal Government. For instance, the Seneca Nation may submit an application for \$10 million while a Native Nation with a population of 400 citizens and a land base of one mile may submit an application for \$1 million. If NTIA cannot fully fund both projects, NTIA should proportionally fund the same percentage of each application. Thus, both applications could receive 60% of their request. After experiencing the debacle of how the U.S. Treasury Department used population and employment numbers to try to equitably distribute \$8 billion to Tribal Governments, we think using a proportional percentage of funding based on the overall requested funding is the best option. Every Native Nation's broadband needs are unique and NTIA will not have a sense of the needs until it can review the applications. Some Native Nations with small populations have significant numbers of employees and enterprises and need quality broadband to survive and recover from the pandemic. More rural Native Nations may have bigger broadband needs because they have not been able to get private carriers to serve them and need to develop their own infrastructure. Every Native Nation is unique and NTIA needs to have an application and distribution process that respects this uniqueness.

## **Topic 3: National Historic Preservation Act, Environmental Assessment & Cultural Resources**

NTIA seeks input on how best to expedite the environmental and cultural resources processes given that Congress has tight timeframes in which TBCP funds need to be expended. The Senate Nation believes that NTIA should defer to each Native Nation on this topic but make clear in the notice of funding availability the timeframes in which the TBCP funds need to be expended and that each Native Nation will need to provide in their application a timeframe for completing any broadband infrastructure projects funded. Again, every Native Nation is unique and is having their own unique experience with the COVID-19 pandemic. Some Native Nations will be able to streamline the environmental and cultural resource processes, while others may not be able to do so. Applicants who are awarded TBCP funds have 180 days in which to commit their funds. NTIA should monitor and require progress reports on these processes from any applicants that get approved for broadband infrastructure projects. If it becomes clear that an applicant will not be able to complete the infrastructure projects even with the allowable time extension for broadband projects, NTIA should allow the applicant to revise the use of their TBCP before having to revert the funds back to NTIA. Congress clearly anticipated some applicants may not be able to meet the timeframes and provided for the reversion of funds in

such instances. But, it is our expectation that NTIA will be providing technical assistance throughout the process for any broadband infrastructure construction projects to minimize such problems.

#### **Topic 4: Unserved Areas**

The topic of how to prioritize unserved areas on Tribal Lands only relates to new construction of broadband infrastructure. We believe the best way for NTIA to determine if a household is unserved is to defer to any data or information provided by an Eligible Entity showing that the household is unserved. The TBCP defines the term “unserved.” The first part of the definition focuses on whether the household lacks access to qualifying broadband service. We think an Eligible Entity can readily obtain this information. The harder question is the second part of the definition of “unserved,” which tries to determine if some broadband provider is already required to provide qualifying broadband service to the household by a date certain. An Eligible Entity under the TBCP likely will not be able to obtain this information. Thus, we believe the burden for the second portion of the definition of “unserved” is on NTIA and the federal government. If an Eligible Entity can show that a household lacks qualifying broadband service, the NTIA should work with the FCC to try to identify any existing broadband providers in the area of the household and ask them to indicate whether they are responsible for providing broadband service to the household. If they are responsible but have not provided broadband service, then the NTIA should defer to the wishes of the Tribal Government that exercises jurisdiction over the lands on which the household is located about whether to include the household in the application of the Eligible Entity or wait for an existing broadband provider to provide service.

#### **Topic 5: Reporting Requirements**

Native Nations are in the middle of a COVID-19 pandemic and will continue to be so through at least the end of this year. In addition, Native Nations will spend the next several years trying to recover from the economic impacts of the pandemic. We are having to meet reporting obligations of any federal funds we receive and these reporting obligations are requiring our administrative staff to work overtime and for us to hire part-time administrative staff to fulfill all of the reporting obligations. Congress clearly intended minimal funds to be used for administrative costs in implementing the TBCP. Thus, we request that NTIA minimize the reporting requirements of awardees. We understand the need for transparency and to inform the public about how federal funds are being used. We think this can be done by indicating how much each applicant receives in TBCP funds and what those funds are intended to be used for. Any Eligible Entity that receives TBCP will be subject to the federal Single Audit Act and Section 905(f) already requires an annual report and requires the Inspector General of the Department to submit a report to Congress every six months. We think this covers the need for transparency and any concerns about waste, fraud or abuse.

In closing, we want to reiterate our concerns about the short timeframe in which consultation on was conducted on this program. We spent precious time and energy in developing these comments and hope that you take the time to consider them. It is important that the TBCP is successful because we plan to continue to advocate for Congress to appropriate

more funds. While \$1 billion is a good start towards addressing the broadband needs of Indian Country, it will not cover the entire need. The digital divide in Indian Country has been a longstanding problem that unfortunately Congress was hoping would be resolved by private carriers. That has not proven to be the case, and we appreciate that Congress finally created a program that prioritizes funding directly to Tribal Governments.

Should you have any questions about these comments, please reach out to Michele Mitchell at [michele.mitchell@sni.org](mailto:michele.mitchell@sni.org).

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Seneca Nation