



USET

SOVEREIGNTY PROTECTION FUND

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*Transmitted Electronically
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Mr. Douglas Kinkoph
Associate Administrator
Office of Telecommunications and Information Applications
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, DC 20230

Dear Associate Administrator Kinkoph,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to Tribal Consultations held by the National Telecommunications and Information Administration (NTIA) on the implementation of the recently established \$1 billion Tribal Broadband Connectivity Grant Program (TBCG Program). This program was created in response to the COVID-19 pandemic and its profoundly negative impact on every governmental, economic, and service delivery function of Tribal Nations. Decades of broken promises, neglect, underfunding, and inaction on behalf of the federal government have left Indian Country severely under-resourced and at extreme risk during this crisis. Our existing systems of service delivery and infrastructure are experiencing greater stress than those of other units of government, as we seek to maintain essential services and deliver upon our commitments, as well as dedicate resources to the unique circumstances of COVID-19 response.

USET Sovereignty Protection Fund (USET SPF) is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.¹ USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

¹ USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe—Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Because there is Strength in Unity

On February 2, 2021 NTIA announced three Tribal Consultations scheduled for February 5, 10, and 12, 2021 to receive recommendations from Tribal Nations regarding implementation of the TBCG Program. USET SPF has several concerns regarding questions posed by NTIA during these consultations, which will inform how they agency will structure the implementation and disbursement of TBCG Program funds. Specifically, we are concerned that program funds could potentially be allocated in a manner that does not support equitable access for *all* Tribal Nations. Similarly, USET SPF is concerned with questions posed by NTIA regarding the streamlining of historical, environmental, and cultural review processes for infrastructure deployment. In structuring the TBCG Program, NTIA must support and uphold our sovereign right to determine how best to use these funds for the benefit of our citizens. NTIA must ensure that funding is delivered via the most expedient mechanisms while providing sufficient opportunity and equitable access for all Tribal Nations to receive and expend these resources.

“Equitable” Disbursement and Reporting Requirements for TBCG Program Funds

Established through the Consolidated Appropriations Act, 2021 (P.L. 116-260), the TBCG Program seeks to provide \$1 billion in grant funding for broadband deployment, adoption, and programmatic support to Indian Country through an “equitable” disbursement directive. In awarding these funds it is critically important that NTIA recognizes that a “one-solution fits all” approach to program awards and implementation does not work for Indian Country, especially USET SPF Member Tribal Nations. Equitable disbursement should ensure that all Tribal Nations, regardless of land base acreage, population size, and “shovel-ready” capabilities, are provided comparable opportunities to apply for and access TBCG Program funds.

NTIA must also recognize that USET SPF Member Tribal Nations have a long and traumatic history of land loss due to the theft of our homelands beginning with first contact with European countries. Our Tribal Nations, as well as Tribal Nations across Indian Country, continue to work to reacquire our homelands, which are fundamental to our existence as sovereign governments and our ability to thrive as vibrant, healthy, self-sufficient communities. For example, some USET SPF Member Tribal Nations were federally-recognized as recently as 2018. While these Tribal Nations do not currently have lands held in trust by the federal government, the law acknowledging their federal-recognition authorized the taking of lands into trust. Some of these Tribal Nations currently have applications submitted and are under review at the Department of the Interior. NTIA must work with these Tribal Nations and exercise administrative flexibility to ensure that they will have equitable access to TBCG Program funds. Further, in light of the diversity in land holdings resulting from hundreds of years of theft and loss, land base should not be a sole determining or disqualifying factor for awarding TBCG Program funds.

In addition, with the equity directive in mind, the allocation of program funds must not be done on a competitive basis. This program was established by Congress to specifically target the broadband deficiencies that exist in Indian Country—deficiencies that have been exacerbated by the COVID-19 pandemic. Allocating programmatic funds under competitive processes never results in equitable disbursement to Indian Country. Rather, competitive processes pit Tribal Nations against each other to obtain funds that should be fundamentally available and accessible due to the federal government’s fiduciary trust and treaty obligations.

USET SPF also recommends that program funds be eligible for use in multi-phase broadband projects. This would support Tribal Nation efforts to construct comprehensive broadband networks through a multi-pronged approach—such as applying for funds to conduct feasibility and engineering studies, infrastructure

deployment, upgrade, and maintenance, and funding for end-user broadband adoption and digital literacy training. Disbursing program funds in this manner would provide Tribal Nations with opportunities to plan for, build, and maintain comprehensive networks regardless of current broadband access and capabilities. This would allow Tribal Nations to address back-haul, middle-mile, last-mile, and end-user connectivity challenges. These actions support P.L. 116-260 directives for infrastructure deployment, provision of affordable broadband services, distance learning, telehealth, and digital inclusion and adoption in Indian Country.

Additionally, USET SPF strongly recommends that NTIA establish a minimum funding award floor to ensure that all Tribal Nations will have equitable access to program funds. It is also vitally important that NTIA not impose a matching fund requirement on Tribal Nations since this program was established specifically in response to the COVID-19 pandemic. Furthermore, NTIA must not subject Tribal Nations to burdensome administrative requirements for use of these funds, including application, reporting, audit, or other types of compliance requirements. Over the past year Tribal Nations have been overburdened with reporting requirements for various federal programs funded through the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). Any reporting requirements mandated by law must be streamlined and only the minimum required, so that Tribal Nations may continue to focus on broadband deployment and addressing the COVID crisis.

Serious Concerns with Expediting Historical, Environmental, and Cultural Review Processes

USET SPF has serious concerns regarding NTIA's questions on expediting and streamlining historic, environmental, and cultural review processes. These review processes should not be streamlined or bypassed without the consent of Tribal Nations. While the build out of broadband infrastructure in Indian Country is critically important, it must not occur at the expense of Tribal consultation, sovereignty, sacred sites, or public health. NTIA must also take into consideration that during the COVID-19 pandemic Tribal Historic Preservation Officers (THPOs)—or State Historic Preservation Officers (SHPOs) relied upon by Tribal Nations—could be operating on limited personnel and budgets. This could increase timelines for the historic, environmental, and cultural review processes required for broadband infrastructure deployment. Similarly, Tribal Nations must not be penalized by NTIA for being unable to meet the deadlines of these review processes in light of circumstances presented by the COVID crisis. P.L. 116-260 permits NTIA to provide extensions for infrastructure projects due to "extenuating circumstances" that prohibit project completion within a project deadline. Such extensions should be granted to TBCG funds awarded to Tribal Nations for broadband infrastructure projects that become delayed due to historical, environmental, and cultural reviews.

NTIA should be coordinating with the Advisory Council on Historic Preservation, the Environmental Protection Agency, and the Department of the Interior (DOI) to provide technical and administrative support to Tribal Nations for historical, environmental, and cultural reviews. Though Tribal Nations must always be the final authority on these reviews, this support will advance these review processes for Tribal Nation TBCG awardees, and not at the expense of hastily approving projects that may have detrimental implications for Native American historical, environmental, and cultural resources. Another major and time-consuming process is obtaining rights-of-way (RoW) permits from the Department of the Interior for infrastructure buildout through Tribal Nation fee and trust lands. This process also includes components of historical, environmental, and cultural review processes and regulations. It is imperative that NTIA work with and support Tribal Nation efforts to obtain necessary RoW permits for TBCG infrastructure projects. Again, NTIA should not penalize Tribal Nations for being unable to meet TBCG infrastructure buildout deadlines if DOI is cumbersome in awarding RoW permits.

Tribal Nation Certification of Eligible Entities and Service Areas

P.L. 116-260 listed several entities eligible to apply for TBCG Program funds, such as Tribal Governments, Tribal Colleges and Universities, Tribal Organizations, Alaska Native Corporations, and the Department of Hawaiian Homelands acting on behalf of Native Hawaiians. USET SPF is concerned that the list of eligible entities will further encourage a competitive application process for TBCG Program funds. USET SPF is not opposed to the eligible entities receiving TBCG funds, however, we are concerned that Tribal Nations will be positioned to compete for funds to provide broadband service within our own Tribal Homelands.

If eligible entities will be submitting applications to receive program funds to serve specific Census tracts of Tribal Homelands, then those entities should be required to document approval and authorization from the respective Tribal Nation, or consortium of Tribal Nations. Some have recommended that a Tribal Nation Resolution be required as a document of proof for an eligible entity to apply for TBCG funds. USET SPF does not oppose such a requirement, however, NTIA must also be cognizant that some Tribal Nation Councils, or other governing bodies, may convene irregularly—especially due to the COVID-19 pandemic. Since NTIA has been charged with reviewing applications and disbursing program funds in an expedited timeframe, NTIA should accept any official Tribal Nation document on official letterhead signed by duly elected or appointed Tribal Nation Officials. Adopting this requirement will ensure that TBCG Program applications submitted to NTIA will not bypass Tribal Nation awareness, insight, and oversight for the provision of broadband services in our Tribal Homelands.

Additionally, if Tribal Nations are the primary applicants for TBCG Program funds, then we should have the flexibility to enter into subcontractor agreements to hire a Native or non-Native entity to fulfill buildout, service, and/or adoption criteria that was awarded in our applications. Not all Tribal Nations want to develop our own telecommunications companies or utilities providers to deploy broadband services in our Tribal Homelands. Similarly, some Tribal Nations may have internet service from a telecommunications provider that does not meet the 25/3 Mbps broadband threshold and/or they only provide service to a limited portion of Tribal Homelands. Therefore, Tribal Nations, or Tribal Nation consortiums, should be allowed to use TBCG Program funds to hire a Native or non-Native telecommunications entity to provide infrastructure deployment, affordable broadband services, telehealth, distance learning, and/or digital literacy training.

USET SPF also strongly urges NTIA to defer to Tribal Nations for any data sets or measures used in funding allocations, including in identifying Tribal Homelands that are unserved and underserved by high-speed broadband. Tribal Nations must be the final arbiters of these measures and should be empowered to challenge any federal data sets—including those on broadband connectivity, such as the National Broadband Maps of the Federal Communications Commission (FCC) and any existing Census data. These maps and data sets are incomplete and, in many instances, inaccurate regarding the levels of broadband service on Tribal Homelands. Historically, these maps and data sets have been used against Tribal Nations to exclude our eligibility to federal broadband funding. Several Government Accountability Office (GAO) investigations have reported on the inaccuracy of federal broadband mapping on Tribal Homelands, especially when data is reported at the Census block or tract levels.² These actions cannot be repeated when implementing the TBCG Program.

² See Government Accountability Office. “Additional Coordination and Performance Measurement Needed for High-Speed Internet Access Programs on Tribal Lands”. GAO-16-222. Jan. 2016. Available at <https://www.gao.gov/assets/680/674906.pdf>; Government Accountability Office. “Increased Federal Coordination and Performance Measurement Needed”. GAO-16-504T.

Similarly, since NTIA will be awarding TBCG funds based on Census tracts, Tribal Nations should have the opportunity to carve out Census tracts that overlap our jurisdictional boundaries. Several federal broadband programs have relied on Census blocks or tracts as the primary method for targeting funds to unserved and underserved areas. However, Census blocks and tracts do not conform to Tribal Nation jurisdictional boundaries and can include population centers outside such boundaries. This has proven problematic in other federal broadband programs—especially those administered by the FCC—because telecommunications companies will apply for funding to serve Census blocks or tracts that overlap Tribal Nation jurisdictional boundaries, and they will fulfill buildout requirements without providing any service on Tribal lands.

In other instances, Tribal Nations have been excluded from applying for some federal broadband programs because the Census block or tract is reported as fully served, or the population data can exceed population caps of certain programs. GAO has determined that Census blocks or tracts overlapping Tribal Nation jurisdictional boundaries can be reported as 100 percent served by broadband if just a single location within those areas is reported as having connectivity. Similarly, these Census areas can exceed population caps for certain broadband programs if much of the population resides outside of Tribal Nation jurisdictional boundaries. Due to these problems with other federal broadband programs, which further exacerbate the connectivity divide in Indian Country, Tribal Nations should be empowered to carve out Census tracts to appropriately use TBCG funds to provide broadband services within our jurisdictional boundaries. This will ensure that USET SPF Member Tribal Nations are not precluded from applying for TBCG Program funds to deliver broadband services to our Tribal citizens and residents within our jurisdictional boundaries.

Narrow the Scope of Interpretation for any Duplication of Federal Funding

The purpose of the TBCG Program is to disburse emergency funds to support broadband availability for Tribal Nations dealing with the harmful effects of the COVID-19 pandemic. Congress established this program to not only focus on broadband infrastructure deployment, but also in the provisioning of affordable broadband services and support for telehealth and distance learning activities. Tribal Nations have leveraged various sources of federal funding and other opportunities to bring high-speed broadband to our communities. Whether using funds obtained from annually appropriated federal programs, prior CARES Act appropriations, or through programs and auctions administered by the FCC, Tribal Nations have continually leveraged multiple federal funds and services to support broadband infrastructure deployment. For these reasons, NTIA should limit its scope of interpretation regarding the “duplication” of federal funding.

For decades Tribal Nations have consistently accessed multi-year broadband loans and grants offered by various agencies at the Department of Agriculture. These loans and grants should not be interpreted as “duplicative” federal funding and disqualify Tribal Nations from accessing funds from the TBCG Program. Comparatively, some Tribal Nations have leveraged funding from the CARES Act for broadband projects and to establish or improve telehealth and distance learning capabilities. NTIA should not disqualify Tribal Nation applicants that have utilized CARES Act funding for broadband infrastructure and services.

Additionally, while there are concerns regarding the potential duplication of funds provided by the FCC’s Universal Service Fund (USF), it is important to note that much of the USF’s funding is allocated to entities the FCC has designated as eligible telecommunications carriers (ETCs). Since the number of Tribally-

owned, chartered, and operated telecommunications companies with ETC designations are relatively low, a majority of the telecommunications companies that receive FCC USF support are non-Native entities. This is an important distinction because under P.L. 116-260 NTIA is directed to consult with the FCC to ensure there is no duplication of federal funding for broadband support in the TBCG Program. In coordinating with the FCC to identify Census tracts that are currently receiving USF support, USET SPF strongly urges NTIA to defer to data provided by Tribal Nations regarding the actual levels of broadband connectivity within our Tribal Homelands. As previously mentioned, telecommunications companies often fulfill buildout and service requirements in FCC USF programs by building around and providing service outside Tribal Nation jurisdictional boundaries.

Conclusion

Acknowledging and understanding the diversity of Indian Country's circumstances and priorities for broadband access will further NTIA's directive to equitably disburse TBCG Program funds. As NTIA proceeds in structuring the funding allocation and programmatic requirements and deliverables of the TBCG program, it is imperative that all due circumstantial considerations be given to benefit Tribal Nations. In the arena of federal broadband funding and support for Tribal Nations, NTIA has largely been absent and an unknown federal entity in Indian Country. However, implementation of the TBCG Program provides NTIA with an opportunity to build upon its delivery of trust and treaty obligations to Tribal Nations. While the TBCG Program will not solve all the broadband access and connectivity issues throughout Indian Country, it has the potential to lay a foundation for addressing Tribal Nation broadband disparities during and after the COVID-19 crisis. USET SPF looks forward to continuing to work with NTIA to close the digital divide in Indian Country, including through the equitable disbursement of TBCG funds. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 615-838-5906.

Sincerely,



Kirk Francis
President



Kitcki A. Carroll
Executive Director