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February 22, 2021

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

RE: Comments in Response to Consultation on Tribal Broadband Connectivity Program

Dear Associate Administrator Kinkoph,

These comments are in response to your February 2, 2021 letter addressed to Tribal Leaders seeking input on how the National Telecommunications and Information Administration (“NTIA”) should implement the Tribal Broadband Connectivity Program (“Program”) established by the Fiscal Year 2021 Consolidated Appropriations Act, P.L. 116-260 (“Act”). I provide these comments on behalf of the Gila River Telecommunications, Inc., which was created by the Gila River Indian Community in 1988 to serve the Gila River Indian Reservation.

Your letter indicated that written comments were due by February 11 and informed Tribal Leaders that three virtual consultation sessions were taking place on February 5, 10 and 12 (which was the day after written comments were due). We believe the timeframe in which NTIA consulted with Indian Country was severely inadequate for a new tribal broadband program. Providing a mere nine days in which to consult violates the policy set forth in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments.<sup>1</sup> The Act was signed into law on December 27, 2020 and Section 905(e)(1) requires NTIA to issue a Notice of Funding Availability within 60 days. NTIA should not have waited until February 2 to begin consultation with Indian Country. Given the short and inadequate timeframe in which NTIA conducted consultation, we are asking that you consider these comments even though they are submitted after the February 11 timeframe.

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<sup>1</sup> Executive Order 13175 of November 6, 2000, Consultation and Coordination with Indian Tribal Governments, available at <https://www.federalregister.gov/documents/2000/11/09/00-29003/consultation-and-coordination-with-indian-tribal-governments>.



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During NTIA’s virtual consultation session on February 12, the moderator sought input on several issues. We provide comments herein on some of the issues raised in the materials provided during the virtual consultation.

### Implementation of the Program Should Focus on the Coronavirus Pandemic

The Program was established by Section 905(c) of Title IX, Division M of the Act, which is the Division of the Act specifically targeting Coronavirus Response and Relief. Section 905(b)(1) appropriates \$1 billion for the Program, to remain available until expended. Congress created the Program in response to the significant lack of broadband connectivity in Indian Country, which hampered Indian Country’s ability to prepare for, respond to and mitigate the impacts of the coronavirus (“COVID-19”) virus.

Native Americans, and particularly those living on Tribal Lands, were hit hardest by the COVID-19 pandemic. Data indicates that one in every 475 Native Americans has died since the pandemic began and Native Americans are four times more likely to be hospitalized because of the COVID-19 virus. Native Americans suffer significant health disparities compared to the rest of the American population, and studies show this is in part due to the lack of infrastructure on Tribal Lands. The lack of adequate broadband infrastructure and equipment on Tribal Lands impaired the ability of Tribal Governments and those living and working in Native communities to telework, engage in remote learning, or access telemedicine in response to the COVID-19 pandemic. As NTIA implements this Program, we believe it is important to keep the COVID-19 crisis in mind and the environment that led Congress to finally make such a significant investment of funds into Indian Country.

### Program Eligibility (Who & What)

Congress provided for a wide range of eligible entities under the Program. We believe this is because Congress understands that Indian Country is struggling with responding to the COVID-19 pandemic and did not want to limit eligibility to only Tribal Governments. Tribal Governments are consumed with the day-to-day business of responding to the COVID-19 crisis and may not have the administrative capacity to apply for grants from the Program. Congress’ ultimate goal is to get service and assistance to those living and working on Tribal Lands. Thus, NTIA should adopt a broad interpretation of who is eligible and not prioritize amongst the eligible entities.

Congress was concerned about the duplication of services, which is why Congress allows each eligible entity to submit one application. While we believe that Congress intended a wide range of eligible entities, we do not believe that Congress intended multiple entities to provide the



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same services to the same households. Thus, it is paramount that NTIA review all applications to prevent duplication of services to the same households. For instance, we think Congress intended to allow a Tribal Government applying for and receiving funding to provide computers for adults in households to help with telework. We also think Congress intended for a tribal school to receive funding to provide computer laptops to children in the same households for distance learning since school and work functions occur at the same time and multiple devices would be needed. However, we do not think Congress intended for a Tribal Government and school to both receive funding to provide MiFi devices to the same household since MiFi devices can support multiple computers at the same time. The same is true for broadband deployment. NTIA needs to review all applications to try to prevent duplication of services. Preventing duplication of services will maximize the benefit of the federal funds available.

Concerning eligible uses, we believe that Congress intended NTIA to broadly interpret what an eligible use is. Congress created the Program to help respond to the COVID-19 pandemic. Applicants have one year from when they receive the funds to spend them, but can obtain an extension of time if the funds are for construction of broadband infrastructure projects. We think Congress intended that the funds be used towards immediate broadband needs to help with the immediate impacts of the COVID-19, such as equipment and devices to allow for distance learning and telehealth activities, and the prevention of any household having their existing broadband service disconnected. We also think Congress intended for the funds to help with long-term broadband deployment in an effort to prepare for the next pandemic or natural disaster, which is why broadband infrastructure projects are allowed an extension of time for using the funds.

Given that Congress intended for Program funds to be used towards immediate COVID-19 needs, applicants should be able to apply for funds to cover costs incurred from January 27, 2020. Congress generally believes this date to be the time in which the COVID-19 virus hit the United States. Since that time, many tribes have used their own funds to provide for the immediate broadband needs of their employees, citizens and people who live within their community. Congress was delayed in passing the Consolidated Appropriations Act, and we believe Congress intended to help those tribes who have already expended funds to address the broadband needs of their communities. Those tribes who used funding from the CARES Act Coronavirus Relief Fund (“CRF”) towards eligible uses should be able to apply to recoup funds from the Program to cover such costs so that they can use their CARES Act CRF money towards other COVID-19 needs. Eligible entities should also be able to apply to cover costs of ongoing projects that began on or after January 27, 2020.

Congress intended maximum flexibility in using Program funds, including combining Program funds with other federal programs to help ensure projects are completed by the one year



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deadline. Section 905(g) specifically provides that Program funds should not impact an entity's eligibility to receive funding from any other federal broadband program. Thus, we think eligible entities can use Program funds to count towards any federal match requirements for other federal programs, or to supplement any other federal funds or cover shortfalls in funding for projects. While Congress was clearly concerned about duplication of services, that issue is different from using Program funds to help cover any shortfalls in funding for projects partially funded by other federal programs.

Lastly, we believe that NTIA should make clear that wireless and middle-mile projects are eligible for Program funding. Congress clearly intended the Program to help with broadband deployment to unserved households. In many cases, the only way in which to provide broadband to unserved households is to ensure middle-mile portions of the network are built or to use wireless infrastructure. Congress prioritizes deployment to unserved households when using Program funds for new construction and Congress must have intended wireless and middle-mile projects to be a covered eligible use.

### Equitable Distribution

Congress requires that NTIA distribute the Program funding on an equitable basis. The language of Section 905(c)(2) is clear that NTIA must award a grant to every eligible entity, so long as such grant does not duplicate funding from another federal program. NTIA may face a challenge if the total value of applications exceeds the \$1 billion in funding appropriated by Congress, which we think it is very likely given the lack of broadband infrastructure in Indian Country and the significant immediate broadband needs associated with the COVID-19 pandemic.

To ensure an equitable distribution of funding, we believe NTIA needs to proportionally fund every application after a robust review of the applications that allows for entities to amend applications for missing components. First, NTIA should review every application to ensure there is no duplication in service amongst the eligible entities and no duplication in funding from other federal programs. Second, we believe applicants should be allowed to amend their applications based on feedback from NTIA. The Program provides NTIA with funding to help provide technical assistance to applicants and NTIA should begin reviewing applications to identify any questions or follow up information, as soon as the application is filed. Lastly, once NTIA reviews all applications NTIA should compare the total requested funding of all applications and proportionally fund the applications. If the \$1 billion in Program funding only allows for NTIA to fund 50% of each application, then each application gets 50% of funding.

Congress did not intend the Program to be a competitive grant process, or for a formula distribution to be used. Every Tribal Government and Native American community has unique



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broadband needs, especially when it comes to responding to the COVID-19 crisis. While some communities may need construction of broadband infrastructure, other communities may need equipment and devices and Congress understood this.

Finally, applicants should be able to revise the uses of any Program funds during the 180 days from when an applicant is awarded grant funds and is required to commit those funds. This will allow an applicant who may only receive 50% of its total requested funding to make adjustments to ensure it can expend any Program funds within the one year requirement towards eligible uses.

#### Priority for Unserved Areas

The virtual consultation and NTIA materials create confusion surrounding when unserved areas receive priority and NTIA needs to provide clarification in its Notice of Funding Availability. NTIA consultation materials say that the Act prioritizes grant funds be used to towards unserved areas but unserved areas do not get any kind of priority within the Program. Unserved households receive priority only when grant funds are being used for new construction of broadband infrastructure. The Program does not prioritize new construction over other eligible uses such as expanding access to remote learning, telework, or telehealth. Many eligible entities may not be looking to conduct new construction, but rather may be interested in using grant funds to upgrade existing equipment or purchase devices to help with remote learning, telework, or telehealth.

The term “unserved area” is not defined anywhere in Section 905 or used anywhere in Section 905(c). Section 905(c)(1) is clear that grants can be used for expanding access to and adoption of: (A) broadband service on Tribal land; or (B) remote learning, telework, or telehealth resources during the COVID-19 pandemic. There is no prioritization between these two uses.

Section 905(c)(8) says that any grant funds being used for new construction of broadband infrastructure must be prioritized towards projects that deploy broadband infrastructure to *unserved households*. This is the only place in Section 905(c) that the term “unserved” is used and it is in regards to “unserved households” versus “unserved areas.” The term “unserved” is defined in Section 905(a)(14) with respect to a household.

In determining whether a household is “unserved,” we think deference should be provided to any evidence or data provided by a Tribal Government showing such household as being unserved. If a Tribal Government can provide data showing that a household lacks access to qualifying broadband service, then the burden should be on NTIA to consult with the Federal Communications Commission (“FCC”) to determine if there is a broadband provider that is



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legally required to provide qualifying broadband service to that household by a date certain. If the FCC does not provide evidence that a broadband provider is legally required to provide broadband service to that household, the household should be deemed to be unserved. Too often, Tribal Governments and those living in households on Tribal Lands have no idea which broadband provider is supposed to be serving them; they only know that they are not receiving broadband service.

NTIA needs to be mindful that many non-tribal telecommunications companies will apply for and receive federal funds to serve areas that may include portions of Tribal Lands. However, often times, these companies will meet their buildout requirements without actually providing service to households on Tribal Lands.

We appreciate NTIA taking the time to consider these comments. If you have any questions about the comments, please reach out to myself at [jmeyers@gilarivertel.com](mailto:jmeyers@gilarivertel.com) or Allison Binney at [abinney@akingump.com](mailto:abinney@akingump.com).

Sincerely,

*James D. Meyers*

James D. Meyers  
CEO/General Manager  
Gila River Telecommunications, Inc.