

GREAT PLAINS TRIBAL CHAIRMAN'S ASSOCIATION

BROADBAND INITIATIVES PROGRAM AND BROADBAND TECHNOLOGY OPPORTUNITIES PROGRAM JOINT REQUEST FOR INFORMATION

The Great Plains Tribal Chairman's Association (GPTCA) writes to express our frustration at the continued lack of inclusion of Tribes in our nation's telecommunications policies and programs in general, and most immediately the effective exclusion of Tribes from the ARRA RUS-NTIA broadband funds.

The Great Plains Tribal Chairman's Association was formed to promote the common interests of the sovereign tribes and nations of the Great Plains region. The Great Plains tribes have the largest geographical land base of any region in the United States, and some of the poorest telecommunications and broadband penetration rates.

The total acreage within all Indian reservations and tribal lands in the Great Plains region is 11,036,490 acres. Further, the Great Plains tribes hold over one-third of the country's trust allotments and tribal trust land tracts. The Great Plains region has a total population of over 189,000 people, second only to the Navajo Nation region.

Unfortunately our the tribes in the Great Plains are some of the poorest communities in the United States. Seven (7) of the ten (10) poorest counties in America are on or within Indian Reservations in North and South Dakota. America is understandably concerned about a 10% unemployment rate, but the true unemployment rate on many of our reservations hovers closer to 80%.

Indian Country in general, and the Great Plains specifically, continues to have the areas least served by telecommunications and broadband in the United States. For many of our reservations, the entire surrounding non-Indian community has cell and broadband service, but that service effectively stops at many of our borders. Some basic telecommunications and broadband statistics include:

- While the national U.S. phone coverage is 98% it is only 69% on tribal lands,¹ and as low as 40% on many reservations.²
- Nationwide it is estimated that less than 10% of the Native population has high-speed broadband access³
- Only 8 of 564 Tribes have telecommunications companies
- Many of our Tribal governments do not have a shared network or email system for basic inter-governmental communications

¹ For tribal lands in the lower 48 states. "Challenges to Assessing and Improving Telecommunications for Native Americans on Tribal Lands." GAO Report, GAO-06-189, pg. 11 (January 2006).

² *Id* at pg. 14

³ "Demographic Profile of Indian Country," National Congress of American Indians-Policy Research Center, (January 10, 2007)

GREAT PLAINS TRIBAL CHAIRMAN'S ASSOCIATION

Individual Tribes, Tribal associations, and Tribal telecom companies and associations have submitted comment after comment about better Tribal inclusion. It is our understanding that this administration is committed to change with regard to inclusion of Tribes in the nation's telecom policies, and wants to reaching the most unserved areas in the country. We hope we can work together on that new commitment with regard to the ARRA RUS-NITA programs.

Some of the primary solutions to this lack of service include systemic legal and policy changes to the current federal telecommunications laws and policies in order to better incorporate Tribes and Tribal entities, to support Tribal self-governance, and to stop subsidizing the non-Tribal entities which have not been effectively servicing our communities.

Yet federal policies and a lack of federal grant preferences for Tribes have continued to make this an increasingly difficult task. Federal policies continue to subsidize non-Tribal, non-Indian, pre-existing companies. The same companies that have not been servicing our communities all these years are often ones that use their federal subsidized structures to sue Tribal governments over service areas and business interests.

Below are some of the specific concerns we have about the current rules for the ARRA RUS-NTIA telecom grants. The existing rules in the previous NOFA have substantially reduced the number of Tribal applications, particularly from the Great Plains, that were planned for Round #1. These are rules that can be changed before Round #2 with sufficient federal commitment.

In addition to the recommendations below, the Great Plains Tribal Chairman's Association helped draft and supports the detailed recommendations outlined in the National Congress of American Indians resolution on the ARRA Broadband funds ("Effective Inclusion of Tribes in the ARRA Broadband Program," NCAI Resolution #PSP-09-026).

(1) TRIBAL PREFERENCES

Constitutional Legal Background for Tribal/Indian Specific Provisions

American Indian tribes are sovereign nations whose existence predates the formation of the United States. From its earliest days, the United States recognized Indian tribes as sovereigns in our own right, with right over our lands and a guarantee of tribal self-government. This historic acknowledgment of native nations finds expression in the U.S. Constitution and in the treaties made between our tribes and the United States.

In 1789, the Constitution of the United States was ratified. It recognizes and affirms the sovereignty of our Indian nations and the unique and different relationship with the federal government in at least three important ways. First, the Constitution provides in the Supremacy Clause that, "[a]ll Treaties made, or which shall be made. ... shall be the Supreme Law of the Land." (U.S. Const, art. VI.). Chief Justice Marshall acknowledged that our Indian treaties "recognize the preexisting power of [each Indian] Nation to govern itself." (*Worcester*, 31 U.S. at 562.) This principle is enshrined in the Constitution by virtue of the Supremacy Clause and its ratification of our Indian treaties "already made."

Second, the Constitution provides in the Indian Commerce Clause that, "Congress shall have the

GREAT PLAINS TRIBAL CHAIRMAN'S ASSOCIATION

power to ... regulate Commerce ... with the Indian tribes.” (U.S. Const., art. I, sec. 8, cl. 3.) Chief Justice Marshall explained the meaning of this clause in *Worcester v. Georgia*:

From the commencement of our government, Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. (31 U.S. at 556-557.)

The Indian Commerce Clause respects the sovereignty of our Indian nations. Congress is not given the power to regulate commerce “for” the Indian nations. Nor is it given the power to regulate commerce “among” the Indian nations; as it is in respect to the States through the Interstate Commerce Clause. (U.S. Const., art. I, § 8, cl. 3.) Instead, Congress is given the power to regulate the United States’ commerce “with” the Indian nations. This power is to be exercised between nations. It is bilateral. It respects the independence of Indian nations and our prior sovereignty.

Third, not only are Tribal governments legally and distinct entities under the Constitution, so are Tribal members/citizens. Indians are mentioned in the Apportionment Clause of the original Constitution (U.S. Const., art. I, § 2), and again in the Apportionment Clause of the Fourteenth Amendment (U.S. Const., amend XIV, § 2, cl. 1). In both places, our tribal citizens were excluded, as “Indians not taxed,” from the apportionment of Representatives in the House.⁴

By excluding “Indians not taxed” from the American electorate in the original Constitution, the Founding Fathers recognized the separate sovereign status of Indian nations and people. Indian people stood outside the Federal union. Through the Treaty Clause (U.S. Const., art. II, § 2, cl. 2), the United States entered into approximately 350 treaties with our Indian nations in the first eighty years of the American union. Inherent in the treaty-making process was a bilateral, nation-to-nation relationship based on mutual respect.

Through the Treaty, Supremacy, Indian Commerce Clause, and the Apportionment Clauses, and subsequent case law, the U.S. Constitution acknowledges our native nations as sovereigns with preexisting rights of self-government and self-determination, and our Tribal members as having a legally separate and distinct citizenship status.

Treaty-Specific Provisions Regarding Infrastructure/Broadband

As outlined above, under the Constitution, Treaties are the “supreme law of the land” for the U.S. federal government. This was acknowledged by the FCC Commission’s own policy regarding Tribes and telecommunications in the *Twelfth Report and Order*.⁵

The majority of the Great Plains member tribes are constituent bands of the Great Sioux Nation, and our Treaty with the United States is the Fort Laramie Treaty of 1868. (See Treaty with the

⁴ We were also excluded from the Citizenship Clause of the Fourteenth Amendment. (U.S. Const., amend XIV, § 1, cl. 1.) This is because we owed our primary allegiance to our separate, independent, native nations. (See *Elk v. Wilkins*, 112 U.S. 94 (1884).) Indians were not made citizens of the United States until the 1924 Indian Citizenship Act. (Act of June 2, 1924, 43 Stat. 253 (1924).)

⁵ *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 12208 (2000) Para 125 pg 5 (“*Twelfth Report and Order*”)

GREAT PLAINS TRIBAL CHAIRMAN'S ASSOCIATION

Sioux—Brule, Oglala, Minniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arc, and Santee—and Arapaho, 15 Stat. 635 (Apr. 29, 1868).)

In our Treaty the United States recognized, secured, and “reserved” our native homelands throughout the Great Plains and our preexisting rights of self-government and self-determination over our own lands. In our Treaties we agreed that we will “regard said reservation their permanent home.”⁶ In our Treaty, the federal government also recognized basic needs and infrastructure such as roads, railroads, etc.

Telecommunications and broadband access are basic infrastructure; they are the roads, water, and electricity of today. They are now the most basic of infrastructure necessary to ensure our Nations, our “reserved” homelands, have access to the rest of the United States. Not only does the federal government have specific treaty obligations, it has a general trust responsibility to ensure that Native Americans and tribal lands have access to the same infrastructure as the rest of America. That trust responsibility is simply not being upheld right now.

Despite these Treaty provisions and the trust responsibilities, each time there has been a build-out of core infrastructure in this country, whether it was railroads, roads, water, or electricity, Indian Country has largely been bypassed. And now we fear we see the same policy of exclusion in the build-out of the nation’s telecommunications and broadband infrastructure.

The federal government continues to subsidize a system which funds non-Tribally approved entities on Tribal lands, does not empower Tribal self-governance to provide and regulate telecommunications, and does not require current providers to service Indian people.

RECOMMENDATIONS:

1) INCREASED POINTS FOR ANY TRIBAL APPLICANT

- **BTOP: “Disadvantaged Small Businesses.”** BTOP offering one (1) point to socially and economically disadvantaged small business applicants borders on comedy, particularly when by comparison non-disadvantaged incumbents are offered at least five (5) points under BIP. Considering the disadvantaged preference is a statutory requirement, it was the agencies that choose to allocate only one (1) point.
 - In general, regardless of location of service area, the point allocation for minority/Tribal-owned providers should be substantially increased. The current funding has been subsidizing non-minority companies for decades, companies that have not been providing adequate services to underserved and unserved communities, most of which are minority communities.
 - The Tribal preference over Tribal lands outlined below is helpful when more than one applicant is applying to cover tribal lands, but it is insufficient to address the Tribal or Indian owned applicant which still has to compete generally against all other better funded applicants.
 - At least ten (10) points should be offered to minority and Tribal applicants for any application under both BIP and BTOP.

⁶ Fort Laramie Treaty of 1868 15 Stat. 635 (Apr. 29, 1868) Article 15.

2) **TRIBAL/TRIBAL-CONSORTIUM PREFERENCE WHEN SERVING TRIBAL LANDS**

- Under the current NOFA, communities which are 75% or more rural are required to apply to the RUS program first. The majority of the Great Plains Tribes will likely fall into this category. However, the RUS program's built-in preference for "incumbency" (for pre-existing, usually non-Tribal, companies) continues to be one of the most significant institutional impediments to serving Tribal communities in rural areas. That preference was highlighted in the first round of the previous NOFA for broadband. Therefore, the majority of the Tribes most in need automatically begin this process "one step back" with a five (5) point deduction for not being an existing or former RUS borrower.
 - **BIP: "Title II Borrowers."** Over the long term, the "incumbency" preference should be replaced with a preference for EITHER "incumbents" -OR- Tribal applicants when the coverage area is over Tribal lands.
 - In the short term, an additional preference should be added for Tribal/Tribal consortium applicants on Tribal lands, either by an outright preference or by a substantial point allocation, such as twenty-five (25) points.

3) **TRIBAL APPROVAL SHOULD BE REQUIRED FOR ANY PROVIDER WHO REQUESTS FEDERAL FUNDS TO SERVICE TRIBAL LANDS**

- As previously discussed, the Fort Laramie Treaty of 1868 clearly outlines that basic infrastructure issues are Treaty issues, directly between the Tribal government and the Federal government.⁷ Infrastructure issues on Tribal lands are clearly to be *negotiated* between the Tribe and the federal government. No applicant should be granted permission to service Tribal lands, much less be subsidized to do so, by the federal government without the consent of each of the affected Tribes.

(2) PREFERENCES FOR THE GREATEST NEED AND LEAST ACCESS

While we understand the federal government's interest in stretching its limited dollars, the criteria outlined in the NOFA perversely benefits those that have the most ability to obtain broadband access without federal assistance, and does the least to assist the most unserved communities in the U.S.

Required financing. The ARRA goals include job creation and assisting those areas of the economy most impacted by the recession. The NOFA states its objective to target these substantially impacted communities, the same communities with the least broadband access (unserved and underserved), yet it then requires matching funds, and allocates substantial points for provision of alternate financial and for sustainability. This requirement has the effect of eliminating those communities most in need from eligibility.

These stringent financial requirements essentially eliminate the majority of communities with the most need. If the economically impacted applicants and communities had the private funding resources and sustainability, they would already have the broadband access. Numerous Tribal

⁷ *Id.*

GREAT PLAINS TRIBAL CHAIRMAN'S ASSOCIATION

communities in great need did not even submit applications after a preliminary review of the financing point allocation.

Not only does the BIP application require sustainability, a full 20 points are based solely on the applicant's financial investment in the project: (1) 10 points for the percentage of financing from outside sources, and (2) 10 points for the grant-loan ratio requested in the application. So the poorest of the poor communities, those with the least broadband access and the least ability to obtain access through private ventures, are automatically deducted 20 point or 20% off the highest possible score. This is reflected in the BTOP application as well, as 20% matching funds are required.

RECOMMENDATIONS:

1) REALLOCATE POINTS TO COMMUNITIES MOST IN NEED

- **BIP: "Leverage of Outside Resources"/"Extent of Grant Funding."** There should be a sliding scale of twenty (20) points available for the most impoverished communities and the communities least likely to obtain broadband access through any means other than federal investment.
- **BTOP: Matching Funds Waiver.** There should be a more flexible waiver for BTOP 20% matching fund requirements for Tribal applicants serving Tribal lands (consistent with the previous Constitutional discussion). In fact, we would argue there should be no matching requirement for Tribal applicants serving Tribal lands. We understand the statutory requirement. But there is also flexibility for discretion built into the statute. And the treaty and trust responsibility, as well as the federal goals of tribal self-sufficiency are sufficient arguments for use of the discretion to waive the matching funds requirement. Additionally there should be more flexibility with regard to public disclosure of government financial information.

2) REFINE DEFINITION OF "REMOTE" AND POINT ALLOCATION

- **BIP: "Proportion of Rural Residents Served in Unserved Areas" –Reservation Population Should Be the Measure.** In many instances it is simply not possible to add additional "rural residents" in 10,000 increments (one (1) point is allocated for each 10,000 residents up to five (5) points) for a tribal provider to serve. Approximate populations of our reservations as estimated by the U.S. Census in 2000 range from under 5,000 to a maximum of 25-30,000. None of which would be able to obtain the full five (5) points under this section.
 - The ARRA statute says the goal is to provide broadband "to the greatest population of users in the area," not to a random number of 50,000 or more residents. **For Tribal applications the greatest population of users "in the area" should be the total population of the reservation,** whatever that population may be. The five (5) points can then be allocated on a sliding scale depending on what percentage of the reservation population the applicant intends to serve.

GREAT PLAINS TRIBAL CHAIRMAN'S ASSOCIATION

- **BIP: “Remote Area Targeting”:** In order to receive maximum five (5) points under this section 250 miles from a non-rural area. We find it hard to believe that under any definition of remote (including poverty, and access to telecommunications, electricity, water, transportation, etc.) the impoverished and isolated reservations of the Great Plains would not qualify as some of the most “remote” communities in America. Yet if you simply measure miles, most of our reservations will not obtain the necessary points:
 - The beginning of the boundary of the Cheyenne River Sioux Reservation is approximately 65 miles from the South Dakota state capitol of Pierre.
 - The boundary of the Pine Ridge reservation is just about 50 miles from Rapid City, SD.
 - The boundary of the Standing Rock Sioux Reservation is about 40 miles from Bismarck, ND.
- Tribal lands should by definition be categorized as “remote.” At a minimum, however, Tribal land status as “remote” should not be defined by proximity to urban populations based on an arbitrary number of miles, but by the remoteness and isolation of the reservation and general lack of access to services and basic infrastructure because of the numerous historical and legal challenges faced by Tribes.

3) STREAMLINE BIP VS. BTOP APPLICATION

- It does not appear as if the statute requires that all rural areas *must* first apply to BIP. It states that *only* 75% plus rural areas *may* apply to BIP. Further an applicant may not receive both BIP and BTOP funds. Therefore it seems there is no statutory prohibition in the ARRA against greater than 75%+ rural Tribes applying directly to BTOP, they just cannot both receive both BIP and BTOP funds for the same infrastructure elements of the same project.
 - Tribes should be able to apply directly to BTOP for grants, and not be forced to apply to BIP first.
- The application itself is cost-prohibitive for most rural Tribes. RUS and NTIA should consolidate the BIP and BTOP applications into a single application with optional sections for each program as necessary, including the option not to apply for a loan, nor file loan support documentation, and, in doing so, make certain the loan application is deemed electronically complete for the purposes of submission.

Broadband is desperately needed on our reservations in the Great Plains to help our communities move out of poverty. The federal government has both the trust responsibility and the ability to ensure Tribes are better incorporated into the next round of RUS-NITA funding, as well as all future telecom grants and policies. The Great Plains Tribal Chairman's Association respectfully requests that our voices are finally heard.

Cc: FCC Commissioner Copps; FCC Tribal Liaison, Shana Barehand
Congressman Collin C. Peterson, Chairman House Agriculture Committee
Senator Ben Nelson (NE); Senator Mike Johanns (NE)
Senator Byron Dorgan (ND); Senator Kent Conrad (ND)
Senator Tim Johnson (SD); Senator John Thune (SD)