

173,000.³ The Navajo Nation has had to take drastic action to try to stop the spread of COVID-19. Most recently, the Navajo Department of issued Public Health Emergency Order No. 2020-030, re-issuing a Stay at Home (Shelter in Place) Lockdown Order through December 6, 2020.⁴

On November 20, 2020, the Navajo Office of President and Vice President (OPVP) issued a letter to the Gallup McKinley School Boards of Education requesting that those school districts return to virtual-only education.⁵ On January 13, 2021, The Navajo Nation Board of Education issued a resolution stating that it would “provide virtual or online learning options only, without face-to-face instruction, until the Navajo Nation deems it safe to return to face-to-face instruction.”⁶ As such, the Navajo Nation must rely on broadband infrastructure in order to educate its children all while over a third of Navajo households reside below the poverty line.⁷ A program such as the Emergency Broadband Fund is critical for the Navajo people.

II. DISCUSSION

A. Introduction

Section 904 of the Consolidated Appropriations Act of 2021 (“Consolidated Appropriations Act” or “Act”)⁸ establishes an Emergency Broadband Connectivity Fund of \$3.2 billion and directs the FCC to use that fund to establish an Emergency Broadband Benefit

³ <https://www.ndoh.navajo-nsn.gov/COVID-19>.

⁴ <https://www.ndoh.navajo-nsn.gov/Portals/0/PDF/PHE/NDOH%20Public%20Health%20Emergency%20Order%202020-030%20Dikos%20Ntsaaigii-19.pdf>.

⁵ See Attachment 1, OPVP Press Release of November 20, 2020.

⁶ See Attachment 2, Navajo Board of Education Resolution, January 13, 2021.

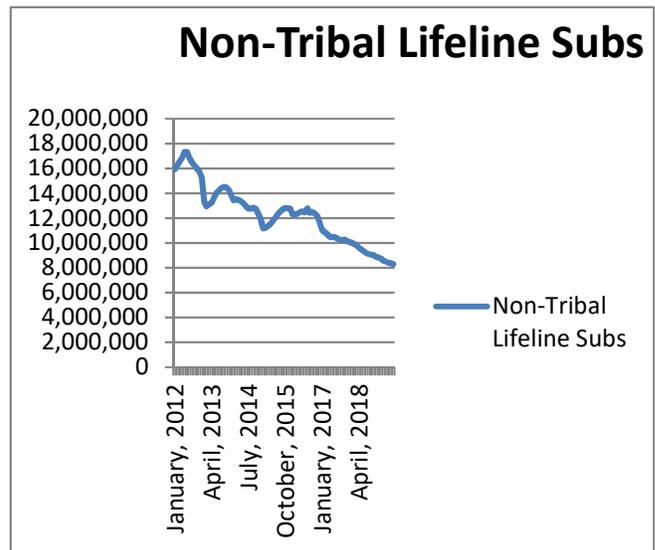
⁷ See “Historical Marginalization Has Left the Navajo Nation Uniquely Vulnerable to COVID-19,” Prosperity Now, May 22, 2020, available at <https://prosperitynow.org/blog/historical-marginalization-has-left-navajo-nation-uniquely-vulnerable-covid-19>. This is almost three times the national poverty household rate of 12.7 percent.

⁸ Consolidated Appropriations Act, 2021, H.R. 133, 116th Cong. (2020) (enacted), available at <https://www.congress.gov/bill/116th-congress/house-bill/133/text> (“Consolidated Appropriations Act” or “Act”) (enrolled bill).

Program to support broadband access during the pandemic. NNTRC fully supports the Emergency Program and the relief it could bring to those on the Navajo Nation that are on the other side of the “affordability gap,” and the “homework gap.” NNTRC remains concerned, however, that mistakes made in the Lifeline Program, if carried over to the Emergency Broadband Program, will impact negatively the ability of Navajo citizens to participate.

B. Changes to the Lifeline Program between 2016-2019, Including New Verification Procedures, Have Disproportionally Impacted Indian Country

Since the *2012 Lifeline Reform Order*, Lifeline subscribership has plummeted in Indian Country. According to the *2019 Universal Service Monitoring Report*,⁹ since the height of enrollment in the Lifeline Program in May, 2012, the overall rolls have been reduced by more than 50% nationwide. However, Lifeline participation in Indian Country has been reduced by close to 75%, as depicted in the attached below and Attachment 3. Moreover, whereas non-Tribal lifeline subscribers has slowed, Lifeline subscription in Indian Country

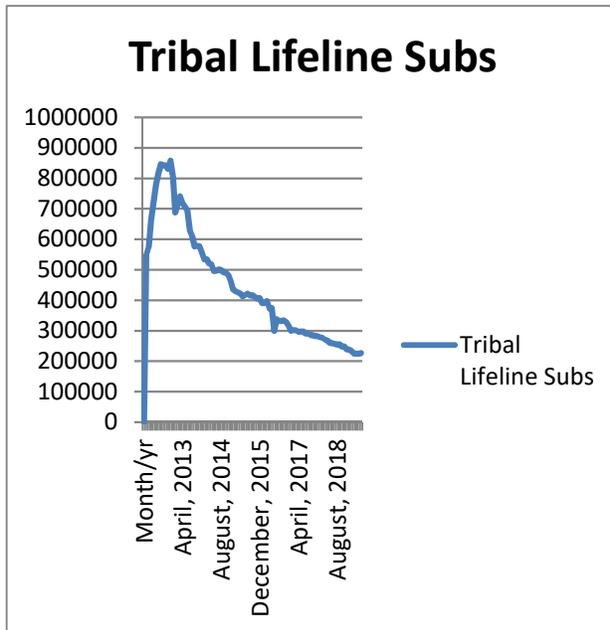


continues in a tailspin, to a low of barely 225,000 participants. Whereas at one point Native Americans accounted for over five percent (5%) of Lifeline participants, that figure is now less than 2.5 percent. While the purge of Navajos on the Lifeline rolls has been slower (thanks in large part to the Herculean efforts of carriers serving the Navajo Nation), between August 2018 and August 2019, more than an additional 12 percent of Navajos have been dropped from the

⁹ This report is available for download at: <http://www.fcc.gov/encyclopedia/federal-state-joint-board-monitoring-reports>. Attachment 3 hereto provides a further breakdown of these numbers.

Lifeline Program, while overall during that period, less than 10 percent of non-Tribal members have been dropped.¹⁰

Navajo Nation then-President Russell Begaye testified before the Senate Committee on



Homeland Security on September 14, 2017 on this problem.¹¹ This disparity in Lifeline participation is explained, in large part, by the strict verification requirements and the establishment of the National Verifier. The FCC has even admitted this, waiving some of the verification and use requirements during the COVID-19 pandemic multiple times.¹² As the FCC stated in its most recent waiver order:

In response to the impact of the COVID-19 pandemic in the United States, the Wireline Competition Bureau has waived certain Lifeline program rules in five previous Orders to provide necessary relief for low-income households. In light of the ongoing pandemic, we find good cause to extend, on our own motion, our prior waivers of the Lifeline program rules governing documentation requirements for subscribers residing in rural areas on Tribal lands, recertification, reverification,

¹⁰ Interestingly, while Indian Country has suffered so much under this reform, when it came to cracking down on carriers who were “gaming the system” and signing up duplicate and/or ineligible subscribers, virtually none served any actual reservation lands.

¹¹ <https://ecfsapi.fcc.gov/file/100544786300/Lifeline%20HSGAC%20Navajo%20Nation%20Testimony%2009.14.2017.pdf>.

¹² See, *Lifeline and Link Up Reform and Modernization*, Order, 35 FCC Rcd 2729 (WCB Mar. 17, 2020) (*First Lifeline Waiver Order*) (temporarily waiving Lifeline recertification and reverification requirements); *Lifeline and Link Up Reform and Modernization*, Order, 35 FCC Rcd 2950 (WCB Mar. 30, 2020) (*Second Lifeline Waiver Order*) (temporarily waiving Lifeline usage and general de-enrollment requirements and directing the Universal Service Administrative Company (USAC) to suspend periodic reviews); *Lifeline and Link Up Reform and Modernization*, Order, 35 FCC Rcd 4482 (WCB Apr. 29, 2020) (*Third Lifeline Waiver Order*) (temporarily waiving three-month documentation requirement for subscribers to demonstrate income eligibility); *Lifeline and Link Up Reform and Modernization*, Order, 35 FCC Rcd 5510 (WCB June 1, 2020) (*Fourth Lifeline Waiver Order*) (temporarily waiving documentation requirements for subscribers residing in rural areas on Tribal lands); *Lifeline and Link Up Reform and Modernization*, Order, 35 FCC Rcd 8791 (WCB Aug. 17, 2020) (*Fifth Lifeline Waiver Order*) (extending prior waivers through November 30, 2020).

general de-enrollment, subscriber usage, and income documentation through February 28, 2021. We will continue to monitor the situation to determine whether any additional extension of these waivers is appropriate.¹³

Unfortunately, the *Public Notice* states that the FCC intends to use USAC, the National Verifier, and other certification requirements borrowed from the Lifeline Program. This will spell disaster. If the FCC has already admitted that the National Verifier cannot work during the time of a pandemic, how can it expect to use the National Verifier to certify participation in a program precisely designed to offset the difficulties created by that same pandemic? The FCC needs to rethink how it will determine eligibility for the Emergency Broadband Program to bring it more in line with its previous *Waiver Orders*.

Rather, the FCC should look to carriers who have worked in Indian Country and get their input as to how this new program can be administered such that Native Americans are not unfairly excluded. Such carriers have a proven track record in providing service, and establishing procedures to properly certify participation, all while dealing with the culture differences, lack of rural addressing, and low population densities that characterize Indian Country.

C. The FCC Should Use All Available Support Programs to Determine Eligibility

The Public Notice asks:

Should the Commission pay special attention to established programs that target groups vulnerable during the pandemic, such as low-income households, Americans living in rural or Tribal areas, communities of color, students, veterans, or the newly unemployed? Should a complete and sufficient plan to combat waste, fraud, and abuse (as required for all applicants) suffice to show that an established plan “maintains verification processes that are sufficient to avoid fraud, waste, and abuse” or must an applicant make a separate showing on that point? If the latter, what documentation should be required of such applicants?¹⁴

¹³ *Lifeline and Link Up Reform and Modernization*, Order, DA 20-1357, released November 16, 2020.

¹⁴ Public Notice, p. 5.

The Commission should use *all* programs that can determine eligibility for Tribal members for benefit programs similar to the Emergency Broadband Fund. Limiting the programs that can be used to determine eligibility makes no sense, especially given the evidence above that the “deck is stacked” against Native Americans. For Navajos, this includes Tribal Temporary Assistance for Needy Families (TTANF), Navajo Department for Self Reliance Program (NNSDR), and the Navajo School Clothing Program (NSCP).¹⁵ The FCC should include these programs.

D. The FCC Should Define “Household” Broadly

The FCC seeks comment on how “household” should be defined, given that the Act itself does not contain a definition.¹⁶ One of the reasons for the significant drop-off in Tribal Lifeline participation has been the very narrow reading of the term “household” coupled with the lack of rural addresses in much of Indian Country. Even though the Commission has acknowledged that homesteads on Native Reservations might contain multiple generations constituting several households,¹⁷ nonetheless it adopted strict requirements for establishing a household, which are contrary to Navajo culture. The Lifeline definition of “household” has resulted in many Navajos losing access to the Lifeline program. The FCC should not make the same mistake with the

¹⁵ See

https://www.needhelppayingbills.com/html/navajo_nation_assistance_progr.html#:~:text=One%20of%20the%20main%20programs,and%20poor%20Navajo%20Nation%20residents. See also <https://www.nndss.navajo-nsn.gov/DSSDEPTSPROGRAMS/DepartmentforSelfReliance/NavajoSchoolClothingProgram.aspx>.

¹⁶ Public Notice, p. 6.

¹⁷ See *Lifeline and Link Up Reform and Modernization*, Notice of Proposed Rulemaking (FCC 11-32), released March 4, 2011 (“*Lifeline Modernization NPRM*”), ¶ 108 (“We understand that there may be situations – such as residents of commercially zoned buildings, those living on Tribal lands, and group living facilities – where application of the one-per residential address rule may produce unintended consequences that would deprive deserving low-income consumers of the support that they otherwise would be entitled to. We encourage ETCs, Tribal Communities, the states and other interested parties to provide input on a rule that maximizes the number of Americans with access to communications services, but also protects the fund from waste, fraud and abuse.”).

Emergency Fund, and should engage with Tribes, on a nation-to-nation consultative process, to better define what a “household” actually means in Indian Country.

E. The Emergency Broadband Benefit Program Should Include All Providers Capable of Providing Service

The NNTRC is concerned that a strict reading of the Act could lead to only existing providers being able to participate, only in their previously served local areas, and then only to their current subscribers. Read literally, the Emergency Program would be limited to existing providers and their existing customers as of December 1, 2020.¹⁸ But this narrow reading of Section 904(a)(9) is not supported by the other provisions of Section 904 or the intent of Congress. The definition of “Eligible Household,” for example, does not require that a household to be a subscriber as of December 1, 2020, in order to be eligible.¹⁹ Clearly, Congress anticipated that households not currently receiving broadband service could be eligible to participate.

Similarly, a provider must be eligible to provide broadband service to those new households, even though it did not do so on December 1, 2020. The first round of CARES funding, for example, allowed many carriers to create new infrastructure on the Navajo Nation, deploying deeper into rural America, some of which came online after December 1, 2020. Surely these new service areas should be supported by the Emergency Program. And in the most recent RDOF auction, SpaceX won support for significant areas on the Navajo Nation.²⁰ Is it disqualified from participating in the Emergency Program because it wasn’t offering commercial service on the Navajo Nation as of December 1, 2020?

¹⁸ *Id.* (“INTERNET SERVICE OFFERING.—The term “internet service offering” means, with respect to a broadband provider, broadband internet access service provided by such provider to a household, offered in the same manner, and on the same terms, as described in any of such provider’s offerings for broadband internet access service *to such household*, as on December 1, 2020.”) (emphasis added).

¹⁹ Act at § 904(a)(6).

²⁰ See <https://www.fcc.gov/reports-research/maps/rdof-phase-i-dec-2020/>.

Section 904(a)(9) should be read only to mean that in order to be eligible to participate, a provider must have had established services anywhere in the United States as of December 1, 2020. Similarly, in order to maximize the number of households the \$3.2 billion can support, the Emergency Program should allow households with existing connections to change providers, both to allow them to switch to a provider that participates, and to seek out the best program for their particular needs. Such an approach will encourage providers to compete for customers, and encourage consumers to seek out the best and most affordable service offerings.

F. The FCC Must Support Connections Beyond Just Wireline Modems

The FCC seems to be playing favorites for traditional wireline carriers in stating the types of devices the Emergency Program will support.²¹ Yet on the Navajo Nation, we have a variety of technologies used to deliver broadband services, including wireline, fixed wireless, wireless, and satellite. Antennas for fixed wireless systems and satellite systems need to be included in the Emergency Program, lest those delivery modes be hampered. If we are to ultimately close the Digital Divide, and overcome the Homework Gap, then we need to apply every innovative technology we can to deliver service as ubiquitously as possible.

Similarly, the FCC should not limit support to only broadband systems that deliver the Internet to devices within the traditional definitions of a “computer” or “tablet.” Instead, the FCC should support any broadband connection capable of delivering data to devices that can perform the functions of a computer or tablet. This must include smartphones. In the same way that the poor who live in rural areas must rely on wireless and other innovative technologies,

²¹ Public Notice at 8 (“We seek comment on whether the Commission should provide any further clarity on Internet service offerings and associated equipment that are eligible for reimbursement in the Emergency Broadband Benefit Program. Would associated equipment include, for example, the monthly rental costs for modems and/or routers that are offered as part and parcel of an Internet service offering? Is there other customer-premises equipment that should be eligible for reimbursement?”).

many of these same people rely almost exclusively on their smartphones for Internet access. A 2019 Pew Research Center study showed that 37% of Americans go online mostly via smartphones, and that rises to 58% for younger users. 17% of users report that they access the Internet *only* via a smartphone, and for 26% of adults with a high school education or less, their only onramp to the Internet is a smartphone.²² Are they to be excluded from the Emergency Program? Then for whom is this Emergency Program designed?

The Public Notice suggests that to “ensure that eligible households with students are able to use their benefit to participate in such activities, we propose that a connected device provided through the Emergency Broadband Benefit Program should be expected to support video conferencing platforms and other software essential to ensure full participation in online learning.” In general, NNTRC supports this concept, but fears that the “other software essential to ensure full participation in online learning” language is too restrictive, given the immaturity, proprietary nature, and often closed systems hastily deployed by many school districts during the pandemic.²³ Moreover, are providers to lose support if they connect a house with a device that isn’t capable of “full participation in online learning”? Burdening the program with such a standard will needlessly slow roll-out and participation, as providers will have to carefully assess the computing capabilities of every new connection. Think how long that will take and how many IT professionals will have to be engaged to assess each house’s computer set-up, and then no doubt be required to troubleshoot every time someone’s Zoom link goes down. Such a regulatory overburden will doom the program from the start, and many providers simply will not participate.

²² <https://www.pewresearch.org/internet/2019/06/13/mobile-technology-and-home-broadband-2019/>.

²³ See “Computer glitches disrupt classes as schools return online,” APNews, September 8, 2020, available at <https://apnews.com/article/technology-miami-connecticut-hartford-alabama-06f5fdc1f7cdf62621a2539a1433bd21> (“Students across the U.S. ran into computer glitches Tuesday as they began the school year with online instruction at home because of the coronavirus, adding to the list of problems that have thrust many a harried parent into the role of teacher’s aide and tech support person.”).

Instead, the FCC should adopt a standard that allows support for all devices capable of running apps for the most popular collaborative video conferencing systems such as Zoom, WebEx, and Microsoft Teams. Such a standard will not unnecessarily “redline” those users without powerful home computing systems who are in the greatest need of the emergency support this program will offer. It also will not scare off providers who might fear the cost of ensuring all subscribers have the necessary equipment, as well as the danger of audit and fines (possibly decades in the future),²⁴ if a subscriber ultimately was unable to fully participate in online learning because of the particular software suite deployed by a school system.

III. CONCLUSION

There is great need on the Navajo Nation for support to close the Digital Divide and the Affordability Gap. The Emergency Broadband Fund can be a vital tool in helping out during the COVID-19 pandemic, but only if mistakes made in the Lifeline Program reform are avoided and Tribes not discriminated against.

Respectfully submitted,

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²⁴ The threat of fines based on decades-old participation in Universal Service Fund programs is very real. In *Application for Review of a Decision of the Wireline Competition Bureau by Net56, Inc., Palatine, Illinois*, CC Docket No. 02-6, Memorandum Opinion and Order, 32 FCC Rcd 963 (2017) (“*Net56*”), the FCC ruled that the Universal Service Fund has no statute of limitations, and providers are now subject to USAC audits and recoupment actions *decades* after the funding years in question. Providers will think twice before participating if they have to carry the threat and contingent liability on their books forever.