

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of )  
 )  
Emergency Connectivity Fund for ) WC Docket No. 21-93  
Educational Connections and Devices )

To: The Wireline Competition Bureau

**COMMENTS OF THE NAVAJO NATION TELECOMMUNICATIONS  
REGULATORY COMMISSION (NNTRC)**

The Navajo Nation Telecommunications Regulatory Commission (“NNTRC”),<sup>1</sup> through undersigned counsel, and pursuant to Sections 1.415 and 1.419 of the Commission’s rules (47 C.F.R. §§ 1.415 & 1.419), submits these Comments in the above-referenced proceeding in response to the Commission’s Public Notice, DA 21-317, released March 16, 2021 (“*Emergency Broadband Connectivity PN*” or “*PN*”).<sup>2</sup> In support of these Comments, the NNTRC submits:

**I. BACKGROUND**

The Navajo Nation consists of 17 million acres (26,111 square miles) in portions of three states—Arizona, New Mexico, and Utah. The Nation is comparable in size to West Virginia. Were it a state, the Navajo Nation would rank 4<sup>th</sup> smallest in population density; only Montana (6.5 persons per square mile), Wyoming (5.4) and Alaska (1.2) are less densely populated.

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<sup>1</sup> The NNTRC was established pursuant to Navajo Nation Council Resolution ACMA-36-84 in order to regulate all matters related to telecommunications on the Navajo Nation. Telecommunications is defined broadly under the Navajo Nation Code to include broadband and “any transmission, emission or reception (with retransmission or dissemination) of signs, signals, writings, images, and sounds of intelligence of any nature by wire, radio, light, electricity or other electromagnetic spectrum.” Its purpose is to service, develop regulation and to exercise the Navajo Nation’s inherent governmental authority over its internal affairs as authorized by the Navajo Nation Council and the Navajo Telecommunications Regulatory Act.

<sup>2</sup> *Emergency Connectivity Fund for Educational Connections and Devices to Address the Homework Gap During The Pandemic PN*, DA 21-317, released March 16, 2021. The *PN* calls for comments to be filed by April 5, 2021, and reply comments by April 23, 2021. These Comments are timely.

The COVID-19 virus has had a devastating impact on the Navajo Nation and its people. The Navajo Nation has suffered 30,059 cases and 1,246 confirmed deaths among a population of approximately 173,000.<sup>3</sup> Navajo schools are virtual-only at least until the end of the current school year.<sup>4</sup> 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.<sup>5</sup>

## **II. DISCUSSION**

### **A. Introduction**

Section 7402 of the American Rescue Plan Act (“Act”)<sup>6</sup> establishes an Emergency Connectivity Fund of \$7.171 billion and directs the FCC to “promulgate rules providing for the distribution of funding from the Emergency Connectivity Fund to eligible schools and libraries for the purchase of eligible equipment and advanced telecommunications and information services for use by students, school staff, and library patrons at locations other than a school or library.”<sup>7</sup>

### **B. The FCC’s Rules Should Encourage Tribal Participation to Counter Decades of Underrepresentation in the E-Rate Program**

The *Public Notice* alludes to the fact that Tribal schools, and especially libraries, historically have been underrepresented in the E-rate program. “Some Tribal libraries have also

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

<sup>4</sup> 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.”

<sup>5</sup> 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.

<sup>6</sup> American Rescue Plan Act, 2021, H.R. 1319, 117th Cong., tit. VII, § 7402 (2021) (enacted), available at <https://www.congress.gov/bill/117th-congress/house-bill/1319/text> (American Rescue Plan Act) (enrolled bill) (“ARPA”).

<sup>7</sup> *PN* at 1.

received E-Rate support, but historically Tribal libraries have been underrepresented among E-Rate applicants.”<sup>8</sup> Yet the *Public Notice* neglects to recognize or take responsibility for the utter failures of the E-rate program as it relates to Tribal libraries that have kept most Tribal libraries out of the program. This has resulted from a decades-long misinterpretation of the statute by the FCC, as noted by the General Accounting Office (GAO) all the way back in 2006.

Some tribal and state library agency officials noted that the current eligibility criterion infringes on tribal sovereignty by involving the state in tribal library E-rate funding. One state librarian, for example, expressed discomfort at being put in the position of acting on behalf of a sovereign tribe and expressed the strong belief that eligibility for E-rate funding should be a matter between the tribe and USAC, without involvement by state government agencies. USAC officials told us that they have received some E-rate applications from tribal libraries. In those cases, a USAC board member successfully worked with the states in question to obtain the certifications. However, USAC officials and the USAC board member emphasized the time-consuming nature of these resolution efforts.<sup>9</sup>

While the *Public Notice* recognizes that the Library Services and Technology Act (LSTA) was amended to make clear that Tribal libraries qualify for support and are thus eligible to participate in the E-rate program, the Commission also recognizes that “the E-Rate rules have not yet been revised to reflect that change to the LSTA.”<sup>10</sup> The FCC should take this opportunity, once and for all, to erase this stain from its legacy and clearly declare that Tribal libraries stand on equal footing with state libraries, and are eligible to participate in the E-rate program generally, and the Emergency Connectivity Program, specifically, without separate state “approval.”

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<sup>8</sup> *PN* at 4, citing *2014 First E-Rate Order*, 29 FCC Rcd at 8969-70, para. 247 (explaining that although Tribal libraries frequently serve as the sole source of free internet access in their communities, few benefit from the E-Rate program).

<sup>9</sup> “Telecommunications: Challenges to Assessing and Improving Telecommunications For Native Americans on Tribal Lands,” GAO-06-189, released January 2006, pp. 30-31.

<sup>10</sup> *PN* at 5.

Similarly, the Commission should make clear that “eligibility” is not equated with “currently receiving E-rate support.” Although there is no explicit definition of “eligible” in the *Public Notice*, there is at least some innuendo that in order to be eligible, schools and libraries already must be in the E-rate program.<sup>11</sup> There is no statutory requirement of this nature, and the FCC should encourage all schools and libraries that meet the criteria for support to apply, regardless of whether they’re currently participating in the E-rate program.

Finally, the FCC should make clear that Head Start centers are also eligible to participate. Although the statute talks in terms for elementary schools and beyond, elsewhere in the Act, “The terms ‘elementary education’ and ‘secondary education’ have the meaning given such terms under State law.”<sup>12</sup> By Resolution CJY-37-05, the Navajo Nation in 2005 adopted the “Navajo Sovereignty in Education Act,” the purpose of which was to “establish the Navajo Nation Department of Diné Education, and to confirm the commitment of the Navajo Nation to the education of the Navajo People.” The Navajo Head Start program was placed under the direction of the Department of Diné Education. Further, Navajo also identifies Head Start classrooms as education centers, specifically to preserve the Navajo language by teaching it to young children.<sup>13</sup> As such, under Navajo Law, the Navajo Head Start centers should be considered as “elementary schools” and eligible to participate in the Emergency Connectivity Program.

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<sup>11</sup> See, e.g., *PN* at 13 (using existing forms because “applicants are already familiar” with such funds).

<sup>12</sup> ARPA, § 2004(d)(1).

<sup>13</sup> 10 N.N.C. §§ 2201-2206. See Exhibit 37, Diné Language Head Start Act.

### **C. The FCC Should Set Aside Some of the Fund For Tribal Schools and Libraries**

Having identified the problem of Tribes not participating fully in the E-rate program, the Commission asks whether it should set aside some of the funding for Tribal schools and libraries.<sup>14</sup> Given the damage caused by the FCC's past application of the E-rate rules, it is only possible to correct this through a clear set-aside for Tribal schools and libraries, to give them a chance to catch up with other E-rate recipients. In determining what percentage of the Fund should be set aside for Tribes, the Commission can look at Lifeline program participation as a proxy. At the height of the Lifeline program in 2013, Native Americans constituted 5.35 percent of Lifeline subscribers (roughly twice the percentage of Americans who are identified as Native Americans on Tribal rolls).<sup>15</sup> The high participation rate in Lifeline is understandable, given the overall dire economic conditions in which so many Native Americans find themselves. It is the same with Tribal schools and libraries when it comes to broadband connectivity. But just this percentage analysis is insufficient, given the fact that the FCC has concluded elsewhere that the costs of providing broadband service in Indian Country are significantly higher than in other areas.<sup>16</sup> Thus, the "Tribal Broadband Factor" in the FCC's High Cost program, for example, established a 25% "premium" cost of providing service on Tribal Lands. The NNTRC submits, therefore, that the FCC should combine both the percentage need figure, plus the additional cost

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<sup>14</sup> *PN* at 12 ("Recognizing the trust relationship between Tribal governments and the federal government, should the Commission allocate a portion of the Emergency Connectivity Fund for Tribal schools and libraries to ensure Tribal students, school staff and library patrons benefit from the Emergency Connectivity Fund? If so, what portion of the fund should the Commission set aside for Tribal schools and libraries?").

<sup>15</sup> See 2019 Universal Service Monitoring Report, released February 4, 2020. Between July, 2012, and June, 2013, Native Americans constituted exactly 5.0 percent of Lifeline participants, with a peak of 5.35% in March, 2013.

<sup>16</sup> See *Connect America Fund*, Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, 33 FCC Rcd 11893 (2018).

figure, to conclude that at least seven percent (or \$500,000,000.00) of the Fund be set aside for Tribal lands.

**D. The FCC’s Rules Should Otherwise Encourage Tribal Participation**

The NNTRC also supports the *Public Notice*’s suggestion for prioritizing funding by approving first those schools and libraries eligible for the highest discounts under the E-rate program.<sup>17</sup> In this way, the FCC will ensure that the money will go where it is most needed, not to people who are the most adept at navigating the FCC’s and USAC’s rules.

**E. The FCC’s Rules Should Encourage Flexibility in Locations Able to be Served under the Program**

The *Public Notice* asks about what locations should be allowed to be served under the program.

Are there other places schools and libraries should be able to place Wi-Fi hotspots to provide broadband to students, school staff, and library patrons who currently lack broadband access? Are there other approaches to funding broadband access to multiple students that the Commission should incorporate into its rules implementing the Emergency Connectivity Fund?<sup>18</sup>

The NNTRC supports rules that provide the greatest flexibility possible as to locations. The rules should allow, for example, the placement of Wi-Fi hotspots at other government facilities. The importance of government “anchor institutions” to Tribal life is well documented by the FCC.<sup>19</sup> Emergency Connectivity Fund equipment should be allowed to be installed

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<sup>17</sup> *PN*, at 13 (“We propose that the Commission adopt rules applying the discount methodology used in the existing E-Rate program to prioritize funding requests, in the event that demand exceeds available funding. Under this approach, once an application filing window closes, USAC will calculate whether demand exceeds the available funds. If demand exceeds available funds at the close of an application filing window, USAC would issue funding decision letters starting with the schools and libraries eligible for the highest discount percentage established under the Commission’s E-Rate program rules and stop issuing decision letters when sufficient funds are no longer available to meet the demand at a particular discount level.”).

<sup>18</sup> *PN* at 9.

<sup>19</sup> *See, e.g.* 47 CFR § 54.313 (a)(5) (Tribal engagement obligations include a discussion of service to Tribal “anchor institutions”); § 54.313 (e)(2)(i)(A) (reporting requirement for recipients of CAF Phase II or RDOF funding of service to anchor institutions); *Improving Communications Services for Native Nations*, Notice of Proposed Rulemaking in Docket 11-40, 26 FCC Rcd 2623 (2011).

wherever students and their parents need to be, including installations at grocery stores and even gas stations. Given the highly rural nature of much of the Navajo Nation, any building with adequate infrastructure could house a hotspot allowing students to drive up and “plug in” to engage in educational activities. Harsh times require creative solutions, and the FCC must look beyond its traditional “stove pipes” of infrastructure if we are to close the homework gap.

**F. The FCC’s Rules Should Encourage Maximum Flexibility in Defining Devices that can be Supported by the Program**

In a similar vein, the FCC should provide flexible rules in terms of the equipment that can be supported by the new fund. In a place like Navajo where it is so difficult to “wire,” a variety of solutions must be allowed. For instance, the Navajo Nation is currently deploying equipment using the 2.5 GHz STA it has received. The rules should make clear that such equipment, when utilized for education purposes, is eligible for support. Just because a particular piece of equipment is not marketed as a “hotspot,” “modem,” or “router,” it should not be disqualified if it is an integral part of an overall educational network infrastructure.<sup>20</sup> Similarly, the rules should support all equipment used to complete an educational network, even if access is done via a smartphone or other device that the Commission concludes is not covered.

**G. The FCC Should Not Specify Minimum Speed Standards Under the Program**

There is a clear national debate as to what constitutes the necessary speeds to qualify as “broadband.” This proceeding, and the Emergency Connectivity Fund, however, is *not* the place for this debate. Children are desperate for solutions to get online and do their school work. If the only solution is something short of 25/3 in terms of speed, isn’t that still better than no

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<sup>20</sup> See, *PN*, at 7 (“we propose that such services be limited to those that can be supported by and delivered with eligible equipment as defined in the American Rescue Plan (i.e., Wi-Fi hotspots, modems, routers, devices that combine a modem and router, and connected devices).”).

connectivity at all? It is like two people debating whether to order the filet mignon or ribeye at a fine steakhouse, while children sit outside starving. It's a nice debate to have, but irrelevant to those that can't afford to dine at the restaurant. The NNTRC implores the FCC not to make "the perfect" the enemy of "the good" and allow support for something short of 25/3 if such a connection is not available to a school or library.

## **H. Additional Comments**

The NNTRC wishes to address two more procedural issues briefly.

### **a. The FCC's Rules Must Ensure Privacy**

There are several places in the *Public Notice* where the FCC proposes significant personal information collection by participants.<sup>21</sup> The NNTRC is concerned that some parents may not feel comfortable with having their students participate in a program where such personal information is being collected. At the least, the FCC's rules must set forth the specific privacy protections that are required in order that Personally Identifiable Information (PII) of students is properly collected and protected, and not made available to any outside sources. Beneficiaries of this program must not be required to sacrifice their privacy in order to receive the benefits afforded by Congress.

### **b. The FCC's Rules Must Not Allow for an Endless Enforcement Window**

Finally, while fighting "waste, fraud, and abuse" is a core part of the good stewardship of federal funds, the FCC must provide participants with some assurance that rational and

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<sup>21</sup> See, e.g., *PN*, at 8 ("To maximize available funds, we propose that the Commission require that schools document the student(s) and staff member served at each supported location and prohibit schools from providing more than one supported connection and more than one connected device to each student or staff member. Likewise, we propose that the Commission require libraries to document the patron or patrons served at each supported location and prohibit libraries from providing more than one supported connection and one connected device to any one patron at a given time.").

reasonable purchase decisions are not later questioned and that money demanded back. The FCC's rules must provide some sort of "safe harbor" exceptions or conduct standards so that schools and libraries aren't arbitrarily hauled into audits and potential litigation. Further, the FCC should reverse its prior position that there is no statute of limitations on the USF. USAC is now regularly going back more than a decade to challenge E-rate and other Universal Service Fund (USF) awards, making mounting a defense to such recoupment claims virtually impossible. Schools and libraries will be hesitant to participate if they believe that they can be subject to litigation a decade or more after the money is spent. Instead, the FCC should make clear that it will direct USAC to only proceed against recipients within five (5) years of the year of award.

### **III. CONCLUSION**

There is great need on the Navajo Nation for support to close the Digital Divide and the homework gap. The Emergency Connectivity Fund can be a vital tool in helping out during the COVID-19 pandemic, and the NNTRC fully supports the FCC's efforts. Nonetheless, to ensure that Tribes can adequately participate, the NNTRC requests that the Commission adopt the suggestions contained herein.

Respectfully submitted,

#### **NAVAJO NATION TELECOMMUNICATIONS REGULATORY COMMISSION**

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