



September 2, 2022

The Honorable John Thune
Senator
United States Senate
511 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Thune:

Thank you for your June 23, 2022, letter requesting that the Department of Commerce Office of Inspector General (OIG) investigate and examine several questions related to the National Telecommunications and Information Administration's (NTIA's) Tribal Broadband Connectivity Program (TBCP), a program funded at nearly \$3 billion as part of the Consolidated Appropriations Act, 2021 (Pub. L. No. 116-260).

Upon receipt of your letter, my office contacted NTIA for responses to your questions. Enclosed please find NTIA's cover letter to OIG as well as NTIA's responses to your questions.

OIG's Office of Audit and Evaluation undertakes thorough audit planning efforts and has identified NTIA's implementation and oversight of broadband programs—including TBCP—as areas of focus. OIG anticipates initiating the first related audit in FY 2023.

If you have further questions, please contact me at (202) 793-3336, or David Wonnenberg, Senior Legislative and External Affairs Officer, at (202) 830-3020.

Sincerely,

A handwritten signature in cursive script that reads "Peggy E. Gustafson".

Peggy E. Gustafson
Inspector General

Enclosures



UNITED STATES DEPARTMENT OF COMMERCE
National Telecommunications and
Information Administration
Washington, D.C. 20230

August 24, 2022

The Honorable Peggy E. Gustafson
Inspector General
U.S. Department of Commerce
1401 Constitution Avenue
Washington, DC 20230

Re: NTIA Responses to June 23, 2022, Letter from Senator Thune to Department of
Commerce Inspector General Gustafson

Dear Ms. Gustafson:

This letter provides responses to the request your office received on June 23, 2022, from Senator John Thune regarding the National Telecommunications and Information Administration's (NTIA's) Tribal Broadband Connectivity Program (TBCP). I appreciate Senator Thune's interest in ensuring that the funds used to address the digital divide in Tribal areas are not used to overbuild existing broadband service, or to duplicate existing federal funding for broadband services. NTIA shares the interest and has structured the program so that funds intended for the deployment of tribal broadband are used in the most efficient and productive manner as possible.

Senator Thune's letter requested your office to undertake an immediate review of the TBCP and examine issues and questions related to his concerns. NTIA's responses to each question posed by the Senator are provided in the Attachment to this letter.

NTIA appreciates your engagement at an early stage in this program and we look forward to working with your office to ensure the program's success. If you have any additional questions or concerns, please contact NTIA's Acting Chief Counsel, Josephine Arnold, at jarnold@ntia.gov or (202) 482-1859.

Respectfully,

Alan Davidson
Assistant Secretary for Communications and Information

**NTIA Responses to Questions in June 23, 2022, Letter from Senator Thune to
Department of Commerce Inspector General Gustafson**

1. Ensuring funds go to unserved areas: NTIA's Notice of Funding Opportunity (NOFO) for the TBCP defines "qualifying broadband service" as "(i) a download speed of not less than 25 megabits per second; (ii) an upload speed of not less than 3 megabits per second; and (iii) a latency sufficient to support real time, interactive applications."

- a. What specific steps did NTIA take to ensure TBCP awards are not used to overbuild qualifying broadband service?

Consistent with Executive Order (EO) 13175, the TBCP application process established in NTIA's TBCP NOFO gave Tribal Government applicants the option of certifying that an area within their Tribal Lands was unserved by qualifying broadband service. The NOFO also set forth a set of criteria to identify the existence of an enforceable buildout commitment between a Tribal Government and a service provider. (Under the NOFO, a Tribal Government could not certify Tribal Lands as "unserved" if they were covered under an enforceable buildout commitment.) NTIA drew the definitions of "unserved" and "enforceable buildout commitment" from Division N, Title IX, Section 905(a)(14) of the Consolidated Appropriations Act, 2021. If an applicant submitted a certification that certain Tribal Lands were unserved, the NOFO required applicants to explain how the "unserved" determination was made. NTIA also participated in standing bi-weekly meetings with the U.S. Department of Agriculture (USDA) and the Federal Communications Commission (FCC), per the Broadband Interagency Coordination Agreement. During these meetings, analysis of potential duplication of service in TBCP applications was a mandatory topic. A process was established whereby NTIA would provide detailed information on those applicants being considered for funding, including proposed service area maps provided directly by the applicants and the associated census blocks. The applicant-provided service area data was compared against current and future broadband infrastructure grant programs by USDA and FCC (Connect America Fund (CAF), Rural Digital Opportunity Fund (RDOF), Community Connect Program, and Rural eConnectivity Program (Reconnect)). Potential overlap, including service provider identification, was addressed with the relevant agency in a follow-up letter to the applicant requesting confirmation that no duplication existed in the proposed project area. NTIA required applicants to confirm that there were not any "enforceable buildout commitments" in the area with the identified service providers and whether the applicant had applied for any other broadband grant programs.

- b. What data sources did NTIA use or consult to determine existing broadband coverage or planned broadband deployments in Tribal areas within the next three years?

NTIA utilized the National Broadband Availability Map (NBAM), which includes data from FCC Form 477 to identify currently reported advertised services on Tribal Lands, as well as the FCC's published data on RDOF enforceable buildout commitments and the USDA ReConnect programs, along with crowd-sourced data such as Ookla speed-test data, as well as the process identified above in response to 1a in combination with applicant-provided service area data to identify areas of potential overlap.

- c. Did NTIA use any on-the-ground efforts to verify whether or not broadband services exist in a particular area today if a broadband provider demonstrated it had qualifying service to that particular area? If yes, where did NTIA implement its on-the-ground efforts?

No, NTIA did not use on-the-ground efforts to verify that areas did not have qualifying broadband service. NTIA utilized the NBAM, which includes data from FCC Form 477, to identify currently reported advertised services on Tribal Lands as well as the FCC's published data on RDOF enforceable buildout commitments and the USDA's ReConnect programs, along with crowd-sourced data such as Ookla speed-test data, as well as the process identified above in response to 1a in combination with applicant-provided service area data to identify areas of potential overlap.

NTIA relied on the applicant for on the ground information about available services. Tribal Government certification that Tribal Lands were unserved by qualifying broadband service (including certification that no enforceable buildout commitments existed) were the determining factors regarding the existence of service duplication.

- d. What other measures, if any, has NTIA taken to ensure any of the TBCP awards will not be used to overbuild qualifying broadband service?

During Programmatic Review curing, NTIA examined the applicant's proposed project area and planned infrastructure deployment and utilized the NBAM platform to assess availability of qualifying broadband service in the proposed project area. If NTIA determined that a specific area within the proposed project area was already served according to the standard for qualifying broadband service, it required that an applicant descope or revise its application to remove that area from the project.

- e. NTIA allowed tribes to "self-certify the unserved status of proposed service areas within Tribal Lands." What steps did NTIA take to verify the unserved status Tribes self-certified?

The TBCP NOFO was developed based on feedback provided to NTIA by Tribal

Nations under government-to-government Tribal Consultation, consistent with EO 13175. During the consultation, which addressed the issue of broadband service availability, NTIA received overwhelming feedback regarding the lack of accuracy of carrier provided data and strongly rebutted representations about the delivery of qualifying broadband services to Tribal Lands.

During Programmatic review curing, NTIA examined the applicant's proposed project area and planned infrastructure deployment and utilized the NBAM platform to assess availability of qualifying broadband service in the proposed project area. If NTIA determined that a specific area within the proposed project area was already served by qualifying broadband service, it required that an applicant descope or revise its application to remove that area from the project.

Per the TBCP NOFO, a Tribal applicant could not certify Tribal Lands as unserved if that area was covered by an "enforceable buildout commitment."

f. What specific technologies and data sources were Tribes permitted to use when self-certifying the unserved status?

Based on consultative feedback that Tribes' intentions to deploy infrastructure are founded in government providing necessary services to their constituents and not to profit, NTIA developed the TBCP NOFO in manner that gave maximum flexibility to Tribes regarding the data and processes used to self-certify, in compliance with EO 13175. No specific technology or data sources were prescribed for use, however, applicants used methods including NBAM, NTIA Indicators of Broadband Need data, FCC Form 477 Data, Ookla or other online speed tests, and community surveys.

2. Coordination with other federal agencies:

a. To what extent is NTIA coordinating with the FCC to ensure TBCP funds are not used to overbuild qualifying broadband service?

NTIA participated in standing bi-weekly meetings with the USDA and FCC (per the Broadband Interagency Coordination Agreement). During these meetings, a mandatory topic was analysis of potential duplication of service in TBCP applications under consideration for funding by the Assistant Secretary. A process was established whereby NTIA would provide detailed information on those applicants being considered for funding including service area maps provided directly by the applicants and the associated census blocks. This applicant-provided service area data was compared against current and future broadband infrastructure grant programs by USDA and FCC (CAF, RDOF, Community Connect, and Reconnect). Potential overlap, including service provider identification, was addressed with the relevant agency and in a follow-up letter to the applicant requesting confirmation that no duplication existed in

the proposed project area. NTIA required applicants to confirm that there were no enforceable buildout commitments in the proposed project area with the identified service providers and whether the applicant had applied for any other broadband grant programs.

- b. What processes has NTIA established with the FCC to ensure TBCP awards are not used in areas in which broadband providers have received or will be receiving subsidies provided by the FCC's Universal Service Fund's High-Cost Programs?

See Response to 2.a.

- c. What processes has NTIA established with the U.S. Department of Agriculture (USDA) to ensure TBCP awards are not used in areas in which broadband providers have received or will be receiving funding provided by USDA's broadband programs?

See Response to 2.a.

- d. What processes has NTIA established with the U.S. Department of the Treasury (Treasury) to ensure TBCP awards are not used in areas in which broadband providers have received or will be receiving funding provided by Treasury's broadband programs?

On May 9, 2022, NTIA entered into an interagency agreement with the Department of the Treasury (Treasury), FCC, and USDA to share information about and collaborate regarding the collection and reporting of certain data and metrics relating to broadband deployment. This agreement will facilitate interagency efforts to avoid duplicating funding from the broadband programs that these federal agencies oversee.

- e. What processes has NTIA established with any other federal agency administering broadband programs to ensure TBCP awards are not used in areas in which broadband providers have received or will be receiving support under those federal programs?

NTIA coordinates federal funding activities through its interagency coordination activities. NTIA convenes bi-weekly meetings with representatives of the federal agencies that fund broadband programs, including the FCC, USDA, Treasury, Department of Education, the Department of Commerce's Economic

Development Agency (EDA), and the Appalachian Regional Commission (ARC), among others, to discuss the status of their program activities.

3. Program accountability: The NOFO for the TBCP references an "enforceable buildout commitment."

a. How did NTIA determine what would constitute as an enforceable buildout commitment?

The NOFO definition of "enforceable buildout commitment" was drawn from the definition of that term in Section 905(a)(14) of the Consolidated Appropriations Act, 2021, which states

Enforceable Buildout Commitment—means, in the context of the definition of unserved set forth in Section A.2.o of this NOFO, a legally binding agreement, which includes a Tribal Government Resolution, between the Tribal Government of the Tribal Lands in the proposed service area, or its authorized agent, and a service provider offering "qualifying broadband service" to unserved households on those Tribal Lands.

Further, in engaging with sovereign Nations, sovereign immunity with regards to contract enforcement had to be considered when working with Tribal Nations. Tribal Nations utilize formal binding resolutions in tandem with formal contracts to set forth formal relationships with non-sovereign entities. Accordingly, NTIA developed a definition of "enforceable buildout commitment" to mean, in the context of the definition of unserved set forth in Section A.2.o of the NOFO, a legally binding agreement, which includes a Tribal Government Resolution, between the Tribal Government of the Tribal Lands in the proposed service area, or its authorized agent, and a service provider offering "qualifying broadband service" to unserved households on those Tribal Lands. (NOFO, Sections A.2.g and A.2.o.)

b. Did NTIA work with any other expert agencies, like the FCC, when making its determination as to what constitutes as an enforceable buildout commitment?

Where overlap in FCC or USDA programs was identified, NTIA held meetings with FCC and USDA to discuss the status and eligibility of the potentially awarded projects. The NOFO definition of "enforceable buildout commitment" was drawn from the definition of that term in Section 905(a)(14) of the Consolidated Appropriations Act, 2021 which was the basis for the discussions with the other agencies.

- c. What guidance, if any, did NTIA provide existing broadband providers to demonstrate an enforceable buildout commitment and how was that guidance communicated to providers?

NTIA held numerous webinars to provide guidance on its TBCP program that addressed the requirement regarding enforceable buildout commitment. The dates and locations of the webinars can be provided upon request.

- d. What processes did NTIA establish to review enforceable buildout commitments?

The TBCP NOFO requires applicants to disclose whether they have terminated an existing agreement qualifying as an enforceable buildout commitment in anticipation of receiving TBCP funding. All applicants were required to certify their unserved status including the lack of enforceable buildout commitments in their applications. No applicant submitted evidence of an enforceable buildout commitment for the proposed project area in their application.

- e. Of all the applications submitted to NTIA for TBCP funds, how many have been rejected due to existing enforceable buildout commitments?

No Tribe provided evidence of an enforceable buildout commitment, and therefore, no Tribal application was denied due to the existence an enforceable buildout commitment. As a requirement for consideration, all applicants that did not rely on non-tribal coverage/speed data sets such as FCC 477 carrier sourced data were required to certify their unserved status, including the lack of enforceable buildout commitments, in their applications. Failure to do so would have resulted in removal from consideration. At this time, all applicants being considered for potential award have met this requirement and self-certified that no enforceable buildout commitments exist in their proposed project areas.

4. What measures has NTIA established to recover TBCP funds from awardees that overbuild qualifying broadband service and do not meet their buildout obligations?

NTIA imposed a Specific Award Condition (SAC) on each TBCP recipient that prohibits them from duplicating federal funding. The SAC states that no federal funds may be used to duplicate costs, services, connections, facilities or equipment that have been authorized through another federal program. To the extent that a TBCP project is later deemed to include duplicate funding from another federal program, NTIA and the NOAA Grants Office reserve

the right to disallow costs and recover grant funds associated with the duplication and/or to reallocate the funds to allowable activities within the project.