

Written Testimony of

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**Hearing on COVID-19 in Indian Country:
The Impact of Federal Broken Promises on Native Americans**

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Chair Lhamon and Commissioners, Hesci. Chokma. I offer you greetings. Thank you for the opportunity to testify today about the state of broadband on Tribal lands and the consequences of the lack of connectivity for Native Americans during the outbreak of COVID-19.

By every measure that is important, Indian Country lags far behind the nation as a whole in terms of high-speed internet. This is simply unacceptable. Tribal Nations are as vibrant as ever, both an important part of the history and modern culture of the United States. Tribal Nations and their peoples contribute greatly to local and regional economies in all regions of the country, yet they are consigned to second class citizenship when it comes to the most important critical infrastructure of the 21st Century: Broadband.

The Lack of Broadband in Indian Country and the COVID-19 Pandemic

The term digital divide was coined twenty-five years ago, and twenty-five years ago that term had significant meaning for the majority of people in the US. It meant many different types of things, the difference between bits, bytes, and old telephone service. It meant the difference in what allowed fax machines and their modems, with their memorable sounds and spools of paper, become equipment that could eventually carry more data. A version of the digital divide even existed then between generations, as younger people adopted new technologies ahead of their grandparents. Everybody felt the digital divide back then somehow, to one degree or another.

At the beginning of 2020, very few people in our country felt the effects of the digital divide at home the way they did decades ago. The citizens and residents of Tribal Nations, however, the people who live in Indian Country deal with the stark reality of a persistent and pervasive broadband divide every single day. And now, confronted by the enormous and various challenges of the COVID-19 Pandemic, some of their worst fears and greatest challenges are being faced without the true benefits of this most essential critical infrastructure. Broadband internet the single most important information platform in the history of humanity, and it is lacking in robust measures throughout the Tribal Nations or our country.

And this is also one of my own worst fears realized. Now that Indian Country is facing a great pandemic, when we need broadband more than ever, we are without it. I have worked in this field for over 20 years, as a senior federal regulator, a tribal executive, attorney, and representative, a volunteer of inter-Tribal government policy making and a fiduciary of Tribal business and non-tribal businesses associations alike. I was raised to this work by a family dedicated to federal-tribal service and I've travelled the entire county working on these issues. My family and I have lived and worked in

Washington DC, in federal agencies and in the halls of the US Congress. And now I commute every day to work on an Indian Pueblo, where high-speed internet is available in only complexly limited ways.

Tribal Nations still don't have the benefits of true and robust broadband, the central touchstone of technology infrastructure that brings together so many societal solutions, including healthcare, public safety, education, civic engagement, and a modern basic interconnected social structure. And while Indian Country doesn't have it when Indian Country needs it most, more than ever there is a greater awareness of what the lack of broadband means to us in Indian Country. Tribal governments are forced to face challenges with their proverbial arms tied behind their backs when they do not have the robust broadband networks to inform and engage their people, and provide their services over the online platforms that have become absolute norms for good and responsible governance and administration.

There is also an emotional and psychological cost to those in Indian Country occurring now when there is an inability to use broadband based video platforms to the same degree that others in the country can use them. To be sure, networks all over the world are stressed with folks working from home and staying at home. But in this great time of worry and hope, when one cannot connect from home with loved ones, friends, and colleagues via the internet, it is a great personal challenge to maintain a human connection. To be disconnected in a world of connectedness is a great hardship. It can be humiliating and embarrassing to be outside of the connected community. In the face of COVID-19 it can be frustrating and supremely isolating.

I have spoken with a number of family members, friends, and colleagues in preparing this testimony, including those that live on Reservations and Pueblos. I've spoken with those whose family live at home of the Reservation. Parents who live here, or sisters, brothers or cousins who live there. When none of these communities can gather for the time in memorial routine cultural and spiritual ceremonial community gatherings, including the famous feast days and dances, it affects the people as a whole, and many individuals have relayed to me the sense disequilibrium and discomfort at the inability to practice their routine shared cultural values and practices. This feeling is exacerbated when families cannot attend virtual birthdays and graduations due to the lack of broadband availability. It is made terrible when one cannot attend the funeral of a loved one, as one of my colleagues could not, and even worse when she could not even attend the virtual gathering of her loved ones to grieve as a family.

In the long movement forward of peoples of color, we are now in the midst of the most important social and civil rights upheaval of my generation. At this crescendo, when so much of what is happening is being fostered by social networking platforms—the public protests, the exercise of civil rights, and the removal of the idolatry of institutional racism in flags and statues--how are the Indigenous peoples of this great country going to add their voices to that forum in support of the Black Lives Matter movement?

At a time when the football franchise in our Nation's Capitol City will actually change its longstanding racist name--something I thought would never happen in my lifetime--the American Indian, Alaska Native, and Native Hawai'ian people of this country still lack a voice in the worldwide marketplace of ideas, the internet. And at a time when the Supreme Court, in its *McGirt v. Oklahoma* decision of last week, has held the United States federal government to its word in its historic promise to the Muscogee (Creek) Nation of lands and jurisdiction, Tribal people in Eastern Oklahoma and everywhere have a great deal to share with society, but they can't get connected.

If civil rights are to be exercised, they should be exercised on the most important information platform in the history of humanity. How can access to the internet itself, not then also be a civil right. A decade ago, a good old friend of mine, then-FCC Commissioner Michael Copps understood the promise that the United States made to Tribes and he placed the idea in my head that access to the internet is a fundamental civil right. From that day to this, I have agreed on this point. This must be recognized as relevant to all civil rights. Access to the Internet must be recognized as one of the most basic of civil rights, the right to be involved in society.

The Problem: Its History and Causes, and the False Solutions from Bad Data and Bad Decision Making in a New Constrained Definition of Tribal Lands.

The reasons for the historical lack of communication technologies on Tribal lands very understandable. The causes are a direct result of historical removal and exclusion, and underpinnings of the problem are distance, terrain, and higher costs. Tribal Nations also lack many traditional sources of revenue, such as the practical ability to tax income, for project development, and their communities face endemic and cyclical types of economic hardship. The problem is also exacerbated by a lack of accurate and reliably measured data. There are also past major policy objectives left undone, such as addressing the need of spectrum ownership and dedicated subsidies and support amounts. And there is a lack of governmental willful priority to address and fund solutions to the actual challenges, not just the symptoms of the problem. New policies and directives are needed. Addressing the challenges will take bold and strategically designed new programs and policies.

On the historical lack of infrastructure, Tribes were forced into the most remote parts of the nation, removed and consigned to areas of the country that did not see involvement in the major historical periods of development. Indian Country was not directly involved the development of a national interstate system or the period of rural electrification throughout the country. Telecom and broadband is no different. And again, in the 1980's and early '90's when certain major telecom carriers deployed long runs of fiber across the West, Indian Country was again passed over. And while there were very promising Tribal priorities written into the Federal Communications Commission's (FCC) National Broadband Plan of 2010, which was a requirement of the American Recovery and Reinvestment Act of 2009, those prerogatives have seen only a few of the goals actually accomplished, with the majority of them remaining unfulfilled and being subject to political squabbles and divisiveness at the FCC.

In its 2018 report, *"Broken Promises: Continuing Federal Funding Shortfall for Native Americans,"* the U.S. Commission on Civil Rights very accurately stated another important element of the problem. The Report stated "Most internet infrastructure in the U.S. is privately owned and operated, and companies generally calculate whether or not to invest in extending broadband lines to communities based on their projected ability to cover costs through subscriptions and earn a profit. Extending broadband access in remote tribal areas typically comes at a higher cost and can be cost prohibitive due to the high level of poverty among Native Americans." This is indeed true. Our regulatory framework in the United States places a priority on the major private industry players in the economic regulation of subsidies and in the licensing framework for wireless services. These major players are not interested in building networks in Indian Country, plain and simple, and they are entrenched in this reluctance.

This fundamental approach places Tribal Nations and their residents and citizens at a disadvantage. Smaller more market sensitive and aspirational wireless companies that would seek to prove their rural and Tribal business models have fared no better. Tribal Nations find themselves in the position of being forced to seek out methods to build networks, but the rules can provide even greater barriers to entry. Only a precious few Tribal Nations have overcome this history and challenge, to create and operate their own telecommunications companies. Nine of these Tribes have wireline telecommunications companies, and a tenth owns and operates a wireless company.

In fact, for over 20 years, the FCC has endeavored to incentive the industries, both wireline and wireless, to build out to Indian Country by offering to pay them for their costs to do so. To no avail. In the summer of 2000, the FCC launched its first effort to do this via the FCC's Tribal Lands Bidding Credit, a mechanism still in the regulations that would reimburse wireless carriers who built out to Tribal lands for all their related costs—trunk lines, towers, antennas and repeaters—in the form of a credit for use in future FCC wireless licensing spectrum auctions. Those auction have become massively large financial endeavors, bring many dozens of billions of dollars into the US Treasury. However, there is not a single network that can be pointed to in Indian Country that was built with a Tribal Lands Bidding Credit.

Nine years ago, in the context of the Connect America Fund reforms and with the goal of dedicating funding that would drive deployment of new wireless networks in rural and Tribal lands through a new Mobility Fund, the FCC also tested the theory of a new Tribal Mobility Fund making subsidy amounts available in competitive bidding. The Mobility and Tribal Mobility fund were deemed “reverse actions” which identified amounts of subsidy for certain areas available only after private sealed bidding.

In the context of the rulemaking, by engaging two of the Tribally-owned telecoms to open up their books and demonstrate their costs to the regulating Bureau, the FCC proved that it simply costs more to deploy networks in Indian Country, in terms of initial build costs, upkeep, and maintenance. However, the obstacles created in the rules precluded the potential of many Tribal Nations to participate in the Tribal Mobility Fund. Ultimately, a lack of wireless licensing and a lack of “line of credit” financing, which was required to potentially reimburse the FCC should a Tribe win a bid for subsidies but not actually build the network to actual regulatory specifications, obviated the ability of many Tribal Nations to participate in the Fund.

Eventually, in any case, with the change in leadership at the FCC, the proposed ten years of future Mobility Fund reverse actions slated for billions in subsidy support, accompanied by future Tribal Mobility funds, was diminished and shelved. The proposed annual efforts were cut short, and the funding reduced in favor of other ideas.

At present, the FCC is preparing to hold another even more massive reverse auction type endeavor, the Rural Development Opportunity Fund or “RDOF”. The major problem of the RDOF, however, is that it is a thinly veiled political rush to allocate the spending of billions of dollars of subsidy in advance of the national election. And in that rush, the FCC again is trying to incentivize companies the vast majority of which are not motivated to deploy on Tribal lands. Yet there is more, as the FCC is also rushing in advance of addressing one of the greatest failings in the toolkit of decision-making that the FCC has.

Perhaps the greatest failing at present is the dearth of accurate data on the state of broadband deployment in Indian Country. Put simply, the FCC’s Broadband Map overstates the levels of deployment. The FCC is using woefully inaccurate data on the extent of the lack of broadband on Tribal Lands. For years and years, Tribal Nations have known that this data overstates their levels of deployment, but it is the way in which it is overstated that also is alarming.

In 2018, the problems of the map became an official finding of the United States Government Accountability Office (GAO) released an important Broadband Internet study entitled “FCC’s Data Overstate Access on Tribal Lands”, GAO-18-630, published and publicly released Sept. 7, 2018. See <https://www.gao.gov/products/GAO-18-630> (Site last visited on July 15, 2020). Importantly, while the numbers in the FCC’s Broadband Map are alarming, they grossly overstate the levels of broadband access on Tribal lands. The FCC Form 477 data, from which their statistics are generated, is provider-reported data that receives only some review by the Commission and no review by Tribal governments.

Moreover, the manner in which deployment is measured is not necessarily based on *actual* deployment but, in many instances, on *potential* deployment. That potential is meaningless if it cannot be achieved, and the achievement of broadband deployment on Tribal lands is importantly related to additional factors not currently taken into account. This current approach results in a skewed and overstated depiction of broadband deployment in Indian Country. I note that the FCC has made improvements in the past couple of years, after powering down the old National Broadband Map in December of 2018, but the current map still has the same inherent fatal flaws.

In its report, the GAO made three important recommendations, each of which would improve efforts on more than just the map. The first was that the FCC develop and implement methods such as

targeted data collection for collecting and reporting complete data. The second recommendation was that the FCC develop a formal process to obtain Tribal input on the accuracy of provider-submitted broadband data including outreach and technical assistance to Tribes. And the third recommendation of GAO was that the FCC obtain formal feedback from Tribal stakeholders and providers on the effectiveness of the FCC's 2012 "Tribal Government Engagement Obligation" on how to fulfill the requirements of that information sharing requirement between FCC regulated-providers and Tribal Nations to determine whether the FCC needs to further clarify its engagement statement efforts.

The GAO's findings on the overstatement of the broadband deployment data were an important milestone, which unfortunately has not yet been fully remedied, even in the face of ongoing efforts to address this problem. As a result all of these other efforts appear misguided and misappropriated.

Importantly, this GAO study was released along with a companion study focusing on the lack of public/private partnerships to deploy tribal broadband services. These studies were then followed by another study on the lack of access by Tribal Nations to FCC spectrum licensing, which I will address later in my testimony. I draw the attention of the Commission to those additional studies found here: "Few Partnerships Exist and the Rural Utilities Service Needs to Identify and Address Any Funding Barriers Tribes Face", GAO-18-682, published and publicly released Sept. 28, 2018. See <https://www.gao.gov/products/GAO-18-682>. (Site last visited on July 15, 2020). And See "FCC Should Undertake Efforts to Promote Tribal Access to Spectrum", GAO-19-688T, published and publicly released Sept. 18, 2019. See <https://www.gao.gov/products/GAO-19-668T>. (Site last visited on July 15, 2020).

The greatest challenge that Tribal Nations face at the FCC now, however, is none of the challenges previously mentioned. It is far more shocking and insulting to Indian Country. It is in the actual definition that the FCC is using of Tribal Lands. Over the past couple of years, the FCC has chosen to exclude from its longstanding definition of Tribal Lands those areas actually located within Tribal lands where there is a greater population density. The FCC's new "Rural Tribal Lands" is misguided and bad policy.

Aside from being contrary to the actual basis of the federal government's trust responsibility as well as the actual legal definition of "Indian Country," this new more restrictive definition of Tribal lands smacks of colonialism and is reminiscent of flawed historical notions of manifest destiny when governments and institutions systematically disregarded Tribal rights and lands, removing Indian people from their homes and forcibly divorcing them from their own homelands and property.

The reason the FCC has given for this definition is that those areas within the Tribal Lands boundaries already have a modicum of broadband deployment based on their population density. As though Tribal lands can only be remote, destitute, and unserved locations. As though to be a citizen of a Tribal Nation, one can only be poor, ignorant, isolated, and unserved. It is the height of paternalistic thinking, and it is, in a word, shameful.

The practical effect is to make the entirety of the problem that much more challenging. Removing the ability of Tribal Nations, and the smaller market sensitive provider that would work them, to engage all of the population within a Tribe's boundaries makes those even more challenging projects to build and more challenging to justify for funding.

With this definition being promulgated throughout the FCC's regulations, in multiple different programs, Tribes and their communities are being made to suffer in the insidious political ideology disputes in Washington, including at the FCC, where their issues are for the first time the subject of ideological debate with long settled tenets of federal Indian law and policy and the very heart of how services should be deployed in Indian Country.

The Actual Solutions to the Problem: A new Tribal Broadband Fund and Tribal Spectrum Licensing

Broadband must be available, accessible, and affordable to meet its promise in Indian Country. The solutions to the Tribal Broadband problem are fairly straightforward. Get back to the actual definition of Tribal lands. Dedicate resources, with specifically defined strategic purposes, to get at the underlying lack of predicate infrastructure. And genuinely involve and position the correct parties who will actually confront the challenges.

The four universal service fund programs of the FCC have been in place for almost 25 years. They have been overhauled to update them from supporting old telephone services to new broadband services, and a couple of them seen tweaks and additions with Tribal lands specific elements. But these programs have become dull tools to address the challenges in Indian Country.

They are the High Cost or Connect America Fund, which represents incumbent provider corporate operational and capital cost subsidies; the Schools and Libraries Program or E-Rate Program, which pays for connectivity to educational institutions, the Rural Healthcare program, which provides connectivity to rural clinics and hospitals; and the much-maligned Low Income Program, which assists low income families in paying monthly broadband bills and has within it, a component called the Tribal Lifeline Program, which has seen controversy and challenge as federal largesse.

One significant underpinning of the Tribal Digital Divide is a pervasive lack of middle mile fiber between the major trunk lines of the internet and Tribal communities. Approximately eight thousand miles of middle mile fiber throughout Indian Country is missing. If it were present, it would otherwise provide a robust backhaul of connectivity to the internet throughout the US. In the recent past, certain inter-Tribal government organizations and entities have looked deeply into this problem. However this problem is not receiving major analysis or attention by the federal government. The framework of the FCC's current Universal Service subsidy programs does not have a mechanism to address this middle mile fiber need. Finding a way to build this will be the foundation for so many other programs that could then flourish at the local level in Indian Country.

A new Tribal Broadband Fund is the solution to this middle mile need, as well as multiple other needs and purposes to successfully address the Tribal Digital Divide. This new subsidy program must acknowledge that most industry players are simply not Tribal lands any type of priority in their future plans. The funding mechanism of the Tribal Broadband Fund should identify and empower those who will get the job done, including Tribal Nations themselves. The purposes of the Tribal Broadband Fund should be those items, including equipment, infrastructure, and recurring services costs, that will bring actual closure to the lack of broadband deployment. The Fund must be a new intelligent design of a federal-tribal partnership to solve the Tribal Digital Divide by also providing technical assistance funding and training.

The Tribal Broadband Fund is actually not a new idea, having been proffered by both Indian Country and the FCC alike since 2011, when it was raised as the Native Nations Broadband Fund in the FCC's Notice of Inquiry entitled "Improving Communications Services for Native Nations," FCC 11-30. In the current vacuum of private provider opportunity, that even this Commission on Civil Rights recognizes, efforts to genuinely engage Tribal Nations themselves in the solutions and as trusted and capable partners to build networks will be transformative. This doesn't have to be done at arms-length, as it is now, it can be done in partnership with the federal government and the FCC through a Tribal Broadband Fund designed to breathe life into the federal trust responsibility as it regards broadband needs. Just as other agencies have worked or contracted directly with Tribal Nations to address their missions in Indian Country, so too can this be done with broadband deployment.

Another major challenge is the pervasive lack of access to spectrum for networks and project buildout on Tribal lands. Wireless licenses are the medium by which robust wireless networks are built. There is a widespread lack of access to these licenses and the use of wireless frequencies and channels that have been licensed to private parties and providers over the past several years, but which also sit unused, warehoused and not built out, nor slated for any type of buildout on Tribal lands at any point in the future. This is an infamously long standing problem, and unlike the lack of middle mile fiber, this is a problem well understood by the FCC.

The lack of access to spectrum licensing was even the subject of a bold rulemaking in 2011 called “Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands.” FCC 11-29. The rulemaking proposed new subleasing negotiation structures for Tribal Nations, However, this rulemaking still sits idle, having been soundly opposed by the incumbent and self-interested wireless industry providers and having seen no action by the FCC. Tribal requests for subleasing of existing but unbuilt licenses have been disregarded by wireless licensees, and their needs have gone into a regulatory black hole on this issues at the FCC.

Which brings me to an immediate and importantly related Tribal spectrum need.

An Immediate COVID-19 Related Need – Extending the Tribal Priority Window at the FCC for Tribal Nations to Apply for 2.5GHz Licenses.

Historically, as I have indicated above, bringing broadband to Indian Country has been a very expensive, complex, and largely unsuccessful endeavor, requiring negotiation with private providers that have little if no interest in expanding their networks across Tribal lands. The 2.5 GHz Tribal Priority Window, however, has the potential to fundamentally change that dynamic by putting broadband deployment where it belongs – in the hands of Tribal Nations – in the form of Tribally-owned spectrum licenses. These licenses were originally allocated in the Kennedy Administration for the use of educational institutions for over-the-air TV. It is the famed Educational Broadband Services spectrum.

The Tribal Priority Window opened on February 3rd and is currently scheduled to close on August 3rd. This window provides federally recognized American Indian Tribes, Alaska Native Villages, Hawaiian Home Lands, and certain qualifying Tribal entities with the opportunity to be first in line to apply for spectrum licenses over their Tribal lands. In addition, the licenses available during the Tribal Priority Window are available free of charge. However, spectrum not allocated during the Tribal Priority Window will be auctioned to the highest bidder.

Holding a spectrum license allows Tribal Nations to exercise their spectrum sovereignty and control their digital destiny. With these 2.5GHz licenses, Tribal Nations can, for example, build their own wireless networks or negotiate to sublease to an existing wireless carriers to build networks that serve their communities. Because licenses can be leased and sub-leased, they can also turn their licenses into a revenue stream. This is a once in a generation opportunity.

The COVID-19 pandemic, however, threatens to, yet again, make an opportunity to bring the 21st Century connectivity to their lands an impossibility for many Tribal Nations. With Tribal headquarters shuttered, Tribal borders closed, and Tribal governments attempting to remotely deal with so many competing major priorities, the scarce resources available are focused on public health and safety, and the chance to meet the FCC’s filing deadline is slipping away for many Tribes.

Even before the pandemic, Tribal governments and their entities faced challenges in obtaining information and preparing an application for the Tribal Priority Window. But the pandemic multiplied those challenges hundredfold. By the end of February, the FCC halted their limited in-person outreach,

and online webinars were no help to Tribal leaders without internet access at home. Expecting Tribal governments to focus on this unique opportunity in the midst of a global pandemic is simply unrealistic.

There is an easy solution here, however. The FCC need only heed the many requests from Members of Congress, inter-Tribal government associations, and Tribal leaders from across Indian Country to extend the Tribal Priority Window. On their own, the FCC has extended numerous other regulatory deadlines because of COVID-19, but has remained steadfast in its refusal to extend the Tribal Priority Window. If this once in a generation opportunity for Tribes to exercise their spectrum sovereignty is to be more than illusory, the FCC must extend the deadline. This is also a simple regulatory lift for the FCC – one that will have a profound and lasting impact across Indian Country.

In the context of this licensing effort, the FCC must also address the exclusion of Tribal lands outside what the agency defines as “rural” from the Tribal Priority Window. The FCC unilaterally redefined Tribal lands for the purpose of the window, leaving Tribes with population centers of 50,000 or more at square one and unable to obtain a 2.5 GHz license. The FCC must address the petitions filed before it on this issue, and rectify this injustice.

The future that the 2.5 GHz Tribal Priority Window affords is one in which Tribes build and control their own broadband networks. It is a future in which Tribes have viable options for telehealth, distance learning, and telework – particularly during national emergencies. And it is also a future in which Tribes are the architects of their communications destiny. This future is built one license at a time.

Thank you. Mvto.