

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

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| In the Matter of                             | ) |                      |
|  | ) |                      |
| Wireless Telecommunications Bureau Seeks     | ) | WT Docket No. 06-150 |
| Comment on Process for Relicensing 700 MHz   | ) |                      |
| Spectrum in Unserved Areas                   | ) |                      |
|  | ) |                      |
| Improving Communications Services for Native | ) | WT Docket No. 11-40  |
| Nations by Promoting Greater Utilization of  | ) |                      |
| Spectrum over Tribal Lands                   | ) |                      |
| To: The Commission                           |   |                      |

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

The Navajo Nation Telecommunications Regulatory Commission (“NNTRC”), 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 proceedings in response to the Commission’s Public Notice (“*700 MHz Relicensing PN*” or “*PN*”), issued August 28, 2017.<sup>1</sup> In the *700 MHz Relicensing PN*, the Commission seeks comments on how it should relicense spectrum in the 700 MHz. This is based on rules established in 2007 to require carriers to build out or relinquish its spectrum on a “keep-what-you-serve” (KWYS) basis.<sup>2</sup> In support of these Comments, the NNTRC submits:

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<sup>1</sup> *700 MHz Relicensing PN*, DA 17-810. The “*PN*” appeared in the Federal Register on September 7, 2017, 82 Fed. Reg. 42263, and called for comments to be filed by October 10, 2017. These comments are timely filed.

<sup>2</sup> *Service Rules for 698-746, 747-762, and 777-792 MHz Bandset al.*, Second Report and Order, 22 FCC Rcd 15289 (2007) (*700 MHz Second Report and Order*).

**I. IT IS TIME TO APPLY A TRIBAL PRIORITY TO RELICENSED 700 MHz SPECTRUM**

At its very core, the 700 MHz spectrum that is set to be relicensed is unwanted. Carriers who had licenses to serve large areas of land simply chose not to deploy in some areas, even though they paid for that spectrum.<sup>3</sup> Because the United State government has already recouped the full market value of this spectrum, any spectrum that is returned pursuant to 47 CFR § 27.14(g)(1), (h)(1) that is over Tribal lands should be set aside for Tribal use.

**A. The Broadcast Tribal Priority Provides the Commission with Ample Precedent**

In 2010, the FCC took the first small steps at countering decades of failures to provide communications services to Indian Country with the establishment of the Broadcast Tribal Priority.<sup>4</sup> Noting that after nearly 80 years of allocating broadcast facilities around the country, “[w]e find that application of our traditional allocation priorities has not realized our Section 307(b) mandate to ‘make such distribution of licenses ... among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service.’”<sup>5</sup> The Commission went on:

Roughly one-third of the 4.1 million American Indian and Alaska Native population of the United States live on tribal lands, which are governed by Indian tribal governments that have a unique legal relationship with the federal government as domestic dependent nations with inherent sovereign powers over their members and territory. Because of their status as sovereign nations responsible for, among other things, “maintaining and sustaining their sacred histories, languages, and traditions,” Tribes have a vital role to play in serving the needs and interests of their local communities.<sup>6</sup>

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<sup>3</sup> Auction 73 raised almost \$19 billion for the U.S. Treasury. See [http://wireless.fcc.gov/auctions/default.htm?job=auction\\_summary&id=73](http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=73) (last visited 10/5/17).

<sup>4</sup> *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, First Report and Order and Further Notice of Proposed Rule Making, 25 FCC Rcd 1583, 1584-85 (2010) (“*Tribal Priority R&O*”).

<sup>5</sup> *Id.* at ¶ 8, citing 47 U.S.C. § 307(b).

<sup>6</sup> *Id.* (internal citations omitted).

Further, the Commission found that because of the unique trust relationship which exists between the United States government and Tribes, setting aside broadcast allocations for Tribes was consistent with the U.S. Constitution.

[T]he priority established herein for the benefit of federally recognized Tribes is not constitutionally suspect because it is based on “the unique legal status of Indian tribes under Federal law.” As the D.C. Circuit explained in 2003, the Supreme Court’s decisions leave no doubt that federal government action directed at Indian tribes, “although relating to Indians as such, is not based on impermissible racial classifications.” As set forth above, the Tribal Priority established herein will further our Section 307(b) mandate and other Commission policies by enabling Indian tribal governments to provide radio service tailored to the needs and interests of their local communities. Furthermore, as discussed above, we find that Indian tribal governments are uniquely situated to provide such service to tribal lands. Accordingly, we believe that the Tribal Priority is consistent with the Equal Protection Clause of the Fifth Amendment.<sup>7</sup>

Since the Broadcast Tribal Priority was established in 2010, there have been six new allocations made pursuant to this policy, and it is undersigned counsel’s understanding that there are several more in the works. It has been a success.

**B. The Tribal Spectrum NPRM Contemplated Using a Tribal Priority For Spectrum**

The failure to serve Indian Country is not limited to Section 307(b) broadcast facilities, but also shows that the FCC has failed in its bedrock requirement under Section 1 of the Communications Act of 1934 “to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.”<sup>8</sup> In the 2011 *Tribal Spectrum NPRM*,<sup>9</sup> the FCC

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<sup>7</sup> *Id.* at ¶ 12, quoting *American Federation of Government Works, and AFL-CIO v. U.S.*, 330 F.3d 513, 523 (D.C. Cir. 2003), cert. denied 540 U.S. 1088 (2003) (“*AFGE*”).

<sup>8</sup> 47 U.S.C. § 151.

<sup>9</sup> *Improving Communications Services for Native Nations*, WT Docket 11-40, Notice of Proposed Rulemaking, \_\_\_ FCC Rcd. \_\_\_ (2011) (*Tribal Spectrum NPRM*).

concluded that “residents of Tribal lands have lacked meaningful access to wired and wireless communications services,”<sup>10</sup> and that:

Greater access to wireless services would offer members of Tribes and others on Tribal lands significant economic opportunities and increased social benefits. Despite the Commission’s existing programs that seek to promote the deployment of both wireless and wireline communications services on Tribal lands, we believe that additional steps are necessary to encourage the further deployment and use of spectrum for Wireless Radio Services over Tribal lands.<sup>11</sup>

One of the tools discussed in the *Tribal Spectrum NPRM* was creating a Tribal Priority for spectrum.

We propose to establish a licensing priority that would be applicable to licenses for fixed and mobile wireless services and available to qualifying Tribal entities for unserved or underserved Tribal lands as defined above, where such Tribal lands are within the geographic area covered by an unassigned Wireless Radio Services license. In offering this proposal we note the significant record support for an expanded Tribal spectrum priority, which the National Broadband Plan recommended for the consideration of the Commission. In making this proposal, we draw upon our recent adoption of a Tribal priority in the context of licensing of broadcast radio services.<sup>12</sup>

Unfortunately, Docket 11-40 has sat dormant now for more than six years, and none of the recommendation contained in the *Tribal Spectrum NPRM* have been adopted.

**C. The 700 MHz Recaptured Spectrum is Perfect for Experimenting With a Tribal Priority**

As mentioned above, the FCC has already received the full value of this spectrum through Auction 83. Further, by failing to build out the returned areas, carriers have declared that they do not intend to serve them.

The Spectrum Tribal Priority for this spectrum can be implemented with rules similar to the Broadcast Tribal Priority. The definitions section of Section 73.7000 can

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<sup>10</sup> *Id.* at ¶ 1.

<sup>11</sup> *Id.*, footnote omitted.

<sup>12</sup> *Id.* at ¶ 35, footnote omitted.

be placed into Part 27. Qualified Tribal Applicants would be: “(1) a Tribe or consortium of Tribes, or (b) an entity that is 51 percent or more owned or controlled by a Tribe or Tribes that occupy Tribal Lands that receive Tribal Coverage.” Section 47 C.F.R. § 27.14(j)(1) will need to be modified to remove the requirement that mutually exclusive applications go to auction in the case where the area served is a Tribal Land and the applicant is a Tribal Applicant.

Because this would be the first use of a Tribal Priority for wireless spectrum, the application process will need to be modified and slightly extended to allow Tribes time to “gear up” for this new opportunity. Similar to the Broadcast Tribal Priority, the Commission should allow Tribal entities to specify proposed Tribal Lands they wish to serve, and after notice and comment, such lands would be removed from the unlicensed areas eligible for relicensing.

Next, the construction period requirement of one year will need to be extended for Tribes seeking to use the Tribal Priority. Since virtually no Tribe currently is a wireless spectrum licensee, they have little or no experience in building out wireless facilities. It will take time for Tribes to acquire and develop the necessary expertise. They should be treated under the buildout and coverage requirements of 47 C.F.R. § 27.14(g) (four years to cover 35 percent of the licensed area and 70 percent by end of the license term). Given the rugged and highly rural nature of many Tribal Lands, construction windows are limited to a few months a year. Further, acquiring rights-of-way and tower leases on reservations takes far longer than in other parts of the country. It will be impossible for

any operator (even a seasoned existing licensee) to build out in Indian Country within a single year from license grant.<sup>13</sup>

## II. CONCLUSION

There was great hope in Indian Country in 2010 and 2011 when the FCC issued the National Broadband Plan, established the Office of Native Affairs and Policy (ONAP), and issued the *Tribal Spectrum NPRM*. There was hope that the FCC could leverage its trust relationship with Tribes to find innovative ways to empower Native Americans to bring 21<sup>st</sup> Century telecommunications and broadband services to Indian Country. But progress has been slow, and innovative regulatory changes have been stalled. The 700 MHz relicensing process provides the easiest and best way to see whether a wireless Tribal Priority can be a success in the way the Broadcast Tribal Priority is allowing Tribes to bring new broadcast services to their people. It is time for the FCC to make good on its many promises to find ways of closing the Digital Divide. A Tribal Priority in the 700 MHz spectrum is one such way.

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<sup>13</sup> The NNTRC suggests that the construction period for any carrier proposing to serve Tribal Lands, even if they are not able to make use of the Tribal Priority, be treated under 47 C.F.R. § 27.14(g). Otherwise, it is highly likely that Tribal Lands will be excluded from the 700 MHz relicensing because licensees can't possibly build out 100 percent of the licensed area within a year.

WHEREFORE, the NNTRC urge the FCC to move forward in this proceeding to establish a Tribal Priority for relicensed 700 MHz spectrum.

Respectfully submitted,

**THE NAVAJO NATION TELECOMMUNICATIONS  
REGULATORY COMMISSION**

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Dated: October 10, 2017