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April 1, 2019

**VIA ELECTRONIC FILING**

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, D.C. 20554

**Re: Notice of Ex Parte, *Transforming the 2.5 GHz Band*, WT Docket No. 18-120**

Dear Ms. Dortch:

On Thursday, March 28, 2019, Clifford Agee, Morgan Gray and Josh Snow of the Chickasaw Nation and Trace Fiber Networks, LLC, a wholly-owned subsidiary of the Chickasaw Nation, and their counsel, Clare Liedquist and the undersigned with Herman & Whiteaker, LLC, met with William Davenport, Chief of Staff and Senior Legal Advisor for Wireless and International to Commissioner Geoffrey Sparks of the Federal Communications Commission ("FCC" or "Commission"). During the meeting, the parties discussed the recent ex parte letter filed by the Chickasaw Nation in the *Transforming the 2.5 GHz Band* proceeding and attached hereto.

Pursuant to Section 1.1206(b) of the Commission's Rules, we are filing this letter electronically in the above-captioned docket. Please contact the undersigned if you have any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. L. Herman, Jr.", with a stylized flourish at the end.

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Donald L. Herman, Jr.  
Clare C. Liedquist  
*Counsel to Trace Fiber Networks, LLC &  
The Chickasaw Nation*

Attachment

cc: William Davenport (via e-mail)

# HERMAN & WHITEAKER, LLC

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March 26, 2019

## VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, D.C. 20554

**Re: Ex Parte Letter, *Transforming the 2.5 GHz Band*, WT Docket No. 18-120**

Dear Ms. Dortch:

The Chickasaw Nation (the “Nation”), by counsel, as it discussed in its August 8, 2018 and September 7, 2018 comments in the above-referenced proceeding, supports the Federal Communications Commission’s (the “Commission” or “FCC”) proposal to utilize local priority filing windows to allocate additional Educational Broadband Service (“EBS”) spectrum in the 2.5 GHz band, especially for tribal nations.<sup>1</sup> Given the lack of spectrum availability to tribal nations to provide reliable broadband service to tribal citizens, the *Transforming the 2.5 GHz Band* proceeding is particularly important for tribal nations. The rules, as proposed by the Commission, would provide a rare opportunity for tribal nations like the Chickasaw Nation to access valuable spectrum to reach its underserved and unserved citizens.

The Chickasaw Nation is a federally recognized, sovereign, and self-governing American Indian Nation, whose territory extends across thirteen counties in rural south-central Oklahoma where providing quality broadband can be challenging and expensive. The Nation has gone to great lengths to attempt to bring both Chickasaw citizens and other Oklahoma residents, in the Nation’s Indian Country, broadband service, including making substantial investments in a fiber optic network and investing in a partnership with local entities to provide wireless broadband to underserved and unserved areas of Oklahoma. However, additional action is required to close

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<sup>1</sup> See Comments of the Chickasaw Nation, WT Docket No. 18-120 (filed Aug. 8, 2018) (“Chickasaw Nation Comments”); see also Reply Comments of the Chickasaw Nation, WT Docket No. 18-120 (filed Sept. 7, 2018) (“Chickasaw Nation Reply”).

the coverage gaps throughout the Nation's Indian Country, including prioritizing tribes and making available EBS spectrum to tribes serving a broader definition of "tribal lands."

*Tribes Should Be Given the First Local Priority Filing Window*

The Nation applauds the Commission for recognizing that opening a local priority filing window for rural tribal nations will allow tribal nations, like the Chickasaw Nation, "an opportunity to access 2.5 GHz spectrum to address educational and communications needs of their communities and residents on rural Tribal lands, including the deployment of advanced wireless services to areas that have too long been without."<sup>2</sup> However, in order to effectively address the disparity in broadband services available to tribal communities, the Commission should provide tribal nations with the *first* opportunity to obtain EBS spectrum within their Tribal lands before other entities, including existing licensees seeking to expand. By providing tribal nations, which are most interested in actually serving their communities, with the first local priority filing window, tribal nations would be able to obtain spectrum necessary to meet the broadband needs of their citizens, and the Commission would thereby address the lack of broadband access in tribal communities.

*The Commission Should Utilize the Lifeline Definition of Tribal Lands or Something More Expansive for the Tribal Local Priority Filing Window so That All Legitimate Tribes are Sufficiently Included*

The Nation agrees that any tribal filing window should be limited to federally recognized American Indian Tribes and Alaska Native Villages located in rural areas,<sup>3</sup> as these are the entities that best understand the needs of their communities and are most likely to put the spectrum to its highest and best use. The Nation cautions the Commission, however, against unnecessarily limiting the definition of "Tribal lands" to "reservations," which is not only inconsistent with federal law, but also may have the unintended consequence of excluding Tribal communities and citizens on Tribal lands that are not federally designated as "reservations." This is a particularly important distinction in Oklahoma because the state is largely made up of "Tribal lands" which no longer meets the strict definition for formal "reservations," but which Congress repeatedly has recognized are still nonetheless Indian Country.<sup>4</sup> The Commission has

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<sup>2</sup> *In re Transforming the 2.5 GHz Band, Notice of Proposed Rulemaking*, WT Docket No. 18-120, ¶ 36 (rel. May 10, 2018) ("NPRM"), ¶ 35.

<sup>3</sup> NPRM, ¶ 36.

<sup>4</sup> A formal "reservation" includes "land set aside under federal protection for the residence or use of tribal Indians, regardless of origin." *Cohen's Handbook of Federal Indian Law*, §3.04[2][c][ii], at 190-91 (Nell Jessup Newton ed., 2012). Formal reservation lands may be set aside via treaty, executive order, or federal statute, and are held in trust by the federal government. *Id.* This definition excludes the historic homelands of the Five Tribes in Oklahoma who negotiated to receive fee simple patents for their lands, as opposed to having such lands held in trust by the United States. *See, e.g.*, Treaty with the Choctaw, Art. II, Sept. 27, 1830, 7 Stat. 333 (proclaimed Feb. 24, 1831). However, Congress still recognizes these lands as "Indian Country," which includes "all lands within the limits of any Indian reservation," "all dependent Indian communities" and "all Indian allotments." 18 U.S.C. § 1151; *Cohen's Handbook*, § 4.07[1][b], at 292. Moreover, "[l]ands retained or held in trust or restricted status for an Indian tribe are Indian country, regardless whether those lands constitute a 'formal' reservation." *Cohen's Handbook*, § 4.07[1][b], at 292, citing *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 124-25 (1993). The definition applies equally in the civil jurisdiction context. *California v. Cabazon Band of Mission Indians*, 480 U.S.

previously included Tribal lands in Oklahoma and Indian allotments in its definition of Tribal lands in programs, such as Lifeline, where Tribal lands includes “any federally recognized Indian tribe’s reservation, pueblo, or colony, ***including former reservations in Oklahoma***; Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688); Indian allotments; Hawaiian Home Lands.”<sup>5</sup> The Nation recommends using the Lifeline definition of “Tribal lands” for this 2.5 GHz priority filing window, or something similar or more expansive, to ensure that all legitimate Tribal communities have an opportunity to acquire much-needed 2.5 GHz spectrum.

Likewise, the Commission should refrain from placing any unnecessary restriction in its tribal local filing window such as excluding “lands that currently are not inhabited by members of the tribal nations and/or are held as private property from the definition.”<sup>6</sup> Residents of Tribal lands include both tribal members and non-members alike and tribal boundaries frequently include lands that are privately-owned.<sup>7</sup> In the late 1900s Congress began allotting communal Indian lands into parcels for private ownership by tribal members through a process commonly known as “Indian allotment.”<sup>8</sup> In doing so, Congress also “open[ed] up unallotted lands for non-Indian settlement,” allowing these “surplus” lands to be sold to non-Indians.<sup>9</sup> These lands, while privately-owned and held by non-Indians, nevertheless remain Tribal lands and are considered part of the “former reservations in Oklahoma;... [and] Indian allotments”<sup>10</sup> consistent with the federal definition of Indian Country, or Tribal lands that the Commission utilizes in its Lifeline program, which the Nation recommends the Commission also use for the tribal local priority filing window. Tribal Nations should be allowed to serve both citizens and non-citizens residing in their Indian Country or Tribal lands, regardless of whether those lands are inhabited by non-members or held as private property.

In defining “rural,” the Nation agrees that the Commission should include Tribal lands that are not part of “an urbanized area or urban cluster area with a population equal to or greater than 25,000.”<sup>11</sup> However, since some clusters within rural Tribal lands have populations that

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202, 208 n.5 (1987); *see also Okla. Tax Comm’n*, 508 U.S. at 128. Currently pending with the United States Supreme Court is a capital case determining whether the State of Oklahoma lacked jurisdiction to prosecute a murder committed by a Native American on Indian allotment lands within boundaries of the Muscogee Creek Nation due to the potential disestablishment of the Muscogee Creek Nation’s formal “reservation.” *Carpenter v. Murphy*, No. 17-1107 (Cert. granted May 21, 2018). The verdict in this case should not have any effect on the definition of rural Tribal lands for purposes of the 2.5 GHz tribal local priority filing window. Even if the Court determines that the Muscogee Creek Nation’s reservation was disestablished, and thus, is subject to state criminal jurisdiction, that decision does not remove the Muscogee Creek Nation’s lands, nor the lands of similarly situated Oklahoma Tribal Nations, from being considered part of Indian Country as “former reservations in Oklahoma.” Moreover, utilizing a narrow definition of “reservation” would likewise exclude Alaskan Native townsites and Pueblo Indian communities held via fee simple title, which are not otherwise excluded from the definition of Indian country. *See* Cohen’s Handbook, §§ 4.07[2][b], at 318, 4.07[3][b][iii-iv], at 337-41.

<sup>5</sup> *See* 47 C.F.R. § 54.400(e)(emphasis added).

<sup>6</sup> NPRM, ¶ 36.

<sup>7</sup> *See, e.g.,* Cohen’s Handbook, § 16.03[2][b], at 1073-74 (“[T]he tribal lands of 118 reservations were allotted. . . totaling ‘almost 36 million acres’; of that, ‘approximately 27 million acres, or two-thirds of all the land allotted to tribal members, had passed by sale or involuntary transfer from the Indian fee owner into non-Indian ownership.’”).

<sup>8</sup> *Murphy v. Royal*, 875 F.3d 896, 928 (10th Cir. 2017).

<sup>9</sup> *Id.* (quoting *Solem v. Bartlett*, 465 U.S. 466-7 (1984)).

<sup>10</sup> 47 C.F.R. § 54.400(e).

<sup>11</sup> NPRM, ¶ 36.

reach very close to 25,000, the Nation recommends using a population maximum of 50,000 which comports with the Rural Health Care Telecommunications Universal Service program's definition of urban area.<sup>12</sup> In terms of how much of the license area would need to be Tribal lands to qualify, the Nation proposes that 25 percent would be sufficient.

*Commercial Carriers Are Holding the Spectrum Hostage*

The Chickasaw Nation recognizes that the *Transforming the 2.5 GHz Band* proceeding is focused on delegating the unlicensed white space in the band. However, throughout the United States, there exists another spectrum warehousing issue where some current licensees and lessees have built only the bare minimum to meet the Commission's overly lenient "substantial service" requirements for the 2.5 GHz band. As a result, many Tribal nations, the Chickasaw Nation included, are unable to access existing spectrum being held by nationwide entities who have no economic incentive to build in rural portions of the United States. To prevent additional spectrum warehousing, the Chickasaw Nation supports the Commission's proposal to establish heightened performance requirements for new 2.5 GHz licenses.<sup>13</sup>

*An Auction Would Eliminate the Educational Purpose of the Band and Benefit Only Large Carriers*

The Nation reiterates that it strongly opposes any sort of incentive or other type of auction in the 2.5 GHz band.<sup>14</sup> When the Commission established the band in 1963,<sup>15</sup> it was with the vision of enabling the transmission of instructional material to educational entities and community anchor institutions such as hospitals, training centers, and nursing homes.<sup>16</sup> In furtherance of this vision for the band, the Commission entrusted the spectrum to educational entities.<sup>17</sup> The proposed local priority filing windows continues this tradition by placing the spectrum into the hands of educational entities and local government groups, including tribal nations, with the drive to serve their communities. The Nation, for example, has been dedicated to distance learning initiatives through its own network, Chickasaw.tv, which documents the history and culture of the Chickasaw Nation, and its partnership with popular language learning software platform Rosetta Stone to offer Chickasaw language courses. By giving entities like the Nation the opportunity to access EBS spectrum, the Commission can help EBS live up to its potential more than twenty years after it was created – to use critical spectrum for educational purposes.

Auctioning the remaining whitespace or conducting an incentive auction of existing EBS spectrum, on the other hand, would award the spectrum to large for-profit carriers and eradicate that laudable educational and communal characteristic that is so unique to the 2.5 GHz band. In

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<sup>12</sup> See 47 C.F.R. § 54.605.

<sup>13</sup> NPRM at para. 54.

<sup>14</sup> See Chickasaw Nation Reply, *Transforming the 2.5 GHz Band*, WT Docket No. 18-120, 2-4 (Sept. 7, 2018).

<sup>15</sup> Educational Television, Docket No. 14744, Report and Order, 39 FCC 846 (1963).

<sup>16</sup> *In re* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66 (rel. Jul. 29, 2004), ¶ 10.

<sup>17</sup> 47 C.F.R. § 27.1201.

the event that the Commission decides to proceed with an auction of the remaining EBS white space, which the Nation opposes, tribal nations should still be given priority or exclusive right to bid on EBS licenses within their Tribal lands. The Commission could provide such priority by reserving at least 2 channel groups for bidding by tribal nations with a local presence only.

Pursuant to Section 1.1206(b) of the Commission's Rules, we are filing this letter electronically in the above-captioned docket. Please contact the undersigned if you have any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Donald L. Herman, Jr.", with a long, sweeping horizontal line extending to the right.

Donald L. Herman, Jr.

Clare Liedquist

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*Attorneys for The Chickasaw Nation*