

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Education and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands)	WT Docket No. 18-120
)	
Transforming the 2.5 GHz Band)	
_____)	

**PETITION FOR RECONSIDERATION BY THE NATIONAL CONGRESS OF
AMERICAN INDIANS**

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Indians
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Date: November 25, 2019

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I. Introduction

The National Congress of American Indians (NCAI), established in 1944, is the oldest and largest organization made up of American Indian and Alaska Native tribal nations and their citizens to advocate on their behalf. NCAI's membership, recognizing that tribal nations lack broadband access and are underrepresented in communications media, has long supported increasing access to spectrum for tribal nations.¹

At its 76th Annual Convention, NCAI members passed the attached resolution, ABQ-19-086C, "Providing for the Success of Tribal Nations in the 2.5 Gigahertz Broadband Tribal Priority for Wireless Networks" (Resolution ABQ-19-86C).² Resolution ABQ-19-086C expresses support for the Federal Communications Commission's (hereafter referred to as "Commission") proposed Tribal Priority Window (TPW) in the 2.5 Gigahertz (GHz) band and, through this duly submitted Petition for Reconsideration, requests reconsideration of eligibility requirements to ensure tribal access consistent with Resolution ABQ-19-086C.

II. Factual Background

In 2018, the Commission released a Notice of Proposed Rulemaking (NPRM) seeking comment on opening a TPW for access to the 2.5 GHz band spectrum.³ NCAI submitted comments to address the Commission's questions raised in its NPRM.⁴ On July 10, 2019, the Commission adopted a Report and Order (2.5 GHz Order) establishing an eligibility definition for the TPW.⁵ On October 25, 2019, the Commission published its Final Rule on the TPW.⁶

¹ See NCAI standing resolutions SD 15-037, "Urging the Federal Communications Commission to Improve Access to Spectrum Licenses for Tribal Nations"; SAC-12-034, "Promoting Tribal Nation Access and Use of Spectrum for Communications Services"; LNK-12-007, "Spectrum Allocation and the Low Power FM Radio (LPFM) 'Tribal Priority'"; and MKE-11-007, "In Support of a Tribal Priority for the Utilization of Spectrum on Tribal Lands."

² See Attachment A.

³ Federal Communications Commission (FCC), *Transforming the 2.5 GHz Band Notice of Proposed Rulemaking* (NPRM), 83 Fed. Reg. 26396 (June 7, 2018).

⁴ NCAI, Comments in Response to FCC Re: WT Docket No. 18-120 (August 8, 2018) available at: <https://ecfsapi.fcc.gov/file/10808020127609/NCAI%20FCC%20Comment%20-%20WT%20Docket%20No.%2018-120.pdf> (last visited Nov. 25, 2019).

⁵ FCC, *Report and Order, Transforming the 2.5 GHz Band*, WT Docket No. 18-120 (July 10, 2019).

⁶ FCC, *Final Rule, Transforming the 2.5 GHz Band*, 84 Fed. Reg. 57343 (October 25, 2019).

III. Petition for Reconsideration Standard

Pursuant to Commission rules of practice and procedure, the Commission may accept a petition for reconsideration where an entity addresses an issue previously raised to the Commission; addresses a new issue that could not have been the subject of an earlier petition due to new information; or the Commission determines that consideration of the facts or arguments relied on is required in the public interest.⁷

Here, NCAI's petition meets all three reconsideration standards of review because it (1) previously addressed tribal eligibility criteria in its NPRM comments; (2) could not have known to address the adoption of the off-reservation designation criteria until issuance of the 2.5 GHz rule; and (3) raises issues of import to the public, including tribal nations.

IV. Argument

A. The Commission Should Reconsider Its Decision to Limit Off-Reservation Lands, including Tribal Trust Lands, From the Tribal Priority Window Eligibility

The Commission should reconsider its decision to use 47 C.F.R. § 54.5 as the definition of eligible tribal lands instead of the broader definition contained in 47 C.F.R. § 73.7000. To the extent that Part 54.5 remains the definition of tribal lands, NCAI requests that the Commission re-open its "off-reservation" designation process described at 47 C.F.R. § 54.412 to prevent the exclusion of tribal trust lands from eligibility in the TPW.

As the Commission noted in the 2.5 GHz Order, numerous tribal commenters and NCAI requested that Part 73.7000 be used as the definition for tribal lands because it is broader and covers all "tribal trust land," which is excluded from coverage under Part 54.5. In explaining its support for the latter definition, the Commission stated that "the Part 54 definition has a similar

⁷ 47 C.F.R. §§ 1.106(c), 1.429(b); see Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization, Report and Order, 26 FCC Rcd 1594, 1627-28, 1634-35 (2011).

purpose to the Tribal priority window, to encourage provision of broadband service on rural lands.”⁸

In selecting Part 54, the Commission recognized that off-reservation lands may be excluded. To address this issue, the Commission proposed a *Part 54 Plus* definition for tribal lands under the TPW. The “plus” entailed utilization of the off-reservation designation process for Universal Service Support for Low-Income Consumers contained in 47 C.F.R. § 54.412. However, the Commission determined that this off-reservation allowance for the TPW would only apply to those tribal nations that had achieved such a designation as of the July 10, 2019 adoption date of the 2.5 GHz Order.⁹

This definitional expansion, however, was effectively illusory as the 2.5 GHz Order was the vehicle both for the notice of, and the closure of, the off-reservation designation process.¹⁰ Thus, only tribal nations that already had their off-reservation lands designated for a different purpose—universal service support—could be eligible for the TPW. The effect of precipitously closing the TPW to off-reservation lands will especially affect rural tribal nations who lack reservations and or have service populations located over non-contiguous parcels of off-reservation trust land.

To prevent the exclusion of tribal nations from the TPW and ensure the full intent of the TPW is realized, NCAI requests that the Commission re-open its Part 54.412 off-reservation process. Re-opening the deadline is consistent with the Commission’s stated goal for the TPW, “to provide broadband access to Tribal lands that historically have been unserved or underserved.”¹¹

⁸ See *2.5 GHz Order* at para 51.

⁹ See *2.5 GHz Order* at para. 54: “[W]e will rely on an existing Commission process and designate off-reservation Tribal lands as eligible for the Tribal priority window if they have already been designated (as of the adoption date of this Report and Order) as Tribal lands pursuant to the designation process contained in section 54.412 of the universal service rules.”

¹⁰ July 10, 2019 was the first time the Commission announced the application of the § 54.412 process to the TPW eligibility in its Report and Order. Within the same order, the Commission closed eligibility to tribal nations that had not already received that designation.

¹¹ See *2.5 GHz Order* at para. 54.

B. The Commission Should Reconsider the Requirement that, in Addition to Being Designated as Tribal Lands, an Area Must Also be “Rural” in Order to Qualify for the Tribal Priority Window

The Commission should reconsider and omit its determination that, in addition to being designated as tribal lands, an area must also be “rural” in order to qualify for the TPW.¹² Reconsideration is warranted because this decision is wholly inconsistent with the Commission’s trust relationship with, and responsibility to, tribal nations.

The federal government has a trust relationship to federally recognized tribal nations,¹³ regardless of the location of tribal lands. There has never been any constitutionally or legally based avenue whereby the federal government would not be required it to adhere to certain fiduciary standards in its dealings with tribal nations simply because of the location of tribal lands.¹⁴ As an independent agency of the federal government, the Commission has long recognized and honored its own general trust relationship with, and responsibility to, federally recognized tribal nations.¹⁵ This trust relationship and responsibility applies equally to all federally recognized tribal nations, not just to certain sub-sets of tribal nations based on the location of tribal lands.

Yet this is precisely what has happened in the Commission’s decision to restrict qualification for the TPW to tribal lands that it considers “rural.” That is, while stating that it is “committed to honoring its trust relationship with Tribal Nations through, among other things,

¹² See *2.5 GHz Order* at paras. 56 – 58. The Commission defined “rural” tribal lands in this context as “not part of an urbanized area or urban cluster with a population equal to or greater than 50,000.” *Id.* at para. 58.

¹³ See, e.g., *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) (citing *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831); *United States v. Kagama*, 118 U.S. 375 (1886); *Choctaw Nation v. United States*, 119 U.S. 1 (1886); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Creek Nation*, 295 U.S. 103 (1935); *Tulee v. State of Washington*, 315 U.S. 681 (1942).

¹⁴ See, e.g., *United States v. Mitchell*, 463 U.S. 206 (1983).

¹⁵ See, e.g., *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, 16 FCC Rcd 4078, 4080-81 (2000) (*Tribal Policy Statement*); *Improving Communications Services for Native Nations*, CG Docket No. 11-41, Notice of Inquiry, 26 FCC Rcd 2672, 2676, para. 5 (2011) (*Native Nations NOI*); *2.5 GHz Order* at para. 57.

policies facilitating broadband deployment on Tribal lands,”¹⁶ the Commission has limited the TPW to only those tribal lands that, in its sole discretion, the Commission has determined to be “rural.” This decision ignores the unique history of land loss and current land holdings of tribal nations, which includes non-Indian settlement in and around traditional tribal homelands, such as, e.g., Seattle, WA or Phoenix, AZ, which today would not be considered “rural” areas but whose neighboring tribal nations nonetheless occupy tribal lands. The Commission must provide all tribal nations the same access to the TPW regardless of whether the Commission characterizes their tribal lands as “rural.”

Moreover, increasing the population limit for the definition of “rural” from 25,000 to 50,000 does nothing to address this issue. In fact, the 50,000 population limit is no less arbitrary than the 25,000 limit proposed in the 2.5 GHz NPRM.¹⁷ Furthermore, the setting of an arbitrary limit that removes the ability of a tribal nation to deploy 2.5 GHz services to the more populated portions of their tribal lands can negatively affect, or indeed obviate, a tribal nation’s deployment planning to create an economically viable and sustainable service offering. The Commission’s reasoning flies in the face of the history of how wireless services have been deployed in the United States by an industry-wide focus on population density for economic efficiency.

The only way for the Commission to honor its trust responsibility to tribal nations, therefore, is to reconsider its decision and eliminate the requirement that tribal lands be “rural” in order to qualify for the TPW. The Commission has distinguished itself, in both past and current opportunities afforded to tribal nations, in working to close the persistent digital divide on tribal lands – and this petition provides the Commission with yet another chance to advance this commitment.

¹⁶ 2.5 GHz Order at para. 57.

¹⁷ See FCC, *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; Transforming the 2.5 GHz Band*, Notice of Proposed Rulemaking, 33 FCC Rcd 4687, 4698-4699, para. 36 (2018) (2.5 GHz NPRM).

V. Conclusion

For the foregoing reasons, NCAI requests that its petition for reconsideration, on the above grounds, be granted.

Further, NCAI notes that recent letters from the United States Senate and House of Representatives have requested an expanded time for the TPW and the distribution of notice to tribal nations. These requests are consistent with Resolution ABQ-19-086C, which requests the Commission extend the timeframe for the TPW to a full 180 days, and adjust the opening of the window to April 1, 2020, so that eligible entities have the appropriate time and opportunity to adequately prepare for and obtain the Tribal Priority license. This approach would ensure the greatest possibility of success for the implementation of a license to deploy broadband services in the 2.5 GHz EBS spectrum. NCAI looks forward to working with the Commission as it adopts TPW procedures and performs consultation with and outreach to tribal nations.

Sincerely,



Kevin J. Allis
Chief Executive Officer
National Congress of American
Indians

ATTACHMENT A



NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians
Resolution #ABQ-19-86C

**TITLE: Providing for the Success of Tribal Nations in the 2.5 Gigahertz
Broadband Tribal Priority for Wireless Networks**

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WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States and the United Nations Declaration on the Rights of Indigenous Peoples, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, there continues to be a great need for the deployment and development of reliable and affordable wireless services on tribal lands nationwide; and

WHEREAS, the Federal Communications Commission (FCC) adopted new rules in its Report and Order FCC 19-62, "Transforming the 2.5 GHz Band" in Educational Broadband Services (EBS) spectrum, in which the FCC provides the important opportunity for tribal nations to obtain a license through a Tribal Priority mechanism; and

WHEREAS, there is a very high level of interest among tribal nations nationwide in obtaining such a license and self-provisioning services to their tribal nations; and

WHEREAS, there is also a challenging learning curve on the licensing, financing, planning, and deployment engineering aspects of these potential projects – as well as the critically important and time-intensive internal decision making and budget authorization processes of over 500 sovereign tribal nations all of which are critically important to the potential success of any projects of tribal nations in 2.5 GHz.

NOW THEREFORE BE IT RESOLVED, that the National Congress of American Indians (NCAI) calls upon the FCC to (1) adjust the opening of the window to April 1, 2020 so that the FCC can provide proper notice and guidance, introduce complete mapping tools, as well as provide robust outreach, and government-to-government consultation and training with inter-tribal government associations and entities in all regions of the country, and (2) extend the timeframe for the Tribal Priority window to a full 180 days so that eligible entities have an opportunity to adequately prepare for and obtain the Tribal Priority license, thus ensuring the greatest possibility of success for the implementation of a license to deploy broadband services in the 2.5 GHz EBS spectrum; and

BE IT FURTHER RESOLVED, that NCAI calls upon the FCC to remove the “rural” tribal lands criteria of these rules, as NCAI firmly believes that the FCC’s trust relationship and fiduciary obligation to make all regulated services available to tribal nations and the residents of tribal lands, in order to close the persistent digital divide that exists on tribal lands, extends not only to *some* tribal nations and their communities, but *all* tribal nations; and

BE IT FURTHER RESOLVED, that NCAI calls upon the FCC to fulfill the legal obligations of the United States federal government in all of its agencies and treat all lands held in trust on behalf of tribal nations similarly and include them in their licensing mechanisms, such as all “off-reservation trust lands;” and

BE IT FURTHER RESOLVED, that NCAI requests that the FCC engage with the appropriate governmental authorities of Hawai’i to identify and designate potential entities within the Native Hawai’ian community, that represent Native Hawai’ian local communities and society, for standing as licensable entities for the purposes of the Tribal Priority; and

BE IT FURTHER RESOLVED, that NCAI requests that the FCC create a regulatory mechanism in all relevant services to provide tribal nations the opportunity of a first right of refusal, such as a Tribal Priority, for new spectrum services, spectrum partitioning and disaggregation and secondary markets opportunities to deploy service over Tribal lands; and

BE IT FURTHER RESOLVED, that NCAI requests that this resolution be filed as an ex parte comment in the appropriate FCC dockets, and also provided to the FCC-Native Nations Communications Task Force; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2019 Annual Session of the National Congress of American Indians, held at the Albuquerque Convention Center, October 20-25, 2019, with a quorum present.



Fawn Sharp, President

ATTEST:



Juana Majel Dixon, Recording Secretary