

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

In the Matter of	)	
	)	
Policies to Promote Rural Radio Service	)	MB Docket No. 09-52
and to Streamline Allotment and	)	RM-11528
Assignment Procedures	)	

To: The Commission

**JOINT COMMENTS OF NATIVE PUBLIC MEDIA  
AND  
THE NATIONAL CONGRESS OF AMERICAN INDIANS**

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## SUMMARY

Native Public Media ("NPM") and the National Congress of American Indians ("NCAI") support the *NPRM*'s proposal to establish a Tribal Priority in FM allotments, AM filing window applications and NCE FM filing window applications for federally recognized Tribes, Tribal consortia, Tribal members, and entities controlled by Tribes or Tribal members (the "Tribal Priority").

The Tribal Priority in the *NPRM* is not being proposed based on the racial makeup of Indian Tribes, but rather to *recognize*, consistent with the FCC's statutory mandate and laws of physics, the *sovereign rights and responsibilities* of federally recognized Tribes, their member citizens, and their economic instrumentalities, such as Tribally-owned or controlled businesses. The FCC underscored its commitment to recognize this sovereignty in its 2000 *Tribal Policy Statement*. It is undisputed that the 563 federally recognized Tribes and 4.1 million Native Americans are seriously underserved by AM and FM broadcasting services. Opportunities to deliver important educational and entertainment services directed at Native Americans represent an important government interest, as outlined in the *Tribal Policy Statement*.

The Tribal Priority rests on sound constitutional footing. Any challenge to the Tribal Priority would be reviewed by the courts under a rational basis test. Faced with a post-*Adarand* challenge to a contracting preference for Alaska Native Corporations in *AFGE v. U.S.*, the D.C. Circuit specifically rejected the plaintiff's claim that the preference should be reviewed under a strict scrutiny standard.

The current *NPRM* is the Commission's first concrete step in implementing the *Tribal Policy Statement* for broadcasting services. NPM and NCAI applaud this first step in a long journey to bring service to unserved and underserved Tribes.

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Native Public Media ("NPM") and the National Congress of American Indians ("NCAI") respectfully submit these comments in response to the Notice of Proposed Rulemaking ("NPRM") regarding Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures released on April 20, 2009 by the Federal Communications Commission ("FCC" or "Commission").<sup>1</sup> As NPM is an association of radio stations committed to promoting access to and ownership of media of communication by Native communities, and as NCAI is the oldest and largest national organization representing federally recognized Tribal government entities, both NPM and NCAI fully support the implementation of rule changes to facilitate the expansion of radio coverage into underserved communities, particularly the creation of a Tribal priority in Section 307(b) radio licensing standards.

**I. BACKGROUND**

As an organization that is dedicated to community broadcasting, NPM represents the interests of thirty-three Native owned public radio stations that serve Native nations as well as

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<sup>1</sup> *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures (Notice of Proposed Rule Making)*, RM-11528, MB Docket No. 09-52, (released April 20, 2009) (hereinafter "NPRM").

non-Native listeners throughout the United States.<sup>2</sup> Since its launch in 2004, NPM's principal focus has been on supporting existing Native American public radio stations and promoting ownership for more Native communities by serving as an advocate, national coordinator, and resource center. Strengthening and expanding the voice of Native America is NPM's primary goal.

Advocating on behalf of its member Tribes from across the entire United States in consensus based decision making, NCAI is a forum for federal-tribal policy on all of the major issues confronting Native peoples today, including the myriad challenges of communications access and deployment. NCAI continues to coordinate with the Commission on a number of Tribal outreach and education efforts. NPM and NCAI have co-hosted several of the Commission's Indian Telecommunications Initiatives or "ITI" regional workshops and roundtables. NCAI annually co-hosts with the Commission the annual high level consultation "FCC-NCAI Dialogue on Increasing Tribal Telecommunications," between Commission officials and members of the NCAI Telecommunications Subcommittee.

Since the creation of NCAI's Telecommunications Subcommittee in 2001, NCAI has adopted many resolutions, representing formal national Tribal policy positions and prerogatives, to support the deployment of telecommunications, broadcast and broadband services throughout Indian Country. NPM is a frequent and active participant in the NCAI Telecommunications Subcommittee. Both NPM and NCAI are appreciative and pleased to submit these joint comments to the Commission.

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<sup>2</sup> NPM, formerly known as the "Center for Native American Public Radio," was created as a center under the National Federation of Community Broadcasters with seed funding from the Corporation for Public Broadcasting. A list of the NPM member stations can be found at [http://www.nativepublicmedia.org/index.php?option=com\\_content&task=view&id=26&Itemid=48](http://www.nativepublicmedia.org/index.php?option=com_content&task=view&id=26&Itemid=48).

There are 4.1 million Native Americans and Alaska Natives in the United States and 563 American Indian Tribes and Alaska Native Villages, all inherently sovereign with their own political and Tribal structures. However, the disadvantaged situation of many Native nations hinders their ability to establish and maintain strong broadcasting stations. First, there is little funding available for the initiation and development of Native radio on many reservations. Second, Native stations are limited in their capacity to produce quality programming due to shoestring budgets, distances radio personnel and staff must travel to get to the station, and the absence of broadcast training opportunities in Tribal communities. Third, Native stations in rural areas must transmit under less than ideal circumstances. Lack of dependable electricity, uneven terrain, and the large area that must be covered in order to broadcast to even a small community create serious complications. Bringing robust communications technology to Native American lands has been a constant struggle,<sup>3</sup> but efforts by the United States government to better recognize the needs of Tribal governments and their people will create more opportunities for Native broadcasting.

NPM and NCAI believe that promoting the expansion of radio service to Tribal lands (and underserved communities in general) will benefit Americans by increasing their access to educational and otherwise beneficial programming. The creation of a priority for Tribal groups in radio licensing would directly further this goal. In addition, such a priority would be in keeping with the FCC's longstanding policy promoting the self-sufficiency and economic development of federally recognized American Indian Tribes and Alaska Native Villages (collectively referred to hereinafter as "Tribes"). Similarly, the adoption of policies which serve to promote the expansion of radio coverage to underserved areas would simultaneously promote

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<sup>3</sup> The first tribal radio stations only began in the 1970s. *See Native Public Media Brings Native American Voices to Washington Policymakers*, Media Minutes (May 30, 2008).

the goals of NPM, NCAI and the FCC's fundamental objective of broadening participation in the broadcast industry.<sup>4</sup>

## II. COMMENTS REGARDING THE ESTABLISHMENT OF A TRIBAL PRIORITY IN SECTION 307(B) ANALYSIS

In Section II.C. of the NPRM, the FCC proposes to create a new priority in FM allotments, AM filing window applications and NCE FM filing window applications for federally recognized Tribes, Tribal consortia, Tribal members, and entities controlled by Tribes or Tribal members (the “Tribal Priority”).<sup>5</sup> NPM and NCAI support this proposal. Such a policy would promote the allocation and licensing of new radio stations to provide coverage for unserved and underserved Tribal lands.

The *NPRM* begins with the proper premise, follows with the correct analysis, and reaches a conclusion that is grounded in sound policy and constitutional bedrock. The issue turns on the fundamental question of sovereignty, not race or ethnicity. “It is well established that the Tribes are inherently sovereign Nations, with the obligations to ‘maintain peace and good order, improve their condition, establish school systems, and aid their people in their efforts to acquire the arts of civilized life,’ within their jurisdiction.”<sup>6</sup> The FCC underscored its commitment to recognize this sovereignty in its *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes, (Tribal Policy Statement)*.<sup>7</sup>

The Commission recognizes the unique legal relationship that exists between the federal government and Indian Tribal governments, as reflected in the Constitution of the United States, treaties, federal statutes, Executive orders, and

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<sup>4</sup> See, e.g., *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547, 567 (1990), *overruled on other grounds in Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

<sup>5</sup> *NPRM*, ¶ 22.

<sup>6</sup> *NPRM*, ¶. 21, citing S.Rep. No. 698, 45th Cong., 3d Sess. 1-2 (1879) (quoted in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140, 102 S.Ct. 894, 903, 71 L.Ed.2d 21 (1981)).

<sup>7</sup> 16 FCC Rcd 4078, 4080 (2000).

numerous court decisions. As domestic dependant nations, Indian Tribes exercise inherent sovereign powers over their members and territory. The federal government has a federal trust relationship with Indian Tribes, and this historic trust relationship requires the federal government to adhere to certain fiduciary standards in its dealings with Indian Tribes. In this regard, the Commission recognizes that the federal government has a longstanding policy of promoting tribal self-sufficiency and economic development as embodied in various federal statutes.<sup>8</sup>

Thus, any changes proposed to the allocation or licensing scheme for broadcast facilities is based not on providing a preference for a racial or ethnic group,<sup>9</sup> but rather based on balancing the obligations to recognize the sovereign rights of Tribes over their member citizens and their territory with the law of physics that dictate that the same radiofrequency spectrum cannot be used by two entities in geographic proximity without debilitating interference.

Whereas some strides have been made by the FCC to honor and implement the *Tribal Policy Statement* regarding the provision of telecommunications services, the current *NPRM* is the Commission's first concrete step in implementing this policy for broadcasting services. NPM and NCAI applaud this first step in a long journey to bring service to unserved and underserved Tribes.

NPM and NCAI mutually note the support that the Commission has recently received from virtually all corners of Indian Country for the establishment of a Tribal Priority. In June, during the most recent Mid-Year Session of the National Congress of American Indians in Niagara Falls, NY, the NCAI Resolution NGF-09-007, entitled *Establishment of a Tribal Priority for Broadcast Spectrum Allocations at the Federal Communications Commission, FCC Docket 09-30*, was unanimously adopted by the General Assembly of Tribal leaders in formal

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<sup>8</sup> *Id.* (citations omitted).

<sup>9</sup> See *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (in upholding legislation benefitting federally recognized Indian tribes, explaining that benefits were “granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities”), cited in the *NPRM*, ¶ 24, n.38.

support of the Commission's proposed creation of a Tribal Priority in Section 307(b) radio licensing procedures. A copy of the Resolution is appended hereto as Attachment A.

#### **A. The Tribal Priority is Constitutionally Sound.**

The FCC seeks comment on the constitutional issues associated with such a priority. In doing so, however, the *NPRM* slips off its firm constitutional ground and wanders into the complex *and utterly inapplicable* issue of racial and ethnic preferences implicated by the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena*.<sup>10</sup> Specifically, it asks whether the Tribal Priority would "be deemed a racial classification subject to strict judicial scrutiny."<sup>11</sup> As demonstrated above, the proposed priority would be fully consistent with the Constitution, and does not trigger the strict scrutiny analysis imposed by the Supreme Court's decision in *Adarand*.

The Tribal Priority in the *NPRM* is not being proposed based on the racial makeup of Indian Tribes, but rather to *recognize*, consistent with the FCC's statutory mandate and laws of physics, the *sovereign rights and responsibilities* of federally recognized Tribes, their member citizens, and their economic instrumentalities, such as Tribally-owned or controlled businesses.<sup>12</sup> The proposed policy thus is completely consistent with past Supreme Court precedent recognizing the status of Tribal peoples, and dates back over 150 years.<sup>13</sup> As then-Judge Scalia

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<sup>10</sup> *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

<sup>11</sup> *NPRM*, ¶ 245 .

<sup>12</sup> *See Morton v. Mancari*, 417 U.S. 535, 554 (1974)("[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the B.I.A in a unique fashion"). The Supreme Court in *Mancari* went on to note: "The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature." *Id.*, n.24.

<sup>13</sup> *Mancari*, 417 U.S. at 554-55.

said in *United States v. Cohen*,<sup>14</sup> “the Constitution itself provides support for legislation directed specifically at Indian tribes.”<sup>15</sup> “The Court’s decisions ‘leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based on impermissible racial classifications.’”<sup>16</sup> The Tribal classification is a political classification, not a racial classification.

Further, the *NPRM* proposes to grant the Tribal Priority for three distinct groups. First are the Tribes themselves, then individual Tribal members, and then entities controlled by Tribes or Tribal members.<sup>17</sup> Each category has strong constitutional backing, so long as certain safeguards are met. The recognition of Tribes, Tribal members and their instrumentalities as politically classified for special rights and special treatment dates back to the Constitution itself and the power of the Federal government to regulate Commerce between the United States and the various Tribes.<sup>18</sup> That this special treatment flows to Tribal members is also well

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On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. *See, e.g., Board of County Comm'rs v. Seber*, 318 U.S. 705, 63 S.Ct. 920, 87 L.Ed. 1094 (1943) (federally granted tax immunity); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) (same); *Simmons v. Eagle Seelatsee*, 384 U.S. 209, 86 S.Ct. 1459, 16 L.Ed.2d 480 (1966), aff'g 244 F.Supp. 808 (ED Wash.1965) (statutory definition of tribal membership, with resulting interest in trust estate); *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) (tribal courts and their jurisdiction over reservation affairs). Cf. *Morton v. Ruiz*, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974) (federal welfare benefits for Indians 'on or near' reservations). This unique legal status is of long standing, see *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L.Ed. 25 (1831); *Worcester v. Georgia*, 6 Pet. 515, 8 L.Ed. 483 (1832), and its sources are diverse.

<sup>14</sup> 733 F.2d 128, 139 (D.C. Cir. 1984)(en banc).

<sup>15</sup> *Id.*

<sup>16</sup> *American Federation of Government Works, and AFL-CIO v. U.S.* (“*AFGE v. U.S.*”). 330 F.3d 513, 523 (D.C. Cir. 2003), *cert. denied* 540 U.S. 1088, 124 S.Ct. 957 (2003), *quoting United States v. Antelope*, 430 U.S. 641, 645 (1977).

<sup>17</sup> *NPRM*, 22.

<sup>18</sup> U.S. Const. art. I, § 8, cl. 3; *see e.g., 25 U.S.C. §§ 461 et seq.*, and *Seminole Nation v. United States*, 316 U.S. 286 (1942). *See also, United States v. Antelope*, 430 U.S. 641, 645 (1977)(“[t]he decisions of

established.<sup>19</sup> That the same special treatment can be afforded entities controlled by Tribes and Tribal members was decided in *AFGE v. U.S.*<sup>20</sup>

Thus any challenge to the Tribal Priority would be reviewed by the courts under a rational basis test. “As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligations toward the Indians, such legislative judgments will not be disturbed.”<sup>21</sup> Faced with a post-*Adarand* challenge to a contracting preference for Alaska Native Corporations in *AFGE v. U.S.*, the D.C. Circuit specifically rejected the plaintiff’s claim that the preference should be reviewed under a strict scrutiny standard. “In *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998), we summed up the state of the law this way: ‘ordinary rational basis scrutiny applies to Indian classifications just as it does to other non-suspect classifications under equal protection analysis.’ *Id.* at 1340.”<sup>22</sup> The United States Department of Justice has maintained this position consistently since the issuance of *Adarand*, and in 1995 issued a Memorandum of Legal Guidance stating:

*Adarand* does not require strict scrutiny review for programs benefiting Native Americans as members of federally recognized Indian tribes. In *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court applied rational basis review to a hiring preference in the Bureau of Indian Affairs for members of federally recognized Indian tribes. The Court reasoned that a tribal classification is ‘political rather than racial in nature,’ because it is ‘granted to Indians not as a

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[the Supreme] Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications”).

<sup>19</sup> See *Morton v. Mancari*, 477 U.S. at 554; see also see *United States v. Holliday*, 70 U.S. 407, 417 (1865).

<sup>20</sup> 330 F.3d at 524 (regulation of commerce between the federal government and tribal entities, including tribally controlled corporations is “at the heart of the [Indian Commerce] Clause”). See also, *California v. Cabazon Band of Mission Indians*, 480 U.S.202, 216 (1987) (stressing that Congress’s objective of furthering tribal self-government includes the “‘overriding goal’ of encouraging tribal self-sufficiency and economic development”); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)).

<sup>21</sup> *Morton v. Mancari*, 477 U.S. at 554.

<sup>22</sup> *AFGE v. U.S.*, 330 F.3d at 524.

discrete racial group, but, rather, as members of quasi-sovereign tribal entities.’  
Id. at 554. See id. at 553 n.24.

The granting of a priority in frequency allocation and radio licensing for federally-recognized Tribes, therefore, is not a race-based classification in violation of *Adarand*. To the contrary, such a priority would be well-rooted in the political and legal history of the United States as a reflection of the unique relationship between the federal government and Indian Tribes. The granting of the Tribal priority would rationally further and advance the Commission’s own trust relationship with, and responsibility to, the Tribes, and the Commission’s policy of promoting Tribal self-sufficiency and economic development. As more Tribal broadcasters develop and broadcast culturally related content, unique to their Tribal subject matter and often in Tribal languages, the Commission would be advancing the important federal goal of providing for Tribal cultural and historic preservation. Importantly, the Commission would also be rationally furthering the laudable goal it has pursued since 2000, found in the very first and very last of its enumerated *Tribal Policy Statement* Goals and Principles, by addressing in a government-to-government manner with Tribes the development of policy to remove regulatory barriers to the deployment of, and adequate access to, communications service to Tribes and their communities.<sup>23</sup>

In this effort, the Commission should heed the *Mancari* Court’s warning against any departure from a rational basis standard to apply a strict scrutiny standard as espoused in *Adarand*.

Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the B.I.A, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were

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<sup>23</sup> 16 FCC Rcd 4078, 4080-81 (2000).

deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.” See *Simmons v. Eagle Seelatsee*, 244 F.Supp. 808, 814 n. 13 (ED Wash.1965), aff’d, 384 U.S. 209, 86 S.Ct. 1459, 16 L.Ed.2d 480 (1966). It is in this historical and legal context that the constitutional validity of the Indian preference is to be determined.<sup>24</sup>

## **B. Some Minor Changes Should be Adopted to the Definitions Used for the Tribal Priority.**

First, NPM and NCAI supports the proposed definitions of “Indian Tribe,”<sup>25</sup> “Federally-Recognized Indian Tribes,”<sup>26</sup> and “Tribal Lands,”<sup>27</sup> All are consistent both with Commission policy, as well as other Federal agency definitions. Any departure from these definitions would unquestionably result in confusion and potential litigation over definitional conflicts. NPM and NCAI especially agrees with the Commission’s proposal that due to the unique nature of broadcast spectrum that doesn’t respect man-made geographic distinctions, “[t]o the extent that tribal lands are “checkerboarded” with fee lands, we will use the outer boundaries of such lands to delineate the coverage area, and will not deduct fee lands not owned by members of Tribes from the coverage percentage.”<sup>28</sup>

The Commission also seeks comment on the proposed requirements to qualify for this priority. NPM and NCAI generally support the qualification structure suggested by the FCC. NPM agrees that in order to qualify for the priority the applicant should be the first local transmission service to the proposed community of license located on Tribal lands and that at least 50 percent of the principal daytime community contour of the proposed facilities should cover Tribal lands, with the caveat noted above about “checkerboarding”. In addition to these

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<sup>24</sup> *Morton v. Mancari*, 477 U.S. at 552-53.

<sup>25</sup> *NPRM*, ¶ 19, n.29.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at ¶ 20, n. 30.

<sup>28</sup> *Id.*

requirements, NPM and NCAI likewise agree that the applicant's status as a federally-recognized Tribe or an enrolled member of such a Tribe should be sufficient to establish qualification for the 307(b) priority. In the final rule adopted in this proceeding, NPM and NCAI urge the Commission, in order to avoid confusion in the future, to make clear that the Tribal Priority applies to *federally recognized* Tribes, Tribal members *enrolled with federally recognized* Tribes, and entities controlled by *federally recognized* Tribes, and/or Tribal members *enrolled with federally recognized* Tribes. The “enrollment” requirement both recognizes the sovereign rights of each Tribe to determine its Tribal membership, and avoids arguments in the future as to what constitutes a Tribal member.

The Commission also tentatively concludes that a holding period of four years of on-air operation should apply to any station or allotment awarded pursuant to the proposed Tribal priority. NPM and NCAI believe that this holding period is a reasonable safeguard against abuse of this priority and would not pose a significant burden to good-faith applicants. NPM and NCAI urges the Commission to make clear, however, that transfers would be allowable if the transferee/assignee also met the standards. Otherwise new facilities could flounder if something happens to the initial license such that it cannot complete construction or continue to operate the station.

### **III. COMMENTS REGARDING MODIFICATION OF POLICIES TO BENEFIT UNDERSERVED COMMUNITIES**

NPM and NCAI fully support several other proposals in the NPRM because it believes that they would serve to encourage the expansion of radio coverage into historically unserved and underserved areas. Because many Tribal lands are located in sparsely populated regions with little to no radio coverage, these proposals would further the goals of NPM and NCAI while advancing the FCC's mission of broadening participation in broadcast communications.

The Commission proposes to modify Priorities (3) and (4) of Section 307(b). Specifically, the Commission puts forward that no Priority (3) preference be given to AM or FM facilities which would, or could be modified to, place a principal community signal primarily over an urbanized area. NPM and NCAI believe that the current reliance on population differences for determining the recipients of new radio licenses unfairly skews the distribution of services to already abundantly served areas. The Commission suggests that in such a situation they should adopt a rebuttable presumption that the proposal is actually for the urbanized area and not the proposed adjacent community lacking a station. NPM and NCAI believe that placing greater emphasis on the scope of reception service is a fair means of ensuring that urbanized areas and abutting communities are not overly represented in radio licensing.

Similarly, the Commission tentatively concludes that a dispositive preference under Priority (4) is inappropriate in all but the most exceptional circumstances. Under Priority (4), the principal deciding factor is the total population to be served by the new reception service. NPM and NCAI agree with the Commission that this reliance on raw population figures also unfairly favors communities proximate to urbanized areas at the expense of rural, Tribal, and other unserved and underserved communities. NPM and NCAI support the FCC's proposed solution of disallowing the preference in situations where 75 percent or more of the population within the principal community contour already receives more than five aural services and the proposed community of license already has more than five transmission services.

The Commission also seeks comment on its proposal to create an "underserved listeners" priority that would be coequal to Priorities (2) and (3). This new priority would apply to proposals that would create third, fourth, and fifth aural reception service to a "substantial portion" of the proposed service population. NPM and NCAI believe that in order to ensure that

this priority effectively serves its intended purpose of expanding coverage for underserved listeners, a "substantial portion" should be defined as 50 percent or more. The Commission also asks for comment on whether this new priority should outweigh Priority (3) proposals only if the total number of underserved listeners exceeds the population of the community for which a first local service is proposed. Although NPM and NCAI support expansion of radio service into completely unserved and underserved areas, it believes that this proposal would constitute a fair balance of competing interests.

The Commission also proposes to limit the ability of an existing station to move from a smaller community to an area with a greater population. NPM and NCAI believe that the migration of stations from small communities to metropolitan areas is a significant problem. To address this, the Commission's proposal forbids community of license changes that would create "white" or "gray" areas under all circumstances. NPM and NCAI supports this solution and believes that this would be an effective step to help ensure that the most poorly served communities will not continue to suffer drops in the level of reception service.

#### **IV. COMMENTS REGARDING ADDITIONAL PROPOSALS OF THE FCC**

NPM and NCAI wish to comment on several proposals contained in the NPRM that, while not directly addressing issues central to their respective organizational missions, would seem to be rational efforts to effectuate the efficient and equitable distribution of radio service.

The Commission suspects that many AM auction applications are filed by speculators seeking a simplified singleton grant that would permit them to avoid the potentially expensive auction process. NPM and NCAI share that suspicion and believe that delegating authority to the Media Bureau and the Wireless Telecommunications Bureau to create a cap on the number of AM applications that may be filed in an auction window would be an effective step in countering

this trend. A five-application limit would not create an excessive burden and would allow new entrants to participate more fully in AM auctions, while diminishing consolidation by major parties.

The Commission also proposes to codify the permissibility of non-universal engineering solutions and settlement proposals that serve to make at least one proposal grantable. NPM and NCAI support delegating the power to the FCC staff to permit such solutions. NPM and NCAI wish to caution, however, that creating a burden to resolve all mutual exclusivities with respect to the other applications in the specified mutually exclusive group may create significant technical difficulties that Tribes and smaller communities with fewer resources will be less capable of managing.

The FCC also seeks to delegate to the Media Bureau and the Wireless Telecommunications Bureau the power to provide deadline flexibility in the filing of post-auction long-form applications. NPM and NCAI believe that such a change would serve to benefit everyone involved.

NPM and NCAI also fully support the FCC's proposal to modify Section 74.1233 in order to prohibit the practice of "band hopping." The Commission should only allow applications to move from the reserved band to the non-reserved band (or vice versa) from FM translator stations that have filed license applications or that are licensed and have been in operation for at least two years. Additionally, NPM and NCAI agree that there should be a holding period of two years of on-air operation following the filing of a license application for new FM translator permittees before they are allowed to switch.

The Commission also proposes to modify Section 73.182(k) to more clearly set out the standards for determining AM nighttime mutual exclusivity among filed applications. This

proposal would codify the Commission's decision in *Nelson Enterprises, Inc.*<sup>29</sup> NPM and NCAI fully support this effort at clarification.

## V. CONCLUSION

The proposals contained in the NPRM represent reasonable measures designed to more effectively carry out the Commission's statutory goal of distributing radio service fairly and equitably. NPM and NCAI applaud the Commission's efforts to address the issues faced by American Indian and Alaska Native broadcasters and those attempting to bring radio service to sparsely populated and underserved areas of the country.

Respectfully submitted,

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### **NATIONAL CONGRESS OF AMERICAN INDIANS**

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Dated: July 13, 2009

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<sup>29</sup> *Nelson Enterprises, Inc.*, 18 FCC Rcd 3414 (2003).

**Attachment A:**

**National Congress of American Indians  
Resolution #NGF-09007**

**Supporting Establishment of a Tribal Priority  
For Broadcast Spectrum Allocations**



# NATIONAL CONGRESS OF AMERICAN INDIANS

## The National Congress of American Indians Resolution #NGF-09-007

### TITLE: Establishment of a Tribal Priority for Broadcast Spectrum Allocations at the Federal Communications Commission, FCC Docket 09-30

#### EXECUTIVE COMMITTEE

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*Standing Rock Sioux Tribe*

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**Jacqueline Johnson Pata**  
*Tlingit*

#### NCAI HEADQUARTERS

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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, 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**, pursuant to the Communications Act of 1934, as amended by the Telecommunications Act of 1996, the role and responsibility of the Federal Communications Commission ("Commission") to ensure that all Americans, in all regions of the United States, have the opportunity to access telecommunications and information services; and

**WHEREAS**, the residents, both Native and Non-Native, of communities of American Indian Tribes and Alaska Native Villages are the worst served citizens in America with regard to telecommunications and broadcast services; and

**WHEREAS**, the 2000 Federal Communications Commission *Statement of Policy on Establishing a Government to Government Relationship with Indian Tribes, (Tribal Policy Statement)* 16 FCC Rcd 4078 (2000), recognizes and promotes the "general trust responsibility with, and responsibility to, federally-recognized Indian Tribes" and also "recognizes the rights of Indian Tribal governments to set their own communications priorities and goals for the welfare of their membership" (16 FCC Rcd 4081); and

**WHEREAS**, Commission's Tribal Policy Statement recognizes fundamental legal nature of Tribal sovereignty, the federal trust responsibility, and the importance of agency consultation with federally-recognized Tribal entities; and

**WHEREAS**, Commission's Tribal Policy Statement includes certain Goals and Principles aimed at engaging with Tribal entities to remove barriers to entry and address in creative new ways the deplorable lack of communications services in American Indian and Alaska Native communities; and

**WHEREAS**, the holding of the Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995), does not require strict scrutiny review for programs benefiting Native Americans as members of federally recognized Indian tribes, as in Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court applied rational basis review to hiring preference in the Bureau of Indian Affairs for members of federally recognized Indian tribes, reasoning that a tribal classification is "political rather than racial in nature," because it is "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." (See 417 U.S. 535, at 553 n.24, and at 554); and

**WHEREAS**, while much of the FCC Media Ownership efforts have been focused on increasing "minority" ownership opportunities, federally recognized Tribal Entities are not simply part of the minority community, but distinct sovereign legal governmental entities with their own individually unique cultures and traditions, governmental priorities, and historic geopolitical situations; and

**WHEREAS**, the Commission is charged to consider rules and procedural changes to better encourage the fair distribution of broadcast licenses, particularly in smaller communities, rural areas, and tribal areas; and afford greater opportunities to participate in competitive bidding, promote the filing of technically sound applications, and deter speculation; and

**WHEREAS**, the opportunities for Tribal Entities to obtain spectrum are quickly diminishing, and there is a serious problem of public radio station under-representation in Indian Country, with a discouragingly low number among the more than 562 federally recognized tribes of only 33 Native American public radio stations serving Indian Country, while most of the public radio spectrum is being licensed for non-Native uses; and

**WHEREAS**, the thirty-three Tribal entity owned public radio stations that currently serve Native American communities in an environment where some Tribes are located in locked out or saturated radio markets; and

**WHEREAS**, the Commission proposes to modify the noncommercial educational (NCE) fair distribution comparative criterion by establishing a Tribal Priority to facilitate the allocation of broadcast spectrum to federally recognized American Indian Tribes and Alaska Native Villages serving tribal lands; and

**WHEREAS**, the creation of a Tribal Priority for broadcast spectrum would significantly further the federal goal of Tribal self-sufficiency and self-determination and would support several fundamental missions of Tribal entities within their communities, which include increasing the deployment of services, strengthening local programming, providing public safety, obtaining diversity of viewpoint, creating cultural preservation and language revitalization, and proving a modern technological outlet to engage community members, especially youth, in the positive development of their values, identity, and quality of life.

**NOW THEREFORE BE IT RESOLVED**, that the NCAI does hereby support the Commission's proposal, FCC docket 09-30/MB docket 09-52, to establish a new 307 (b) Tribal Priority to be applied to FM allotments, AM filing window applications, and NCE filing window applications for federally recognized Tribes and their members; and

**BE IT FURTHER RESOLVED**, that the creation of a Tribal Priority for broadcast spectrum would significantly further and promote the federal goal of Tribal self-sufficiency and self-determination; and

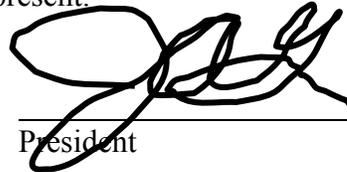
**BE IT FURTHER RESOLVED**, that the creation of a Tribal Priority would support several fundamental missions of Tribal entities within their communities, which include increasing the deployment of services, strengthening local programming, providing public safety, obtaining diversity of viewpoint, creating cultural preservation and language revitalization, and proving a modern technological outlet to engage community members, especially youth, in the positive development of their values, identity, and quality of life; and

**BE IT FURTHER RESOLVED**, that the Commission should rely upon the principles of federal Indian law within its Tribal Policy Statement and other orders and rulemakings to take the appropriate legal steps to create the Tribal Priority; and

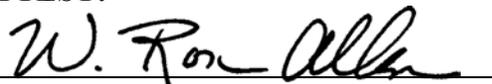
**BE IT FINALLY RESOLVED**, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

**CERTIFICATION**

The foregoing resolution was adopted by the General Assembly at the 2009 Mid-Year Session of the National Congress of American Indians, held at Conference Center Niagara Falls in Niagara Falls, New York on June 14-17, 2009, with a quorum present.

  
\_\_\_\_\_  
President

**ATTEST:**

  
\_\_\_\_\_  
Recording Secretary