

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

To: Office of the Secretary, for the Commission

COMMENTS

Cherokee Nation, a federally-recognized American Indian Tribe, hereby comments on the Commission’s Notice of Proposed Rule Making (“*NPRM*”) 1/ in the above-captioned docket, in support of the establishment of a Section 307(b) priority for Native American and Alaska Native Tribal groups serving Tribal Lands (the “Tribal Priority”). With certain refinements and applicability as proposed in these Comments, such a Tribal Priority will further the Commission’s goal of promoting much needed channels of communication for Native American and Alaska Native Tribes. 2/

The Cherokee Nation is headquartered in Tahlequah, Oklahoma. 3/ Cherokee Nation has jurisdiction over all or parts of 14 counties in northeastern Oklahoma. 4/ Through its

1/ FCC 09-30 (released Apr. 20, 2009).

2/ Such a Tribal Priority would pass constitutional review. *See, e.g., Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335, 1340 (D.C. Cir. 1998) (“ordinary rational basis scrutiny applies to Indian classifications just as it does to other non-suspect classifications under equal protection analysis.”).

3/ *See* Article XVII, Constitution of the Cherokee Nation (copy at Attachment 12 to FCC File No. BNPED-20071018ASQ).

participation in the Commission’s 2007 window for applications for new and major noncommercial educational (“NCE”) radio stations, the Nation is the holder of one construction permit for a new NCE station, 5/ and is a pending applicant for construction permits for two additional new NCE stations (collectively, the “Cherokee Nation Proposed Stations”). 6/ Cherokee Nation’s goal is that the proposed Tahlequah Station will serve as the flagship for a network of three Cherokee Nation NCE stations, serving many of the more than 100,000 Cherokees who live within the Nation’s 14-county tribal lands. The Cherokee Nation Proposed Stations will educate with Cherokee language programming and provide Cherokee Nation citizens access to news about issues and events important to the Cherokee community and culture, programming which is not otherwise easily accessible. 7/

As set forth in the *NPRM*, the Tribal Priority would apply in commercial FM allotments, AM filing window applications, and NCE FM filing window applications. 8/ The *NPRM* proposes a three-prong test for qualification for the Tribal Priority: “(1) the applicant

4/ See *id.* at Article II.

5/ FCC File No. BNPED-20071018ASQ (Marble City, Oklahoma).

6/ FCC File No. BNPED-20071018ASS (Tahlequah, Oklahoma); FCC File No. BNPED-20071018ASR (Murphy, Oklahoma).

7/ As detailed in its applications for the Cherokee Nation Proposed Stations, *see supra* n. 5 and n. 6, these stations will assist the Cherokee Nation’s language preservation efforts and promote the unique culture of the Nation, which is the United States’ second largest Native American tribe. The Cherokee Nation Proposed Stations will provide local, regional and national news and public affairs programming of special interest to Cherokees and other Native Americans who live within the Nation’s jurisdiction, as well as general interest programming. Specifically, programming on the Cherokee Nation Proposed Stations will frequently be in the Cherokee language, as the Cherokee Nation strongly believes that hearing the language through mass media helps encourage language retention. Many communities within the Cherokee Nation have no access to noncommercial radio, and those that do, often find that Native American programming is non-existent.

would have to be either a federally recognized Tribe or tribal consortium, a member of a Tribe, or be an entity more than 70 percent owned or controlled by members of a Tribe or Tribes; (2) at least 50 percent of the daytime principal community contour of the proposed facilities would have to cover tribal lands, in addition to meeting all other Commission technical standards; and (3) the applicant would have to propose at least first local transmission service to the proposed community of license, which would have to be located on tribal lands.” ^{9/}

Cherokee Nation’s concern is with criterion (3), which as currently formulated could hinder much needed service to tribal lands. Instead, Cherokee Nation proposes that criterion (3) be refined to omit the requirement that the station must provide a first local transmission service to the proposed community of license, if not across-the-board (commercial FM, AM and NCE FM), then certainly omitted for NCE FM applications. As so refined, criterion (3) would provide solely that “the proposed community of license would have to be located on tribal lands.”

A first local transmission service is an irrelevant factor for NCE applications, and for good reason. Fair distribution of service determinations on reserved-band NCE channels are based at the outset on first or second reserved channel NCE aural signal coverage within the proposed station’s 60 dBU contour. ^{10/} Unlike the non-reserved portion of the FM band, NCE FM stations operating on the reserved-band are not allotted to a community based on a table of allotments, but instead must avoid prohibited overlap of their service areas with those of pre-

^{8/} *NPRM* at ¶ 22.

^{9/} *Id.* (footnote omitted).

^{10/} *See* 47 C.F.R. § 73.7002.

existing reserved-band stations. 11/ Moreover, NCE stations have a lesser service obligation to the designated community of license. 12/

In sum, assignments in the NCE FM reserved-band are based on service contours, not on a table of allotments tied to community of license. Service contours, not community of license designations, form the foundation of the established Section 307(b) criteria for NCE reserved-band applications. The Tribal Priority should not upset this long-standing focus on service area by requiring as a qualifying criterion first service to the proposed community of license.

The unnecessary distraction from Section 307(b) goals that would result from requiring a first local transmission service for the Tribal Priority is evident by consideration of the pending application of Cherokee Nation for a new NCE reserved-band station for Tahlequah, Oklahoma, 13/ its constitutionally-mandated tribal headquarters. 14/ Tahlequah is located on Cherokee Nation historic tribal lands, and at least 50 percent of the daytime principal community contour of the proposed station would cover such tribal lands. 15/ But Tahlequah is currently the

11/ See 47 C.F.R. § 73.509.

12/ Cf. 47 C.F.R. § 73.515 (at least 50% of community of license or population within NCE's station's 60 dBu contour) with 47 C.F.R. § 73.315 (entire principal community of commercial FM station within 70 dBu contour).

13/ See *supra* n. 3.

14/ See *supra* n. 6.

15/ As recognized in the *NPRM* at n.30, "tribal lands" means both "reservations" and "near reservation" lands. Of particular relevance to Cherokee Nation is that the definition of "reservations" includes any federally recognized Indian tribe's reservation, pueblo or colony, "including former reservations in Oklahoma." See 47 C.F.R. § 54.400(e). Other federal programs have made federal benefits available for locations within "former reservations in Oklahoma." See, e.g., Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 1993-3 C.B. 1, 146-151 (tax incentives based on certain business activity within Indian reservations,

designated community of license of two commercial radio stations. ^{16/} These commercial stations, broadcasting country music formats, are not owned by nor focused on serving Native Americans. Under current Section 307(b) standards applicable to NCE reserved-band applications, the allotment of these commercial FM stations to Tahlequah is irrelevant to the Section 307(b) evaluation of Cherokee Nation's application for a construction permit. That should remain the case under the Tribal Priority.

It is also essential to further the Commission's goal to provide greater opportunities to Native American broadcasters that the Tribal Priority be applied to any qualified NCE pending application so long as, at the time of adoption of the *NPRM*, the Commission had not made a tentative selection in the application's mutually-exclusive group. Thus, pending Native American applicants in the October 2007 NCE major and new application filing window – such as Cherokee Nation – who are still awaiting a tentative selectee in their application's mutually-exclusive group – would be judged under the Tribal Priority as it is adopted by the Commission in this proceeding.

Application of the Tribal Priority adopted in this proceeding to pending NCE applications is essential to opening up this limited resource to this underserved population. Due to the demands on the spectrum from October 2007 NCE window, this spectrum may never be available to Native American tribes again. That is, following a nearly decade-long hiatus on new NCE applications, the October 2007 NCE window saw an unprecedented demand for reserved-band spectrum: approximately 3,600 applications to construct new NCE FM stations were filed

including, by cross-reference, "former reservations in Oklahoma"); IRS Webpage, "Geographic Boundaries Determined for Tax Incentives Associated with 'Former Indian Reservations in Oklahoma'" at <http://www.irs.ustreas.gov/newsroom/article/0,,id=99491,00.html>.

^{16/} KTLQ(AM) and KEOK(FM).

during the ten-day window. 17/ As of the NPRM adoption date, the Media Bureau had made only limited inroads towards designating tentative selectees. For still pending applicants such as Cherokee Nation, which faces, for example, well over a dozen mutually-exclusive applications for its Tahlequah station, the NCE spectrum to serve its tribal lands, once assigned to an October 2007 applicant, will be foreclosed.

The Commission has before, and specifically in the NCE context, applied its reformulated selection policies to pending applications. 18/ Other mutually-exclusive applicants cannot complain of a change in expectations, as no applicant in a filing window has any sure expectation of prevailing when it is uncertain at the time of filing how other applications will be structured and which facilities they will specify. Holding pending applications to policies that further Communications Act goals adopted during their pendency is not only permissible, 19/ but here is necessary to ensure that non-replaceable and scarce NCE spectrum is available for Native American broadcasts. 20/

17/ See Public Notice, DA 09-744 (Media Bureau rel. Apr. 1, 2009).

18/ See *Reexamination of Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7424 [¶ 91] (2000) (all pending mutually-exclusive NCE applications will be evaluated under new point system).

19/ See, e.g., *National Cable & Telecommunications Association v. FCC*, 47 CR 1242 (D.C. Cir. May 26, 2009) (FCC application of new rule to pending contracts not an impermissible “retroactive” rule) and quoting *Chem. Waste Mgmt. v. EPA*, 869 F2d 1526, 1536 (DC Cir 1989) (“It is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes.”).

20/ As before when the Commission applied the new NCE point system, the Commission could open an amendment window for pending applications to supplement their applications to demonstrate their qualifications under a newly adopted Tribal Priority, as well as a settlement window. See Public Notice, DA 01-729 (Media Bur. rel. Mar. 22, 2001). Also, in the interim, while continuing to process mutually-exclusive groups, when the Media Bureau issues a notice as to a tentative selectee, it could seek comments as to whether that mutually-exclusive group

Cherokee Nation supports the Commission's efforts in the *NPRM* to give voice to Native Americans to service their tribal lands. Provided the *NPRM* proposal is tailored to eliminate, at least in the NCE FM context, the need to designate a first local transmission service, and is applied to pending applications, the Commission's goals and the public interest will be served by adoption of the *NPRM* proposal to establish a Tribal Priority.

Respectfully submitted,

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July 13, 2009

should be held in abeyance because another member of the group might qualify for a Tribal Priority.