

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

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SUMMARY

Most commenters agree with Native Public Media (“NPM”) and the National Congress of American Indians (“NCAI”) that the Tribal Priority outlined in the *NPRM* is vital to bringing broadcast service to Native Americans. Prometheus goes further, urging the Commission to implement the Tribal Priority immediately.

Those who question the Tribal Priority do so without thorough analysis or understanding of the fundamental relationship between the Federal government and Native Americans. As demonstrated in our comments and reiterated herein, the Tribal Priority recognizes the sovereign rights and responsibilities of federally recognized Tribes, their member citizens, and their economic instrumentalities, such as Tribally-owned or controlled businesses. The Tribal Priority is a political classification, not a racial classification, and therefore does not implicate *Adarand*.

The need to bring Tribal voices to radio is great, and the Tribal Priority proposed in the *NPRM* is this generation’s best means of doing so. Tribal lands often lie relatively close to non-Native American populations. Limiting new tribal radio stations to remote areas of no interest to non-Tribes ignores the fact that many Native Americans living on Tribal lands are in close proximity to non-Native lands, some of which are in suburban or even urban areas. Under the current allocation and licensing mechanisms, they are left virtually without a voice.

The proposed four-year holding period, similar to that adopted in the *NCI Point Order*, will ensure that entities will not “game” the system by proposing service to Native Americans, only to then move the service away from Tribal lands or sell the station to non-Tribal interests. By requiring the licensee to be controlled by a Tribe, Tribal member, or Tribal entity controlled at least 70 percent by a Tribal interest (but necessarily controlled by a single Tribe), the purpose of fostering Tribal independence and self-governance, as well as providing new Native American

speakers and programming to the airwaves, will be fulfilled. Additionally, in implementing the 70 percent control test, the Commission should allow for *pro forma* transfers of control where the controlling entity gradually shifts over time, similar to what was adopted in the *NCE Points Order*.

Finally, the Commission should adopt the definition of “Tribal lands” as proposed in the *NPRM* to include “near reservation.” That alone, however, will not rectify the problem facing the approximately 250 Tribes that either have insignificant or nonexistent land holdings. NPM and NCAI urge the FCC to adopt the Tribal Priority proposed in the *NPRM* and then issue a Further Notice of Proposed Rule Making and begin government-to-government consultations with Tribes to develop a revised Tribal Priority that would allow Tribes to demonstrate the functional equivalent of “Tribal Lands.” This issue should not, however, stand in the way of implementation of the Tribal Priority as a whole.

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Native Public Media (“NPM”) and the National Congress of American Indians (“NCAI”) respectfully submit these Reply Comments in response to the Notice of Proposed Rulemaking (“*NPRM*”) in the above-referenced proceeding. On July 13, 2009, NPM and NCAI filed Joint Comments in support of rule changes to facilitate the expansion of radio coverage into underserved communities, particularly the creation of a Tribal Priority pursuant to Section 307(b) radio licensing standards. In these Reply Comments, NPM and NCAI reiterate support for the Tribal Priority, address comments filed by others in this proceeding, and clarify aspects of its proposal for implementation of the Tribal Priority proposed in the *NPRM*.

I. RESPONSE TO OTHER COMMENTS FILED IN THE PROCEEDING

Of the approximately thirty (30) commenters in this proceeding, only nine (9) comments, other than those filed by NPM and NCAI, address the Tribal Priority issue. Of those, three support the broad concept of a Tribal Priority.¹ Prometheus argues that the Tribal Priority is of such importance that the Commission should decouple it from the more technical aspects of the

¹ See Comments of Prometheus Radio Project and National Federation of Community Broadcasters (“Prometheus”), p. 14; Comments of the Cherokee Nation; and Comments of Media Technology Ventures, p. 2. The Comments filed by the National Association of Broadcasters (NAB) mentions the proposed Tribal Policy at page 2, but does not comment further on the proposal.

proceeding and adopt it immediately. “Given the complexity and likely duration of the larger rural radio [sic], Prometheus and NFCB urge the Commission to immediately implement the Tribal Priority, rather than waiting for all questions in the rural radio proceeding to be resolved.”² NPM and NCAI agree – the Commission should adopt the Tribal Priority with all speed.

A. Objections to the Tribal Priority Are Unsupported by Precedent

Two (2) commenters, Jorgenson Broadcast Brokerage, Inc. (“JBB”)³ and Booth, Freret, Imlay & Tepper (“Booth, Freret”),⁴ oppose the proposed Tribal Priority on constitutional grounds. Both do so in a sentence or two, without any analysis of the issue. Our Comments, in contrast, fully demonstrated that the proposed Tribal Priority is based not on providing a preference for a racial or ethnic group,⁵ but rather on the obligations of the FCC to recognize the sovereign rights of Tribes over their member citizens and their territories.⁶ The Tribal Priority proposed in the *NPRM* recognizes the sovereign rights and responsibilities of federally recognized Tribes, their member citizens, and their economic instrumentalities, such as Tribally-

² *Id.*

³ Comments of Jorgenson Broadcast Brokerage, Inc., p. 7. “JBB is also concerned regarding Section 307(b) preference for Native American or Alaska Native Tribal groups serving Tribal Lands. Such preferences have been found to be unconstitutional.”

⁴ Comments of Booth, Freret, Imlay & Tepper, pp. 7-8. “There is no basis for a Section 307(b) preference for Native American or Alaska Native Tribal groups serving Tribal Lands. Such a preference harkens back to the comparative hearing preferences for certain groups, and was found to be unconstitutional. Furthermore, it is antithetical to the entire concept of Section 307(b) of the Communications Act. The entire goal of Section 307(b), [sic] is to compare communities’ needs for radio service, not the relative (and subjective) qualifications of the applicants for those facilities.”

⁵ 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.

⁶ NPM and NCAI Comments, p. 6-10.

owned and/or controlled businesses.⁷ The Tribal Priority is completely consistent with past Supreme Court precedent recognizing the status of Tribal peoples, and dates back over 150 years.⁸ Those 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.”⁹ The Tribal Priority is a political classification, not a racial classification, and therefore does not implicate *Adarand*.¹⁰

B. The Tribal Priority is Needed

One commenter, Frank McCoy, opposes the Tribal Priority as unnecessary, stating:

A preference for Native American Tribes is unnecessary, based on the needs outlined i[n] the NPRM. The poorly-served Tribal areas in the West, by virtue of their [sic] being few stations there, allow for many available FM channels. . . . The FCC’s own

⁷ 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.

⁸ *Mancari*, 417 U.S. at 554-55.

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.

⁹ *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).

¹⁰ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). See *AFGE v. U.S.*, 330 F.3d at 524 (“ordinary rational basis scrutiny applies to Indian classifications just as it does to other non-suspect classifications under equal protection analysis”, quoting *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998)).

website has a channel finder tool which is also applicable. In places where no channels are available, the FCC is empowered to waive spacing requirements (for second-adjacent, as an example) to permit allotments that would serve tribal lands.¹¹

There is an important difference between good intentions and an established legal right. The absence of Tribal voices in radio is not due to some lack of technical understanding of the current allocation and licensing system. It runs far deeper. To put it into perspective, there are currently approximately 4.1 million American Indians and Alaska Natives, making up roughly 1.5 percent of the population of the United States. Federally recognized American Indian reservations make up 55.7 million acres or 2.3% of the area of the United States (exclusive of the State of Alaska).¹² Yet, as the *NPRM* notes, there are currently only 41 Native-owned stations, representing less than one-third of one percent (0.33%) of all radio licenses.¹³ Existing allocation and licensing criteria have failed to encourage the development of audio services on Tribal lands.

Tribal lands often lie relatively close to non-Native populations. Limiting new tribal radio stations to remote areas that are not of interest to non-Natives ignores the fact that many Native Americans living on Tribal lands are in close proximity to non-Native lands, some of which are in suburban or even urban areas. Under the current allocation and licensing mechanisms, they are left virtually without a voice. As demonstrated in our Comments, the need to bring Tribal voices to radio is great, and the Tribal Priority proposed in the *NPRM* is this generation's best means of doing so.

¹¹ Comments of Frank McCoy, p. 13.

¹² This number only includes current reservations and not the more expansive definition proposed in the *NPRM*.

¹³ *NPRM*, ¶ 19.

C. The Tribal Priority and Commercial FM Auctions

Several commenters, while not opposing the proposed Tribal Priority, nonetheless suggest limitations or modifications to the Commission's proposal. Such proposals, unfortunately, would either severely limit the usefulness of the Tribal Priority, or render it a nullity, as discussed below.

The Hatfield & Dawson comments maintain that, in the context of new commercial FM stations, the Tribal Priority may be illusory, since:

A Tribe could go to the time, trouble, and expense of prosecuting a rulemaking proceeding to get a vacant FM channel allotted to a community on tribal land (including the payment of a \$3740 filing fee for the accompanying Form 301 application), only to see the allotment go to the highest bidder in the Congressionally-required auction, which auction may not occur for several years. The auction winner, while possibly required to provide principal community service to some percentage of tribal lands (should that particular proposal be adopted), may still not provide the type of service which the original (tribal) proponent had in mind.¹⁴

Hatfield & Dawson's comments propose to limit the Tribal Priority to "non-table services such as the AM, NCE FM, and LPFM radio services, where that priority can be applied at the application stage."¹⁵ Unfortunately, Hatfield & Dawson's solution would neither solve the "late free rider" problem, nor assist in bringing commercial FM radio stations to Tribal lands. Rather than give up on commercial FM, however, NPM and NCAI urge the Commission to adopt the Tribal Priority in commercial FM allocation proceedings and then explore the possibility of granting a bidding credit for qualified Tribes in any future FM auction where the allocation is based on a Tribal Priority. Such a bidding credit would be different from, and in addition to, the new entrant bidding credit ("NEBC") currently contained in Section 73.5007 of the

¹⁴ Hatfield & Dawson Comments in MM 09-52, p. 4.

¹⁵ *Id.*

Commission's Rules.¹⁶ Evaluating proposals for a Tribal entity broadcasting bidding credit, and its implementation, should be the subject of a Further Notice of Proposed Rule Making.¹⁷ **For now, NPM and NCAI make clear, the core proposal for a Tribal Priority, as set forth in the NPRM should be adopted immediately.** Only secondary issues such as commercial FM bidding credits should be addressed at a later date.

D. The Four-Year Holding Period Is Sufficient to Deter Trafficking

Mullaney Engineering, Inc. ("MEI") suggests that the Tribal Priority be permanent.¹⁸

If such a preference is granted then it should be considered a "**permanent restriction**" on the license for such a facility. That is, to avoid unjust enrichment, any future sale must be to an entity which also qualifies for a similar preference. Given that "Tribes" are considered sovereign nations, to permit at a later time the facility to be relocated out of the area or transferred/assigned to an inconsistent change in ownership would be akin to permitting foreign ownership in broadcasting. Needless to say, that the preference should only be awarded to an [sic] tribal entity proposing to serve its own tribal lands and not the lands of another tribe.¹⁹

NPM and NCAI disagree. The four-year holding period proposed in the *NPRM* is both workable and consistent with prior FCC precedent. To impose a permanent restriction on the license and require that any future transfer be made to an entity similarly eligible for the Tribal Priority ignores the fact that changes to tribal population, geographies, demographics, and priorities, require at least some flexibility. Further, to require a Tribal Priority license holder to

¹⁶ 47 C.F.R. § 73.5007.

¹⁷ Interestingly, after all but declaring the Tribal Priority unconstitutional, Booth Freret urges the FCC to adopt a bidding credit. "If the Commission wishes to provide some incentive to Native American or Native Alaskan groups to provide service to Tribal Lands, the equivalent of a new entrant credit should be afforded to those groups." Booth Freret Comments, p. 8. As fully discussed above, Booth Freret's constitutional argument (consisting of one sentence without any case citation) is without merit. Their proposal for a bidding credit, however, is worthy of examination. Mullaney Engineering also supports granting bidding credits to Native Americans. Mullaney Engineering Inc. ("MEI") Comments, p. 7.

¹⁸ MEI Comments, p. 6.

¹⁹ *Id.* (emphasis in original). NPM and NCAI address MEI's last comment about serving other tribes *infra*, Section II.A.

maintain its license in perpetuity would simply infringe the licensee's constitutional right to contract, and impinge on the sovereign rights of Tribes.²⁰

In its *Report and Order, Comparative Standards for Noncommercial Educational Applicants ("NCE Points Order")*,²¹ the Commission addressed the issue of trafficking in broadcast stations when the grant of new noncommercial stations was made under the new point system. It concluded that a four-year waiting period would be sufficient to ensure that the system was not "gamed."

We believe that if applicants are to be selected on the basis of their different characteristics, those characteristics should be maintained for a minimum period to be meaningful. We also believe that a holding period will limit speculation that might accompany reliance on a point system. We have chosen a four-year holding period of on-air operations because it is one which we think is sufficient to establish meaningful service for the community without any undue burden on the licensee. This will generally begin at the time of program tests. Four years is one half of the current eight year license period. Within a four year period, a new station would generally have established and implemented its educational programs, received feedback from the public it serves and the underwriters from which it is seeking financial support, and adjusted its programming accordingly.²²

The Commission went on to state that it would conduct random audits to ensure that licensees maintain the factors that allowed them to receive grants via the point system.²³ The same rationale applies to the Tribal Priority. A four-year holding period from the inception of broadcast service is a reasonable balance, marking one-half of a license term.

²⁰ For example, NPM and NCAI can foresee the situation in which, after establishing itself as a broadcasting entity with experience in the field, a Tribal entity may need to sell or divest from its existing license in order to purchase a separate broadcasting license and facilities that would be more suitable to its ever-evolving community-related communications priorities. The Tribal Priority is intended to remove barriers to entry, rather than create new ones. NPM and NCAI feel strongly that the Tribal Priority would increase and foster communications acumen among the Tribal Nations, a laudable goal fundamentally related to the Commission's stated governmental purpose of removing barriers to market entry for Tribal entities. The four-year holding period strikes the correct balance in fostering this goal, while at the same time guarding against the trafficking of broadcast licenses.

²¹ MM Docket No. 95-31, 15 FCC Rcd. 7386 (2000), *aff'd on recon.*, FCC 01-64, February 28, 2001.

²² *Id.*, ¶ 93.

²³ *Id.*, ¶ 94.

Similarly, in the *NCE Points Order*, the FCC recognized that there could be instances in which a construction permit or a license might need to be assigned during the four-year period.

We have decided that from the grant of the construction permit through the four year holding period, NCE entities who must assign or transfer their permit or license will be limited to recovery of their legitimate and prudent expenses. We conclude that "legitimate and prudent expenses" as relevant here will include the costs of obtaining the permit and constructing the station, but will not include costs of station operations. To further ensure that the public receives the benefits to which it is entitled, during the holding period a proposed assignee of such a station will be required to demonstrate that it would qualify for the same or a greater number of points as the assignor originally received.²⁴

NPM and NCAI suggest the same standard be applied to permittees/licensees awarded through the Tribal Priority. Any assignee would have to be a federally recognized Tribe, enrolled Tribal member, or a Tribal entity controlled at least 70 percent by a Tribe, Tribal members or Tribal entity. By maintaining this control, the purpose of fostering Tribal independence and self-governance, as well as providing new Native American speakers and programming to the airwaves, will be fulfilled.

II. ADDITIONAL ISSUES FOR CLARIFICATION

As indicated above, few comments address the Tribal Priority. After deliberating further on the issue of the Tribal Priority, NPM and NCAI suggests the following to help clarify the standards for, and implementation of, the Tribal Priority.

²⁴ *Id.*, ¶ 97.

A. NPM and NCAI Support The 70 Percent Control Test, With Certain Clarifications

In the specific context of the broadcast licensing regulations for the Tribal Priority,²⁵ NPM and NCAI support the proposed 70 percent control test for any entity awarded an allocation, construction permit, or license based on the Tribal Priority. As explained in our Comments, concepts of Tribal sovereignty and the political classification of Tribes flow both down to individual Tribal members, as well to entities controlled by Tribes and Tribal members.²⁶ Making sure that the Tribal Priority results in increased access to the airwaves for Tribal voices requires something more than majority control of a corporate entity in this instance. The 70 percent supermajority strikes a reasonable balance, allowing some amount of non-Native equity that might be required to secure either capital funding or operational expertise.

That having been said, NPM and NCAI urge the FCC to clarify how it would calculate the 70 percent ownership requirement. Specifically, the Commission should make clear that the 70 percent test does not require 70 percent ownership of members of the *same* federally recognized Tribe. Given the reach of a radio facility, it is quite possible that a station could cover multiple Tribal lands belonging to several federally recognized American Indian Tribes and Alaska Native Villages.²⁷ Requiring that a single Tribe control 70 percent of the licensee

²⁵ NPM and NCAI note that in other contexts, such as that of the federal 8(a) contracting program of the Small Business Administration, there is a simple majority (51 percent) control test which is appropriate in those instances. Because of the Commission's specific concerns concerning the potential gaming of such licensing regulations, in this context, NPM and NCAI agree with the Commission's proposed 70 percent control.

²⁶ See NPM and NCAI Comments at pp. 7-8, citing *Morton v. Mancari*, 417 U.S. 535, 554 (1974); *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).

²⁷ By way of example, and by no means a unique situation, if a new allocation were made to Santa Domingo Pueblo, New Mexico (2000 Census population: 2550), located on the Pueblo of Santa Domingo Reservation, such a station could also serve the following Tribal lands: Pueblo of Santa Ana, Pueblo of Jemez, Pueblo of Zia, Pueblo of San Felipe, and Pueblo of Sandia, all individually recognized American

would foreclose such cooperative ventures, and deny small Tribes the opportunity to serve their people with broadcasting services.

B. Definition of Tribal Lands

NPM and NCAI generally agree that the definition of “Tribal Lands,” as proposed in footnote 30 of the *NPRM*, should include both reservation and “near reservation” lands.²⁸ Such a definition will go a long way toward reversing the policies of the United States from the 1800’s through the late 1950’s--the Removal and Reservation, the Assimilation and Allotment, and Termination and Relocation Eras,²⁹ which were designed to eradicate Tribal cultures, absorb and subsume the indigenous populations, and eliminate American Indian land holdings.³⁰ As a result, not every Tribe has a reservation. There are over 563 federally recognized Tribes, but only 312 reservations, with some Tribes occupying more than one reservation. Many American Indian Tribes and Alaska Native Villages, lack significant or congruous land parcels to call their own. Unconditionally limiting the Tribal Priority to “landed” Tribes, however, would unnecessarily limit the ability of federally recognized Tribes with either insignificant or no land holdings to utilize the Tribal Priority. The Commission, therefore, should address the needs of these Tribes, and NPM and NCAI support the issuance of a Further *NPRM* to address this critical issue.³¹

Indian Pueblo Tribes. In that case, it would make perfect sense for the Tribes to form a consortium to serve the six separate, but contiguous reservations.

²⁸ *NPRM*, ¶ 20, n. 30.

²⁹ See David H. Getches et al., *Cases and Materials on Federal Indian Law*, 84–87 (4th ed. 1998).

³⁰ Prior to the modern Self-Determination Era, which began in the late 1960’s the Termination and Relocation Era generally sought to derecognize the rights of Tribes to govern and provide for their communities and citizens, and remove lands from recognition as part of reservations, and relocate thousands of Tribal families to urban and suburban communities nationwide.

³¹ Again, NPM and NCAI believe that the Commission can implement the Tribal Priority as proposed in the *NPRM* now, and reserve for a later further *NPRM* the issue of how to address “landless” Tribes.

Indian land status is inherently complicated and due to the legacy of Federal policies, much Indian land is fractionated, which has resulted in a checkerboard effect. In order to serve both Tribal lands and near reservation lands, as a result of checkerboarding, other federal agencies have based their offerings based on service areas rather than strict definitions of Tribal Lands. While the Department of Energy, the Environmental Protection Agency and the Indian Health Service serve broad geographical regions where Indians reside, the Census Bureau defines tribal areas in terms of service areas. The Census definition is the newest and is adaptive, meaning it is intended to account for changes over time and is in use by the Department of Housing and Urban Development.³²

The Commission could, for example, allow a Tribal Entity to seek a Tribal Priority based on a demonstration that the area being served by the proposed allotment is the functional equivalent of “Tribal lands.” Such a showing could be made based on such factors as Native American population density, within the proposed city of license and service area, and other evidence demonstrating that the proposed city of license and service area have a common cultural link to Native peoples, similar to what other Federal agencies have done.³³

³² Tribal service areas include: American Indian reservations (AIRs); Off-reservation trust lands (ORTLs); Oklahoma tribal statistical areas (OTSAs); Tribal-designated statistical areas (TDSAs); State-designated tribal statistical areas (SDTSAs); Tribal census tracts (tribal tracts); Tribal block groups; Tribal subdivisions on AIRs, ORTLs, and OTSAs; Census designated places (CDPs) on AIRs, ORTLs, and OTSAs. The HUD/ Department of the Interior definitions build on the Census Definitions and includes near-reservation service areas, California Jurisdictional areas, and Congressionally mandated service areas. The HUD definition is related to service despite the area, while the Census definition is strictly statistical. *See* 25 U.S.C. 4101 *et seq*; 42 U.S.C. 3535(d); 63 FR 12349, Mar. 12, 1998; 24 CFR Code of Federal Regulations Part 1000 – Native American Housing Activities (Revised as of April 1, 2008); 73 FR 67470 (November 14, 2008).

³³ NPM and NCAI recognize that such definitions in other federal agencies involve the delivery of those agencies’ services to suburban and urban areas. In the context of a Tribal Priority for a broadcasting license a careful analysis must be undertaken to analyze the potential areas that may qualify based on the above characteristics, and others, but with the intent to not necessarily include certain regions so non-Native in their character or location, such as urban areas, so as to defeat the shared purposes here of both the Commission and the Tribes.

So that the Tribal Priority may be immediately implemented, NPM and NCAI supports the issuance of a Further NPRM, and initiation of a government-to-government dialogue with Tribal governments on this specific issue. NPM and NCAI recognize the nature and scope of this “near reservation” or “landlessness” issue as one that is discrete, and given the significant need in Indian Country for the deployment of broadcasting services, one that can be dealt with separately and effectively in future action.

C. Gradual Board Change Should Not Violate the Four-Year Holding Period

NPM assists in bringing new non-commercial Native American stations to the airwaves. Its members generally tend to be either Tribes, or in some instances 501(c)(3) non-profit organizations. NPM is familiar with the way in which such NCE station boards can gradually turn over, either through annual elections of entire boards, or through the gradual turnover when board terms are staggered. NPM therefore requests that the Commission make clear that in the event a *pro forma* transfer of control is necessary due to a board change, such a transfer does not violate the four-year holding period, so long as the new board continues to meet the ownership criteria.

The Commission in its *NCE Points Order* reached a similar conclusion that should be adopted here.

We generally agree with commenters that gradual changes in the board, of the type that ordinarily occurs in most NCE organizations, will not for purposes of a holding period be treated as the equivalent of a sudden transfer of control or assignment. Nevertheless, we note that we have adopted several point factors that are board dependent, including diversity of ownership and localism. Such factors must be maintained despite board turnover. To address inevitable changes in board composition, we will award diversity and localism preferences only to organizations whose own governing documents ensure that these factors are preserved despite Board changes (e.g. whether existing and incoming board

members can have other media interests and whether outgoing board members will be replaced with others who are similarly representative of the community).³⁴

Thus, so long as the new board is comprised of at least 70 percent enrolled members of a federally recognized Tribal entity, the licensee would still qualify for the Tribal Priority and not run afoul of the four-year holding period.³⁵

III. CONCLUSION

The comments filed in this proceeding demonstrate that the proposals contained in the *NPRM* are ripe for adoption. As suggested by Prometheus, the Commission should move expeditiously to implement the Tribal Priority as proposed. The Commission should also issue a further *NPRM* to address two issues: 1) Bidding credits tied to the Tribal Priority; and

³⁴ *NCE Points Order*, ¶ 98.

³⁵ The FCC, in unique situations, should entertain *ad hoc* waiver requests in the event that a licensee were to briefly and minimally fall below the 70 percent control threshold because, as outlined above, a gradual change in board structure has reduced board control to under 70 percent Native-controlled. Such waiver requests should be accompanied by a concrete plan to return ownership control to over 70 percent, and any waiver granted should be short in duration (no more than one year).

2) Criteria by which “landless” Tribes could take advantage of the Tribal Priority. These latter matters should not hold up the basic Tribal Priority, however.

Respectfully submitted,

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