

**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

**REPLY COMMENTS OF CHEROKEE NATION**

Cherokee Nation, which submitted Comments in this proceeding, hereby files these Reply Comments to address comments submitted in response to the Commission’s Notice of Proposed Rule Making (“*NPRM*”) 1/ in the above-captioned docket as they relate to the proposed establishment of a Section 307(b) priority for Native American and Alaska Native Tribal groups serving Tribal Lands (the “Tribal Priority”).

Cherokee Nation’s Comments support the establishment of a Tribal Priority as a constitutional means to further the Commission’s goal of promoting much needed channels of communication for Native American and Alaska Native Tribes. Other commenters, including Native Public Media/The National Congress of American Indians and Prometheus Radio Project/National Federation of Community Broadcasters, also support instituting a Tribal Priority. Cherokee Nation, as well as commenters Prometheus Radio Project/National

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

Federation of Community Broadcasters, urge the Commission to immediately adopt the Tribal Priority. 2/

While in favor of a Tribal Priority, in its Comments, the Cherokee Nation proposed that Criterion (3) for the Priority be refined to omit the requirement that the station must provide a first local transmission service to the proposed community of license. 3/ As so refined, Criterion (3) would provide solely that “the proposed community of license would have to be located on tribal lands.” 4/

As documented in the Cherokee Nation’s Comments, fair distribution of service determinations on reserved-band noncommercial (“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, not on first local transmission service. 5/ Radio stations allotted to a community that focus their programming on the general public do not promote the goal of giving voice to Native Americans, and thus the happenstance of their existence should not defeat the Tribal Priority.

The need to refine Criterion (3) of the Tribal Priority to omit the first local transmission service requirement is particularly critical for Native American Tribes such as the

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2/ See Cherokee Nation Comments at 5-6; Comments of Prometheus Radio Project and National Federation of Community Broadcasters at iv.

3/ Proposed Criterion (3) is “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.” *NPRM* at ¶ 22.

4/ With the criterion that the community of license be on tribal lands (as defined by the Commission), as well as the 50% contour over tribal lands floor, there is no need, as suggested by one commenter, that the transmitter site must be local on tribal lands. *Cf.* Comments of Mullaney Engineering, Inc. at 6. Such a restriction would not necessarily promote service to a Tribal constituency, while it would diminish flexibility in situating technical facilities.

5/ See 47 C.F.R. § 73.7002.

Cherokee Nation, which due to displacement from historic lands, settlement of lands by non-Native Americans and disbanding of reservations at the time of statehood, do not have exclusive reservations; rather, as with other Tribes located in Oklahoma, the Cherokee Nation co-exists on its defined territory with the population at large. The *NPRM* recognizes that “tribal lands” means both “reservations” and “near reservation” lands, 6/ and the Commission’s definition of “reservations” includes any federally recognized Indian tribe’s reservation, pueblo or colony, “including former reservations in Oklahoma.” 7/

Thus the *NPRM* rightly (and consistent with other federal recognition) 8/ accommodates the unique status of Native American Tribes which have territories defined by their former reservations. However, this accommodation would be undermined if such Tribes cannot avail themselves of the Tribal Priority because they lack exclusive control over their territories and therefore may share a locale with a non-Tribal broadcast outlet. For example, one of the Cherokee Nation’s proposed radio stations is to be licensed to its constitutionally-

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6/ *NPRM* at n.30.

7/ 47 C.F.R. § 54.400(e).

8/ *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, 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>; U.S. Census Bureau, Definition of Oklahoma Tribal Statistical Area (OTSA) (“Oklahoma tribal statistical areas (OTSAs) are statistical entities identified and delineated by the U.S. Census Bureau in consultation with federally recognized American Indian tribes in Oklahoma that do not currently have a reservation, but once had a reservation in that state. Boundaries of OTSAs will be those of the former reservations in Oklahoma, except where modified by agreements with neighboring tribes for data presentation purposes.”) at [http://www.census.gov/geo/www/cob/na\\_metadata.tml](http://www.census.gov/geo/www/cob/na_metadata.tml).

mandated tribal headquarters, Tahlequah, Oklahoma. 9/ 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 (as defined as former reservations in Oklahoma). But Tahlequah is currently the designated community of license of two commercial radio stations. 10/ These commercial stations, broadcasting country music formats, are not owned by nor focused on serving Native Americans, and do not promote the goals of the Tribal Priority. Tahlequah, as non-exclusive Cherokee Nation territory, supports non-Native American businesses, including radio stations, along with Native American enterprises. The Tribe cannot control or restrict non-Native American entrepreneurs that may have or plan radio outlets on non-exclusive tribal lands. Particularly so as to not discriminate against Native American Tribes such as Cherokee Nation lacking in exclusive territories, the first location transmission service criterion must be eliminated as a factor for the Tribal Priority.

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. 11/ One commenter noted the difficulty in applying the Tribal Priority to commercial FM allotments, as a Native American Tribe could go to the expense and effort of proposing a new commercial FM allotment, but then lose the opportunity to serve by failing to be the highest bidder at auction. 12/ This potential injustice is well noted; but in lieu of excluding commercial FM allotments from

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

10/ KTLQ(AM) and KEOK(FM).

11/ *NPRM* at ¶ 22.

12/ See Comments of Booth, Freret, Imlay & Tepper, P.C. at 8; Comments of Mullaney Engineering, Inc. at 7.

the Tribal Priority, the better solution to advance the Commission's goals, as suggested by other commenters, is to award a bidding credit, similar to, but distinct from, that for new entrants. 13/

Moreover, the need for Native American outlets cannot be met solely by *pro bono* engineering assistance, the FCC's on-line channel finder and/or spacing waivers, as proposed by one commenter. 14/ Not every Native American Tribe is located in sparsely-radioed areas, as assumed by that commenter. Nor is the Cherokee Nation's primary impediment to serving its Native American citizens a lack of professional resources; it is conflicting demand for the spectrum. As noted in the Nation's Comments, 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 during the ten-day window. 15/ For still pending applicants such as Cherokee Nation, which faces 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. Thus, Cherokee Nation urges the Commission to apply the Tribal Priority 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. 16/

The Tribal Priority, with the refinements suggested herein, including eliminating the step of designating a first local transmission service, and for commercial FM stations, establishing an auction bidding credit, will promote the Commission's goal to advance Native

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13/ See 47 C.F.R. § 73.5007.

14/ See Comments of Frank G. McCoy at 13-14.

15/ See Comments of Cherokee Nation at 5-6.

16/ See *id.*

American Tribal service to their constituents. The Tribal Priority should be adopted promptly and apply to pending NCE applications in order to foster Native American efforts to establish radio stations.

Respectfully submitted,

**CHEROKEE NATION**

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