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WASHINGTON, D.C. OFFICE
fifth floor
flour mill building
1000 potomac street nw
washington, d.c. 20007-3501
TEL 202 965 7880 FAX 202 965 1729

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December 24, 2009

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Ex Parte* Comments
GN Docket Nos. 09-47, 09-51, 09-137
NBP Public Notice #5

Dear Ms. Dortch:

On behalf of the National Congress of American Indians (NCAI), Native Public Media (NPM), the New America Foundation's Open Technology Initiative ("New America" or "NAF"), and the Southern California Tribal Chairmen's Association (SCTCA), together the "Joint Native Filers", we hereby submit these additional *Ex Parte* Comments concerning the National Broadband Plan Public Notice #5.

These *Ex Parte* Comments stem from a face-to-face meeting on December 17, 2009, which included Geoffrey Blackwell of the National Congress of American Indians and Chickasaw Nation Industries, and Sascha Meinrath of the New America Foundation's Open Technology Initiative with Commission staff and others, and follow-up telephone conversations. An *ex parte* notification was filed on behalf of the Joint Native Filers on December 18, 2009. Based on these discussions, and rooted in the comments filed in this proceeding by the Joint Native Filers, both individually and together, we submit these clarifying *Ex Parte* Comments related to NBP Public Notice #5.

Background: The Need for Broadband Among Native Nations is Great

As the Commission has previously acknowledged, "By virtually any measure, communities on Tribal Lands have historically had less access to telecommunications services than any other segment of the population."¹ Broadband deployment on Tribal Lands is at less than a 10 percent penetration rate while analog telephone reaches only

¹ *Extending Wireless Telecommunications Services to Tribal Lands*, WT Docket No. 99-266, Third Report and Order, 19 FCC Rcd. 17652 (2004) (*Tribal Lands Bidding Credit and Order*).



one in three families in many Tribal communities. According to data from the 2000 decennial census, about 69 percent of Native American households on Tribal Lands in the lower 48 states had telephone service, which was about 29 percentage points less than the national rate of about 98 percent.² Moreover, the rate of broadband adoption or subscribership is largely unknown as most adoption surveys have underrepresented or not included Tribal populations and to date there has not been a federal survey focused on collecting information on Tribal Lands³. Nevertheless, where Native Americans have access to broadband, their rates of Internet use are on par with, if not higher than national averages.⁴ The *NPM/NAF New Media Study* surveyed individuals from 120 Tribes in 28 states, finding a higher percentage of respondents utilized the Internet on daily basis than compared with respondents of national surveys.⁵ Further, despite being largely ignored by outside commercial providers, a number of Tribes have developed and deployed their own telecommunication systems.⁶

The Need for a Tribal Broadband Plan within the National Broadband Plan

Tribal Lands encompass unique conditions that necessitate distinct economic, policy and regulatory approaches. Critical infrastructures of any sort have not historically been deployed, nor developed through typical market forces, compared to other parts of the nation. Critical infrastructure rarely has come to Tribal Lands without significant federal involvement, investment, and regulatory oversight. Substantial barriers to telecommunications deployment are prevalent throughout Native lands including rural, rugged terrain that increases the cost of installing infrastructure, limited financial resources that deter investment by commercial providers, a shortage of technically trained Tribal members to plan and implement improvements, and difficulty in obtaining rights-of-way to deploy infrastructure across some Tribal lands.⁷

Several Tribal areas have overcome the barriers through “self-provisioning” services, utilizing a variety of wired and wireless technologies and business models.

² January 2006 GAO Report, Telecommunications, Challenges to Assessing and Improving Telecommunications for Native Americans on Tribal Lands, available at <http://www.gao.gov/new.items/d06189.pdf>.

³ *Id.* at 11.

⁴ “New Media, Technology and Internet Use in Indian Country” (“*NPM/NAF New Media Study*” or the “*Study*”)

⁵ *Id.* at 12-13. Over 90% of respondents reported at least daily use. The *Pew 2008 Spring Tracking Survey* respondents reported lower rates of Internet use of at least once daily from home (58%), work (44%) or someplace other than work or home (9%).

⁶ *Id.* at 28 – 55.

⁷ January 2006 GAO Report at 5.



There are eight Tribal telephone companies, with more planning to come online in the near future, providing broadband other forms of communications technologies, including traditional telephony, DSL “triple play” as well as Cable TV in certain limited instances. In addition, Tribal governments and residents have developed innovative approaches to deploying broadband and promoting adoption. Networks on the Coeur D’Alene Tribe’s Reservation, and those of the Confederated Tribes of the Colville Reservation, and Leech Lake Band of Ojibwe are bringing broadband connectivity to Tribal “anchor institutions,” including government buildings, schools, libraries, healthcare facilities, and public safety.⁸ All of these projects have relied upon some type of federal grant, loan, or other assistance. As the FCC works to develop a plan for universal access, the Tribal Broadband Plan is needed to address Tribal Lands barriers to broadband deployment and issues related to critical backbone, middle-mile and last-mile solutions that recognizes that Tribes, and Tribal Lands, are fundamentally different.

According to Stephen Cornell and Joseph P. Kalt,⁹ *Two Approaches to the Development of Nation Nations: One Works, the Other Doesn’t*, Native Nations take different approaches to economic development by both asserting their rights to self-governance while simultaneously building the foundation and institutional infrastructure to exercise those rights. The Native Nation building approach to sustainable economic development includes, (but is not limited to) strengthening governmental institutions in order to effectively assert sovereignty, diversifying Tribal economic ventures, creating innovative social policies for the community, and developing cultural resources of all kinds. In the United States, the nation building approach to sustainable economic development in Indian Country is the practical application of Tribal sovereignty. Regulations and federal programs that affect Indian Country need to take into account the complexity and tensions involved with balancing Tribal sovereignty and participating in the larger U.S. society.

The National Broadband Plan should be working with Native Nations to jointly stimulate conditions that will address the significant market challenges and unique demand aggregation requirements of Tribal Lands. A Tribal Broadband Plan should recognize that “one size fits none” and does not favor any one technology or business model, but *places the priority focus on the Tribe* and its community to anchor health, education and public safety institutions, recognizing Tribal government oversight and service obligations. “Indian Country” is not a simple or monolithic concept. Approximately 2.4 million American Indians and Alaskan Natives are members of 564 federally recognized Tribes. More than 55 million acres of Indian land are held in trust

⁸ See *NPM/NAF New Media Study*, pp 28-37.

⁹ Cornell, Stephen and Joseph P. Kalt, “Two Approaches to the Development of Nation Nations: One Works, the Other Doesn’t,” in *Rebuilding Native Nations: Strategies for Governance and Development*. Ed. Miriam Jorgenson. University of Arizona Press, Tucson 2008.



by the Bureau of Indian Affairs.¹⁰ It is critical to note here that this figure does not take into account the vast areas not held in trust, which are within the exterior boundaries of reservations and other Tribal Lands areas. As a consequence, “Tribal Centric” business models have the greatest chance for sustainability, in terms of both adoption and ultimate profitability. In addition, local efforts are more likely to focus on extending and improving service over maximizing profits.¹¹

As historic and geo-political federal enclaves, Tribal Lands are communities with their own unique institutions and operations. As sovereign local governments, Tribes are uniquely and intimately knowledgeable of their own communities and needs. In certain situations, it will only be through Tribal ownership and operation that critical communications infrastructure and adoption solutions, in the form of genuine and lasting community-wide services, will be deployed and flourish. Placing Tribes at the center of the process on Tribal Lands, and implementing actions that prioritize to the Tribes in planning, regulation and deployment is a necessary first step in achieving successful and enduring solutions to the deplorable and long standing lack of communications technologies in Tribal communities nationwide. Indeed, while in the past such Tribal owned carriers have been referred to as “carriers of last resort,” it may be that because of unique economic and cultural factors unique to Indian Country, that Tribal owned telecommunications providers should be considered as “carriers of first resort” that the creation of such carriers should be encouraged and looked upon as a model that can be replicated across many of the Tribes.

The Commission Should Adopt An Appropriate Definition of Tribal Lands for the Tribal Broadband Plan Purposes

As commenters noted in previous filings, the actual legal definition of Indian Country found in 18 U.S.C. § 1151 applies in the civil context as well. Because of this appearance of inconsistencies, the Commission should clarify that it is aware of the historical situations and case law precedence that has impacted the Tribal landscape over the generations, such as the Allotment Era of Federal Indian policy which greatly affected Tribal Lands in Oklahoma and many other Tribal regions of the nation, or the effects of *Alaska v. Native Village of Venetie Tribal Government*¹² which affected the “Indian Country” status of Alaska Native Villages. It would be important in this complex area with the ultimate national goal of the furtherance of robust broadband networks, rather than Fourth and Fifth Amendment Search and Seizure litigation, that the Commission analyze for impact the utilization of its own USF regulations regarding Tribal Lands,

¹⁰ *Comments of Native Public Media*; Docket No. 090309298-9299-01.

¹¹ See *GAO Report* at 5 – 6. “Additionally, at 2 of the sites we visited, the tribally owned companies are focusing on extending and improving service rather than on maximizing profit.”

¹² 520 U.S. 522 (1998).



which effectively addresses the aforementioned complexities, respectively, by including definitions for “former reservations in Oklahoma,” and “Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688).”¹³ The FCC should also analyze for impact a definition of Tribal Lands that is consistent with the developments of the definitions utilized by the United States Census Bureau with respect specifically to American Indian Tribes and Alaska Native Villages, as federally recognized Tribal Entities.

I. Necessary First Steps: Data Acquisition

The first steps in implementing the Tribal Broadband Plan will be to assess the true state of broadband deployment on Tribal Lands. There has been no systematic analysis of broadband deployment on Tribal Lands to date. While the *NPM/NAF New Media Study* documented that demand for broadband services is high, no government agency has made any concerted effort to determine the state of broadband deployment on Tribal Lands. Current FCC data collection mechanisms are insufficient, since they are focused on residential deployment more so than identifying whether key governmental hubs are adequately connected. A 2006 GAO Report noted, “the rate of Internet subscribership is unknown because no federal survey has been designed to capture this information for tribal lands.”¹⁴ Moreover, adoption surveys have largely underrepresented or not included Tribal populations in their surveys. As such policymakers have little relevant data on the state of broadband in Native America. Although commenters have estimated the penetration of broadband at approximately five to eight percent, without accurate information on deployment and adoption figures it is difficult to understand the size of the problem nor the policy options for addressing it.

- ***Provide State Broadband Data and Development Grant Program funding to Tribal Entities and Ensure Tribal Access to Mapping Data***

To this end, the government should provide adequate funds for broadband mapping and planning for Tribal Lands, preferably through the NTIA-administered State Broadband Data and Development Grant Program. This can only be done through extensive consultation with Tribes. Existing broadband maps must be verified by Tribes, and FCC Form 477 data should be made available on a government-to-government basis. The maps developed should focus less on end-user residential maps, and more on determining whether the key Tribal institutions that can act as delivery hubs are fully connected. Engaging Tribes directly in this process may require NTIA to change its rules

¹³ *Joint Comments of Native Public Media and the National Congress of American Indians: Broadband for Tribal Nation Building*; GN Docket Nos. 09-47, 09-51, 09-137; page 9.

¹⁴ *Challenges to Assessing and Improving Telecommunications For Native Americans on Tribal Lands*, (“GAO Report”), p. 10.



to ensure unencumbered access by Tribal Governments to mapping data funding through NTIA State Broadband Data and Development Grant Program. History has taught us that paying third-party non-Tribal entities to acquire data on Tribal Lands is uneconomical, ineffectual, and often counterproductive.

- ***Reevaluate the use of the Census in respect to collection of broadband data on Tribal Lands***

Currently, the Decennial Census survey does not collect information on broadband subscribership and use and supplemental Census surveys do not accurately capture Tribal broadband subscribership, given their limited sample size. The upcoming Decennial Census provides a unique opportunity to collect broadband deployment data. The FCC should urge Congress to mandate that a question pertaining to broadband adoption be included on the Census long form, similar to what is included for telephone service. The FCC should also work with the Census Bureau and through the Tribal consultation process to perform more targeted supplemental surveys on broadband adoption among Tribal communities as a part of ongoing broadband data collection efforts.

- ***The FCC should employ its regulatory mechanisms to obtain information on the deployment of broadband on Tribal Lands***

As an essential first step, the FCC should create consultative mechanisms--such as an Office of Tribal Affairs--to obtain precise and accurate information directly from Tribal Governments and their offices concerning the deployment of broadband on their land. The Commission should also establish an Tribal broadband Census Notice of Inquiry to collect information from all interested parties. In a recent Notice of Request (Docket # 09-214) the Commission sought comment regarding sharing Form 477 data with another government agency, the NTIA, for the purpose verifying served and unserved populations for the distribution BTOP grants. As noted by the NTIA in their request, the FCC may share this data with other government agencies and during the filing period, there were no objections to sharing this data to the NTIA.¹⁵ In their comments, the National Cable & Telecommunications Association, self-promoted as the “principle trade association for the U.S. cable industry” agreed that “Form 477 data submitted by broadband providers can be extremely useful in establishing broadband policy” and recognizes the value to the NTIA in determining the service needs of communities Form 477 can provide.¹⁶ Form 477 data can have similar value to Tribal Governments in determining the broadband needs of their citizens, where to apply resources, and what intervention is needed. Respecting the government-to-government

¹⁵ <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020350294>.

¹⁶ *Id.*



relationship Tribal Entities hold with the Federal Government and respecting the need for Tribal Entities to accurately evaluate the service availability on Tribal Land, the Commission should share Form 477 with Tribal Governments for verification.

- ***The FCC should perform a Spectrum Inventory of Spectrum use and availability on Tribal Lands***

The lack of data on Tribal Lands extends to the availability of spectrum as well. Both in the vast geographic areas of some Tribes such as the Navajo, as well as the patchwork lands of many Tribes such as the reservations in the Great Plains or highly allotted lands of the Tribes in Oklahoma or the Midwest, there is no adequate census of available spectrum for wireless broadband use. The FCC noted “[T]ribal lands may vary significantly with regard to population density, terrain, and other such buildout factors which can affect the feasibility of building out facilities on Tribal Lands and account for the lack of service.”¹⁷ Any recommendation for Tribal connectivity must acknowledge that a one-fits-all model will not be successful, but must also recommend that value of wireless connectivity. For example, in the *NPM/NAF New Media Study* case-studies on examples of digital excellences on Tribal Lands revealed that “All of the network projects are making use of hybrid wireless and wireline topologies for their last-mile and middle-mile networks, using a 2.4 GHz and/or 5 GHz spectrum to provide last-mile services.”¹⁸ However, the report also found that unlicensed spectrum was not sufficient for all project goals, as the resource can be exhausted. To best understand providing broadband to Tribal Lands, Tribal Entities need to know the spectrum details of those lands, including what licenses cover which frequencies, what those allocations are used for, and the extent of which those frequencies are actually used.

The FCC should therefore perform a Spectrum Inventory to examine and inventory, in detail, frequency allocations on Tribal Lands, identify licensees, and determine whether such licensees have adequately utilized the licenses they have received to bring telecommunications infrastructure to key Tribal institutions, or whether they have historically engaged in “red lining” or utilized the spectrum in ways that are contrary to robust delivery of services to Tribal Lands. This inventory should include all frequencies between 225 megahertz and 10 GHz.

¹⁷ Extending Wireless Telecommunications Services to Tribal Lands, WT Docket No. 99-266, Third Report and Order, 19 FCC Rcd. 17652 (2004) (hereafter “*TLBC Report & Order*”) at ¶8.

¹⁸ *NPM/NAF New Media Study*, p. 31.



II. Tribal Coordination Key to Deployment of Broadband on Tribal Lands

- ***Create new means of effectuating consultation and coordination with Tribal governments***

In a Memorandum signed November 5, 2009, President Obama called on all Federal agencies to report back to the White House on their efforts to establish clear plans to consult with Indian Tribes as part of developing Federal policies.¹⁹ As the Memorandum notes: History has shown that failure to include the voices of Tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and Tribal officials has greatly improved Federal policy toward Indian Tribes. Consultation is a critical ingredient of a sound and productive Federal-Tribal relationship. The U.S. Federal government as a must take the lead in coordinating among the various agencies with responsibilities vis-à-vis Tribes, and establishing lines of communication with those Tribes so that broadband access is available to every person in the United States.²⁰ Thus it is imperative for the Commission to carry out structural reforms to improve the Federal-Tribal Trust Relationship within the FCC including the following.

- ***Creation of a formal joint Native Nations/FCC Broadband Taskforce***

Tribal communities encompass unique and distinct challenges compared with other un-served and underserved areas. Therefore it is imperative to strengthen and facilitate special government-to-government opportunities for the FCC to work directly with knowledgeable Tribal leaders. As part of this effort, The FCC should form an FCC-Native Nations Task Force and implement a strategic broadband initiative to support the various elements in the deployment of broadband infrastructure and stimulation of adoption. The FCC-Native Nations Task Force should consist of elected and appointed Tribal officials and FCC officials, should be formed to support collaboration and consultation at the FCC and serve as a vehicle for the FCC's participation in the larger federal-Tribal initiative. A joint Tribal/FCC Broadband Taskforce would be essential to better understanding the particular obstacles, challenges and best practices to creating communications solutions throughout Native lands.

To develop a comprehensive approach, the FCC should convene certain key elected and appointed Tribal leaders from throughout the nation. By utilizing the exception to the Federal Advisory Committee Act for intergovernmental purposes, this

¹⁹ <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>.

²⁰ See also *Comments of Native Public Media, SCTCA and National Congress of American Indians to Second Request for Information (RFI)*; Docket Number 0907141137-91375-05, pp.7-9.



task force should act and operate much as a federal advisory committee would, only with increased and coordinated task force responsibilities. The FCC should devote the time and efforts of several key senior decision makers to work directly with the Tribal leaders. The joint taskforce should draw upon and involve the formal input from Tribal community leaders/visionaries from successful projects, Tribal governments, technical and communications industry experts, and relevant federal agencies. Together with these Tribal leaders and project and industry experts, the FCC can build joint taskforce priority actions aimed at addressing the multiple priorities shared by the FCC and Tribes in closing the infamous “digital divide.”

- ***Creation of a Tribal Office at the Federal Communications Commission, with an effective and high level impact***

Currently, Tribal concerns and needs are not addressed holistically within the FCC, often leading to suboptimal policies. To improve Tribal communications policymaking the FCC should create an Office of Tribal Affairs. With 564 federally recognized Tribes in the United States, the creation of a Tribal office to work directly with Tribal entities renews federal focus on addressing the digital needs of Tribal communities by providing an effective operational and regulatory mission in structural framework within the FCC. The FCC Tribal Office should be established with an agenda and responsibilities that are consistent with the federal trust obligations and government-to-government relationship shared between the FCC and Tribal entities. In order for the FCC to properly advise and assist throughout the Commission, the office should be elevated in the structural framework of the Commission to be able to coordinate effectively with all Bureaus and Offices of the Commission. Of critical importance, the FCC Tribal Office should be supported by appropriate budget and staffing priorities, utilize internal detailed positions to draw upon the expertise of the various bureaus and new hire authority for expert leadership. Staffing in the office should draw upon internal hiring positions and detailed staff posts to obtain critical legal, economic analysis, and engineering expertise from across the Commission. However, the Commission should utilize new and outside hiring authority to conduct a nationwide search for the senior leadership of this office, particularly its Director. The FCC should conduct a search to hire and draw upon the talent of national subject matter experts for this effort, consistent with developing the FCC’s expertise in federal Indian policy matters, its understanding of the multifaceted community development and communications related needs faced by Tribal communities, and its familiarity with the on-the ground real world situations.

- ***Better Inter-governmental Coordination within the Federal Government is Required***

As the FCC no doubt is aware, jurisdiction to implement the special trust relationship that exists between Tribes and the U.S. Federal government is split among a number of Federal agencies. Many of those Federal agencies have infrastructure on



Tribal Lands that themselves are often outdated and woefully inadequate, relying on antiquated technology and infrastructure with limited capacity. The FCC, as part of its new Tribal Office should coordinate with federal departments and agencies with key missions on Tribal Lands, such as the BIA, Indian Health Service, and Bureau of Indian Education, to make better use of their telecommunications infrastructure to provide better service to Tribes. To this end, Congress should ensure that funds exist to upgrade facilities on Tribal Lands to standards that support the current industry norms for high-capacity communications, (e.g. a fiber optic connection). This would allow the federal government to provide state of the art services where certain federal trust obligations of those particular agencies are met.

It must be clear, however, that any such upgrades would *not necessarily* be the backbone for the “Tribal Centric” business models referred to herein. Emphasis must be maintained on the Tribal Centric approach to demand aggregation. In many cases, BIA local agency offices or IHS facilities, for example, are found in limited locations on Tribal Lands, compared to the distribution of the Tribal community and its own anchor institutions. While Native Nations and their local federal officials often coordinate, the federal priorities for these institutions, and others, are often separate and distinct from those priorities and missions of the Tribal governments and their institutions. Native Nations view the deployment of communications networks as a critical exercise of their self-determination and sovereignty in the development and diversification of their economies and self-provisioning of services for their communities. In recognizing its own government-to-government relationship with Tribes, the FCC also acknowledged the need for Tribal self-determination in its 2000 *Tribal Policy Statement*:

Therefore, as an independent agency of the federal government, the Commission recognizes its own general trust relationship with, and responsibility to, federally-recognized Indian Tribes. The Commission also recognizes the rights of Indian Tribal governments to set their own communications priorities and goals for the welfare of their membership.²¹

As a practical matter, taken from the unfortunate but valuable lessons of history, Federal ownership or control of any part of a network should not be allowed to limit or prioritize the Tribal Centric model which is proven to be successful. The lesson of failed paternalistic policies of the past must be recognized and avoided. To risk the future of networks in Indian Country on upgrades to existing federal facilities would be misplacing the priority of community oriented demand aggregation in the vast majority of situations throughout Tribal Lands.

²¹ *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes, (Tribal Policy Statement)* 16 FCC Rcd 4078, 4081 (2000)



- ***Creation of seats upon the Federal State Joint Board on Universal Service for Tribal Government Representatives***

Universal Service Fund (USF) support mechanisms have been critical to the deployment of telephone service and certain amounts of broadband connectivity on Tribal Lands, such as the Schools and Libraries program. Enhanced Tribal Lands Lifeline and Link-Up support has made all the difference in certain Native communities for the deployment of basic telephone service. However, Tribal Entity representatives are missing from key Universal Service discussion venues. As the federal government engages in the review of the USF for sustainability and broadband deployment, seats on the Federal State Joint Board should be made available to Tribal representatives so that those living and working on Tribal Lands nationwide have their voices represented in the maturation of the Joint Board's intergovernmental regulatory process. Congress should amend the Communications Act to require at least one Tribal representative on the Federal State Joint Board on Universal Service as well as any other key decision-making bodies whose work impacts Tribal Lands.

III. Create a Universal Service Enhanced Tribal Lands Broadband Program and Increase the Intergovernmental Coordination with Tribal Entities on Universal Service Support Mechanisms

In 2000, the FCC created changes to the USF programs aimed at Tribal Lands, implementing a new federal method for Eligible Telecommunications Carrier designations and creating the Enhanced Tribal Lands Lifeline and Link-Up Support programs. Over the past decade these changes have been of great importance and value to those who have increasingly deployed telephone service on Tribal Lands, including Tribal Entities themselves. In particular, the Tribal Lifeline and Link-Up programs have been critical to service in many areas of Indian Country. As the government enters an era of re-examination of the USF for broadband support, it should take necessary certain steps to again directly address Tribal Lands.

On September 22, 2009, the FCC's Federal Advisory Committee on Diversity for Communications in the Digital Age adopted a recommendation that the "Government should consider modifying the Universal Service Fund's Lifeline and Linkup programs, which help eligible low-income consumers establish and maintain telephone service, so that these programs include a subsidy for broadband hardware, connection and service." The Committee stated that, "in addition, as part of its consideration with respect to modifying the Universal Service Fund's Lifeline and Linkup programs, the Government should recognize the success of the Enhanced Tribal Lands programs and create similar programs for broadband services to Tribal Lands." In October, 2009, at its Annual Convention, the National Congress of American Indians adopted a resolution with a similar request of the government, calling upon the FCC "to create a Enhanced Tribal Lands Broadband Program within the Universal Service Fund programs," and "...set a



initial eligibility requirement to those communities and areas lacking in basic telephone service as Tribal lands communities in critical need of communications services.”

The creation of a new USF program supporting low-income broadband services on Tribal Lands would have direct positive results on the deployment and adoption of broadband in Tribal communities. In creating such a program it is important for the FCC to recognize and draw upon the important successful elements of the existing Enhanced Tribal Lands Lifeline and Link-Up programs for basic telephone service, but not eradicate the ongoing operations of that important program to address the ongoing challenge of deploying basic telephone service on Tribal Lands. Within this new program, the FCC should set an initial eligibility requirement to the communities and areas lacking in basic telephone services, such as Tribal Lands and communities. The USF program should also recognize the demand aggregation needs on Tribal Lands. Further, USF could also support broadband access, both in the last-mile components as well as extending critical middle-mile infrastructures to ensure Native networks have a high-capacity connection to and from the Internet backbone. However, any USF reform must make certain that analog safety remains in place until all of Native America is connected to telephone service and broadband.

One important method by which the Commission should ensure that USF supported services remain present and viable on Tribal Lands, to make certain both the proper use and growth of USF support, is to obtain a Tribal certification approval in federal Eligible Telecommunications Carrier (ETC) designations on Tribal Lands. Increasing the coordination and consultation with Native Nations on its ETC designations, and requiring Tribal approval would also assist the Commission in its efforts in jurisdictional determinations and review of deployment and consumer elements of the ETC applications for Tribal Lands. Formally including Tribal governments in these regulatory processes would also help define, in each instance, the proper “Tribal Centric” approach that will engage their anchor institutions which are most familiar with the communities and their ultimate end users. An ETC designation for any provider serving Tribal Lands is most certainly a “regulatory action” that “will significantly or uniquely affect Tribal Governments, their lands and resources,” so this action would also meet one of the fundamental priorities of the FCC’s Tribal Policy Statement regarding Tribal consultation, in one of the most important and critical regulatory areas to deployment of communications networks on Tribal Lands.²²

²² See *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, 16 FCC Rcd 4078, 4081 ¶¶III ¶2 (2000) (“The Commission, in accordance with the federal government’s trust responsibility, and to the extent practicable, will consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources”).



IV. Amend Federal Broadband Programs to Spur Deployment and Access in Tribal Communities

Current statutory and regulatory limitations and prohibitions on utilizing federally funded broadband infrastructure by the entire Tribal community, creates duplicative and parallel infrastructures, rather than a more cost-effective integrated infrastructure. For example, the Schools and Libraries or “E-Rate” program and the Rural Health Care program have been beneficial in providing broadband connectivity to public schools, libraries, healthcare and other institutions on Native lands as well as providing operational support to commercial or Native telephone companies. However, current limitations and prohibitions within these programs severely inhibit their ability to spur broadband deployment in Tribal communities. Given the considerable costs and obstacles to telecommunications deployment on Tribal Lands, it is both wasteful and inefficient to have built-in restrictions on funded infrastructure that limit what services it can be used for and for whom. Across the board, the FCC should review the statutory and regulatory barriers to using existing broadband infrastructure to serve Tribal Lands. In addition, several current programs to spur deployment in underserved or unserved areas are set-up to inhibit the priority for Tribal projects, either as a result of differences in Tribal communities compared to other communities or structural obstacles that de-emphasize “Tribal” centric efforts. It is critical that these programs be amended to account for the unique characteristics of Tribal Lands.

- ***Critical reforms to E-rate***

There are at least two aspects of the E-rate program that do not currently serve Tribal Lands and must be changed. Specifically the Commission should:

1. Make it clear that libraries on Tribal Lands qualify for the E-Rate program and allow Tribes to self-designate what constitutes a “library.”
 2. Extend the E-rate “Alaska Waiver” to include all Tribal Lands and eliminate the first restriction in the waiver process that requires there be only one provider in an area.
- ***The term “Library” is ill-defined in the 1996 Telecommunications Act and difficult to apply to Tribes***

The 1996 Telecommunications Act which extended the E-Rate program to include libraries does not contain a separate definition regarding what is a “library.” Instead it cites to the definition contained in the Library Services and Construction Act (LSCA). However, LSCA was repealed by Congress a few months after the 1996 Telecom Act was passed. When it was printed, section 254(H) was changed to refer to the newer Library Services and Technology Act (LSTA), and its definition of library.



The FCC recognized this in its 1997 Order implementing the schools and library program:

Section 254(h)(5) does not include an explicit definition of libraries eligible for support. Rather, in section 254(h)(4)'s eligibility criteria, Congress cited LSCA. The Joint Board, therefore, used the definition of library found in Title III of the LSCA. In late 1996, however, Congress amended section 254(h)(4) to replace citation to the LSCA with a citation to the newly enacted LSTA. In light of this amendment to section 254(h)(4), we find it necessary to look anew at the definitions of library and library consortium and adopt definitions that are consistent with the directives of section 254(h).²³

After discussing the differences in the statutory definitions, the FCC concluded as follows:

We, therefore, adopt the LSTA definition of library for purposes of section 254(h), but we conclude that a library's eligibility for universal service funding will depend on its funding as an independent entity. That is, because institutions of higher education are not eligible for universal service support, an academic library will be eligible only if its funding is independent of the funding of any institution of higher education. By "independent," we mean that the budget of the library is completely separate from any institution of learning. This independence requirement is consistent with both congressional intent and the expectation of the Joint Board that universal service support would flow to an institution of learning only if it is an elementary or secondary school. Similarly, because elementary and secondary schools with endowments exceeding \$50 million are not eligible for universal service support, a library connected to such a school will be eligible only if it is funded independently from the school.²⁴

A "private library" qualifies for E-Rate funding, "but only if the State in which such private library is located determines that the library should be considered a library for purposes of this subtitle."²⁵ NTIA was deeply concerned that Tribal schools would not meet the eligibility requirements for E-Rate funding.

²³ *Federal-State Joint Board on Universal Service, Report and Order*, CC Docket No. 96-45, FCC 97-157, 12 FCC Rcd 8776, 9069-70 (*Order*). The Commission released an erratum correcting this Order on June 4, 1997. See *Federal-State Joint Board on Universal Service, Order on Reconsideration*, CC Docket No. 96-45, FCC 97-246, 62 Fed. Reg. 40,742 (July 30, 1997).

²⁴ *Id.* at ¶ 558 (footnotes omitted).

²⁵ Pub. L. No. 104-208, § 213(2), quoted *Id.* at n. 1436.



We note NTIA's concern that certain tribal schools may not meet the statutory definition of schools and, therefore, may not be eligible for universal service support. While 187 schools funded by the Bureau of Indian Affairs were included in the total number of schools cited by the Joint Board, NTIA contends that there may be additional schools established by Tribes or tribal organizations. We conclude that, if those schools meet the statutory definition of school and the other eligibility criteria under section 254(h), they will be eligible for universal service support. We also conclude that section 254(h)(5)(A) does not give us the discretion to provide universal service support to any entity educating elementary and secondary school aged children unless that entity meets the statutory definition of school.²⁶

Unfortunately, no similar concern was shown toward Tribal libraries, until the Government Accounting Office (GAO), in January, 2006, issued a report entitled "Telecommunications: Challenges to Assessing and Improving Telecommunications For Native Americans on Tribal Lands" (GAO-06-189, released January, 2006).²⁷ The report noted that Tribes raised issues concerning the eligibility challenges for Tribal libraries.

As part of its integrity process, USAC requires a third party verification of the eligibility requirement. Thus, USAC verifies a library's eligibility for E-rate funds by asking state library administrative agencies to provide written certification of a library's eligibility for state LSTA funds. This process has prompted a number of comments from several of those we interviewed. Some tribal and state library agency officials noted that the current eligibility criterion infringes on tribal sovereignty by involving the state in tribal library E-rate funding. One state librarian, for example, expressed discomfort at being put in the position of acting on behalf of a sovereign tribe and expressed the strong belief that eligibility for E-rate funding should be a matter between the tribe and USAC, without involvement by state government agencies. USAC officials told us that they have received some E-rate applications from tribal libraries. In those cases, a USAC board member successfully worked with the states in question to obtain the certifications. However, USAC officials and the USAC board member emphasized the time-consuming nature of these resolution efforts.

In fall 2002, FCC, USAC, and the Institute of Museum and Library Services (IMLS) officials met to discuss possible remedies for this

²⁶ *Id.* at ¶ 555 (footnotes omitted).

²⁷ Available for download at <http://www.gao.gov/new.items/d06189.pdf>.



situation. These discussions produced a consensus that a change to the E-rate eligibility requirement for libraries defined in the Communications Act could facilitate tribal libraries' eligibility for E-rate funding. These discussions focused on a modification to the Act that would allow tribal libraries eligible for funding from either a state library administrative agency or tribal government under the LSTA to be eligible for funding under the E-rate program. FCC officials told us that modifications to the Act would require legislative action by the Congress, because such modifications cannot be made by FCC through a Commission order or administrative proceeding.²⁸

As a consequence, the FCC should adopt changes to E-rate rules to make it clear that libraries on Tribal Lands qualify for the E-Rate program. These changes should also allow Tribes to self-designate what constitutes a "library" rather than requiring them to go to their respective states, which have little jurisdiction over Tribes and even less knowledge of the Tribal libraries. If the FCC is unable to make this clarification, the Commission should request that Congress amend the statute to allow Tribes to self-designate what constitutes a "library" in their community.

- ***Using Anchor Institutions Such as School and Libraries to Provide for Public Access on Tribal Lands Will Require a Change in E-rate Rules***

The Schools and Libraries program of E-rate could be used as the basis to provide funding to Tribal anchor institutions to serve as hubs for community adoption of broadband. The problem is that under the very strict rules contained in Section 54.504, E-rate funding is limited in who can access it (see the discussion above), and must ensure that such use is limited to strictly educational purposes. In 2001, the FCC issued a limited waiver to the State of Alaska to allow excess capacity at schools and other institutions to be used by the public after hours.²⁹ The FCC described the Alaskan problem as follows:

Alaska states that in remote communities in rural Alaska, numerous schools and libraries have obtained dedicated Internet access through discounts from the schools and libraries universal service mechanism. Many of these schools and libraries rely on satellite telecommunications services for their Internet connections, and the satellite services are most often provided on a non-usage sensitive basis. Due to the remote nature of schools and libraries in Alaska, there is usually only one provider of this

²⁸ *Id.* at pp. 30-31.

²⁹ *Federal-State Joint Board on Universal Service, Petition of the State of Alaska*, FCC 01-350 (released December 3, 2001) ("*Alaska Waiver Order*").



satellite down link service, and that provider typically only provides this service on a 24 hour, 7 days a week basis. Schools and libraries occupy the satellite connections for educational purposes when they are open, but during times when the schools and libraries are closed, the available connections remain unused. As a result, due to the non-usage sensitive nature of the services, services that could be used after the operating hours of schools and libraries presently go unused.

The FCC began by noting that current rules prohibit the use of schools and libraries subsidies for non-educational, and even after-hours access. It nonetheless granted a limited waiver as follows:

We grant this waiver subject to the following conditions: (1) there is no local or toll-free Internet access available in the community; (2) the school or library has not requested more services than are necessary for educational purposes; (3) no additional costs will be incurred, i.e., services subject to a waiver must be purchased on a non-usage sensitive basis; (4) any use for noneducational purposes will be limited to hours in which the school or library is not open; (5) and the excess services are made available to all capable service providers in a neutral manner that does not require or take into account any commitments or promises from the service providers.

This waiver is dependent on Alaska's implementation of these conditions. We believe that these conditions are appropriately tailored to narrow the scope of waiver to ensure the integrity of the schools and libraries mechanism, yet broad enough to provide relief to rural remote communities in Alaska that are encountering economic and distance-related challenges to receiving telecommunications and advanced services. Maximizing the use of services obtained from the schools and libraries program by permitting such rural remote communities to use the excess service that is available as a result of the non-usage sensitive basis of the service and the limited hours that the service is used for educational purposes will further the goals of universal service, consistent with the Act. If these conditions are satisfied, then we will find that special circumstances have been met and that a waiver is in the public interest.³⁰

The FCC also concluded that there was no statutory prohibition against waiving the rules. "Nothing in section 254(h)(1)(B) prohibits the Commission from granting a waiver of section 54.504(b)(2)(ii) of its rules to expand the use of such services, so long

³⁰ *Id.* at 4, footnote omitted.



as in the first instance they are used for educational purposes.”³¹ Existing broadband connectivity cannot be effectively or efficiently utilized due to these statutory limitations on sharing Internet connections. As a result, E-rate limitations that prevent line-sharing and mixed use should be eliminated. Further, there is no reason not to extend the E-rate, “Alaska Waiver” to include all Tribal Lands. In particular, the FCC should eliminate the restriction in the waiver process that prevents the approval of a waiver request if there is already one provider in the area. Often satellite vendors may offer CONUS service, but at rates so high that that most residents are unlikely to be able to afford the service. Virtually no Tribe can qualify for the waiver because of this restriction.

- ***Critical Reforms to FCC Rural Health Care Pilot Program***

The Rural Health Care Program currently prohibits the broadband connection to be leveraged to provide connectivity in the rest of the community.³² This is a counter-intuitive restriction. Given the high-cost of broadband deployment in Tribal Lands, it is essential that available infrastructure be utilized to the maximum benefit of the community. The FCC should allow Tribal healthcare providers to utilize funding from the pilot program to extend the broadband connectivity into the surrounding community to provide for telehealth services. Further, Tribal communities should be able to leverage the excess capacity from these telecommunications infrastructures to provide essential middle-mile, and other interconnection access for last-mile broadband networks. These networks should be permitted to allow for open, wholesale access to their excess capacity to any for-profit or non-profit broadband provider – allowing the infrastructure to spur high-speed connectivity into the rest of the Tribal area.

- ***RUS and NTIA should change their policies regarding applications for funds to serve Tribal Lands and expand their outreach to Tribes***

Current rural telecommunication deployment programs have inherent barriers to entry for Tribes ongoing programs, as exemplified, by preferences for incumbent telecommunication providers. USDA should write and implement the Significantly Underserved Trust Areas (SUTA) Regulations. RUS currently give preference to previous Title II borrowers. USDA should implement SUTA provisions of the 2008 Farm Bill through the current ARRA funding opportunities, and future broadband initiatives, based on coordination and consultations with Tribal Entities to address, within the existing ARRA timeframes, the inherent barriers to entry faced by Tribes in the NOFA application process. SUTA provisions should address applications by Tribal Entities so that they are not disadvantaged by their lack of Title II status. In addition,

³¹ *Id.* at 5.

³² *Rural Health Care Support Mechanism*, FCC 07-198, released November 19, 2007, ¶¶ 75, 105-08,



current and future grant programs through NTIA or RUS need to be amended to better account for Tribal Lands. For example, the term “Remote” is defined by proximity to urban populations. “Remote” should instead reflect the availability of services on Tribal land and restrictions that arise from the geo-political situations vis-à-vis the States affecting infrastructure deployment independent of proximity to urban populations. Further, applications funded through NTIA and RUS providing service to Tribal Lands should be approved by the Tribes as States do not promote, support, or regulate Tribal Lands. Last, Tribal applicants should not be penalized by a lack of choice of provider as Tribe applicants are sovereign entities and provide needed services previously neglected by other providers.

V. Adoption of a Tribal Priority for Spectrum

Greater access to spectrum that improves the capacity and reach of wired and wireless broadband networks into Native Communities is therefore critical. Given the low population-density landscape of so much of Native America, many projects will rely on wireless connectivity. The most successful wireless networks are currently operating in unlicensed bands, and at times exhaust the available capacities on these bands. These projects would substantially benefit from access to lower-frequency bands, allowing providers to serve more residents at a lower cost. Without available spectrum bandwidth, connectivity to broadband will continue to remain elusive for many Tribal communities. Spectrum on Native lands is likely to be severely underutilized, representing an enormous untapped resource for providing connectivity to Native residents. Current policies on spectrum, have led to substantial financial and structural obstacles to Tribal entities to access this underutilized resource.

- ***Granting Tribal Priorities or Broad Tribal Waivers Is Constitutionally Sound***

As sovereign entities, federally recognized Tribal Entities share a unique government-to-government relationship with the United States Federal government as recognized in the Constitution, numerous federal laws, policies, and Supreme Court cases. Federally recognized American Indian and Alaska Native Tribal Entities, their citizens and their instrumentalities, such as Tribally-owned or controlled businesses, are politically classified rather than racially classified. As such, the rational basis review, rather than strict scrutiny, applies to citizens of federally recognized Tribal Entities.³³

³³ 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. While “Native Americans,” is a term commonly used, in speaking, to refer to persons who self-identify as being of racial descent



The government-to-government trust relationship between Tribal Entities and the Federal government is the reason for the existence of several federal agencies, institutions, and programs aimed at Native Americans, including the Bureau of Indian Affairs, the Indian Health Service, the Administration for Native Americans, and the special efforts of the Federal Communications Commission with its focus on Tribal initiatives since 1999, both regulatory and outreach based, to remove barriers to entry in the communications industries for Tribal Entities. Notably, the Commission recognized in 2000 its own government-to-government relationship and its own responsibilities to reduce regulatory burdens on Tribal Entities.³⁴

as “Indians,” the term “Tribal Entities” is employed above for the purposes of this recommendation to mean federally recognized American Indian Tribes and Alaska Native Villages, their member citizens, and their economic instrumentalities, such as Tribally-owned or controlled businesses. *See also United States v. Antelope*, 430 U.S. 641, 645 (1977) (“[t]he decisions of [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”). *See also American Federation of Government Works, and AFL-CIO v. U.S.* (“*AFGE v. U.S.*”). 330 F.3d 513, 524 (D.C. Cir. 2003), *cert. denied* 540 U.S. 1088, 124 S.Ct. 957 (2003) (“regulation of commerce between the federal government and Tribal entities, including Tribally controlled corporations is “at the heart of the [U.S. Constitution’s Indian Commerce] Clause”). 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, stating “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.” *Id.* 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 that “*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 discrete racial group, but, rather, as members of quasi-sovereign tribal entities.’ *Id.* at 554. *See id.* at 553 n.24.” *Legal Guidance on the Implications of the Supreme Court’s Decision in Adarand Constructors, Inc. v. Pena*, Memorandum to General Counsels, Walter Dellinger, Assistant Attorney General, U. S. Department of Justice, Office of Legal Counsel, June 28, 1995, <http://www.fedcivilrights.org/www.fedcivilrights.org/DOJAdarand.pdf>, at p. 8. (last visited December 23, 2009).

³⁴*See Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, 16 FCC Rcd 4078, 4082 ¶¶III ¶4 (2000) (“The Commission will endeavor to streamline its administrative process and procedures to remove undue burdens that its decisions and actions place on Indian Tribes. As administrative and organizational impediments that limit the FCC’s ability to work with Indian Tribes, consistent with this Policy Statement, are identified, the Commission will seek to remove those impediments to the extent authorized by law.”).



In an ongoing proceeding at the FCC, the Commission is proposing to grant a Tribal Priority under Section 307(b) of the Communications Act.³⁵ Therein the FCC set forth the statutory basis for granting a Tribal Priority:

It is well established that Tribes are inherently sovereign Nations, with the obligation 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 jurisdictions. . . . The Commission therefore believes that is in keeping with its policy toward and relationship with Tribes, as well as the public interest, to aid Tribes and tribal consortia in their efforts to provide educational and other programming to their members residing on tribal lands, as well as to assist them in acquiring and operating commercial stations for purposes of business and commercial development.

Similar policies related to the National Broadband Plan are equally supported by the caselaw.

Opportunities for Tribal spectrum ownership in Indian Country is essential to closing the digital divide. As stated in a NTIA hearing earlier this year by Diana Bob, staff attorney for the National Congress of American Indians: “[T]ribal lands have historically been left out of critical infrastructure build-outs....[Broadband] is a great thing for most of the country but for Indian Country there is a major lack of analog access as well.”³⁶ Delays in providing telephone services to Tribal communities lead to the creation of the Universal Service Fund to help subsidize telephone services in rural areas.³⁷ The lack of broadband infrastructure and a desire to gain the advantages of Internet access has spurred Tribal services providers, such as SCTCA’s Tribal Digital

³⁵ See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures (NPRM)*, 74 Fed. Reg. 22498 (May 13, 2009).

³⁶ United States Department of Commerce BTOP Public Meeting Transcripts, Session 2, March 23, 2009, available at <http://www.ntia.doc.gov/broadbandgrants/meetings.html>.

³⁷ See *Supra* note 13, *Telephone Subscribership on Reservations Study* at 3. “Statistics from the 2000 Decennial Census estimated that 67.9% of all American Indian households living on American Indian Reservations and Off-Reservation Trust Lands: Federal had telephone service.” See also David Wilson, *Weaving the Navajo.Net: Advanced Telecommunications Services, Cultural Adaptation, and the Navajo Nation’s “Internet to the Hogan” Technology Plan*, J. on Telecomm. & High Tech., (forthcoming 2009) at Part V(A)(ii).] The deployment of broadband infrastructure is no better. A 2006 GAO report, *Challenges to Assessing and Improving Telecommunications for Native Americans on Tribal lands* estimated Broadband penetration at less than 10%. United States Government Accountability Office, *Challenges to Assessing and Improving Telecommunications for Native Americans on Tribal Lands*, GAO-06-189 (Jan, 2006) (“GAO Tribal Telecommunications Project”).



Village in Southern California and the Coeur D'Alene Tribe in Northern Idaho. Due to the low population density in their communities these communities found wireless to be the most viable solution. But as the FCC has realized: “[T]ribal lands may vary significantly with regard to population density, terrain, and other such buildout factors which can affect the feasibility of building out facilities on Tribal Lands and account for the lack of service.”³⁸ Tribal entities need access to spectrum as well the flexibility to decide how to best apply technologies to increase the penetration of broadband in their communities. The Commission is considering the adoption of a Tribal Priority in the broadcast spectrum licensing process. NPM and NCAI submitted comments in support of this important rulemaking. The FCC should adopt that Tribal broadcast spectrum priority, as an important first step to deploying broadcast services on Tribal Lands. The FCC should look beyond the broadcast licensing rules, with the same constitutional and rational basis justification, to implement a Tribal Priority in all of its spectrum licensing policies, including its spectrum secondary markets rules, for the purposes of advanced wireless uses, commercial mobile radio services, and public safety communications. Further, in areas where spectrum license holders have not met build-out obligations, grant access to Tribal entities to direct the deployment of needed services.

VI. Revising the Tribal Lands Bidding Credit

In 2000, the FCC created the Tribal Lands Bidding Credit (TLBC) for commercial mobile radio services spectrum auctions. The TLBC for commercial mobile radio services spectrum auctions have not adequately increased access to spectrum by those most motivated to develop projects that will increase broadband access in Tribal communities. In a 2004 Report and Order, the FCC found that, “[T]he record, though limited, suggests that underutilization of the Tribal Lands bidding credit program stems from technical obstacles, economic factors, difficulties obtaining certifications, and other problems, rather than from overly-restrictive buildout requirements.”³⁹ In some instances, providers did only what was necessary to satisfy the bidding credit requirement. Regardless of the effectiveness of this singular incentive program, service providers will continue to be constrained by the market reality that investments in rural areas have longer payback periods and lower rates of return.”⁴⁰ The TLBC has not resulted in the Tribal acquisition of spectrum rights. The Commission should undertake a new review of the TLBC with the goal of increasing Tribal access to spectrum and removing barriers to use of spectrum by Tribal Entities. The TLBC should be revised,

³⁸ Extending Wireless Telecommunications Services to Tribal Lands, WT Docket No. 99-266, Third Report and Order 19 FCC Red. 17652 (2004).

³⁹ Extending Wireless Telecommunications Services to Tribal Lands, WT Docket No. 99-266, Third Report and Order, 19 FCC Red. 17652 (2004) *supra* note 1 at ¶ 8.

⁴⁰ Julie Penner, and Bhavin Parekh, *Spectrum Access in Indian Country*, with Native Public Media. 2009 (not yet published).



taking into account the FCC's acknowledgment of the technical, economic, and certification obstacles, with the goal of increasing Tribal access to spectrum.

VII. Permit Tribes to Utilize "White Space Devices" and Resolve the White Spaces Barrier to Entry in International Exclusion Zones

In Tribal communities where spectrum is available, the FCC must take action to remove barriers to entry and lift bans on the Tribal utilization of white spaces devices (WSDs) in Tribal communities located next to international border. WSDs have the ability to locate and communicate over unused frequencies to allow for networking opportunities over unutilized spectrum including white spaces in broadcasting spectrum. Given the gross underutilization of spectrum on Tribal Lands, it belies logic to limit the use of FCC approved WSDs on unused frequencies for wireless broadband deployment. As part of this effort, the Commission must resolve the limitation on WSDs in International Exclusion Zones, to ensure access to these networking technologies on Tribal Lands along the Mexico and Canadian border.⁴¹ The exclusion is particularly problematic for the Southern California Tribal Digital Village, which existing mesh network would greatly benefit from the superior propagation characteristics of the TV band to expand broadband access to Tribal residents.⁴² As the Commission itself has previously observed, Section 301 itself does not apply to transmitters at sufficiently low power that they pose no risk of harmful interference.⁴³ The Commission makes no attempt to explain in the *Order* how it is possible for unlicensed devices to qualify as broadcast devices subject to the treaty when they do not even meet the threshold requirement of requiring licenses under Section 301.⁴⁴

VIII. Greater federal funding and education, and the creation of new federal program mechanisms to meet the myriad of planning and start up needs for deployment and digital adoption programs on Tribal Lands

At the federal policy level, government financial assistance from programs, such as the RUS for the Southern California Tribal Digital Village, were substantial elements to get these projects off the ground. The current Recovery Act broadband stimulus programs offer an important opportunity to expand existing Native networks and spur the

⁴¹ *Unlicensed Operation in the TV Broadcast Bands*, FCC 08-260, released November 14, 2008, ¶¶ 263-65.

⁴² *NPM/NAF New Media Study*, pp. 54-55.

⁴³ *See Revision of Part 15 of the Commission's Rules Regarding Ultra-Wideband Transmission Systems, Second Report and Order and Second Memorandum Opinion and Order*, 19 F.C.C.R. 24, 558 (2004) (Second UWB R&O).

⁴⁴ Pursuant to Section 302, these devices must be certified by the Commission before being marketed or sold in the United States. 47 U.S.C. §302a(b).



deployment of new networks. The NTIA's funding for Public Computing Centers and Sustainable Adoption Programs could continue be useful tools for developing Community Technology Centers in Native communities. In addition, the administrators of NTIA and RUS could hold workshops to expand awareness of grant opportunities for Native communities and Tribal governments. Beyond the BTOP and BIP grant opportunities, and the existing programs at RUS and NTIA, additional programmatic support is needed to further connectivity and adoption within Native Nations. There remains a need for federal funding that is tactical in its uses and applications to provide support for necessary individual community feasibility studies, technical assistance, business implementation, and adoption programs. The Congress should consider creating a special program with specific statutory and programmatic authority directed specifically at American Indian and Alaska Native villages tailored to meet the myriad needs of these at risk communities and address their remote and unserved market conditions.

Recommendations for federal grant programs:

- ***Increase funding for Indian Telecommunications Initiatives Tribal Workshops and Round-table Programs***

Current initiatives to provide for education, training, and development of best practices are underfunded. The Indian TeecCongress should provide specific funding in future FCC budgeting to increase funding for the Indian Telecommunications Initiatives Tribal Workshops and Roundtable programs to a minimum of \$200,000 annually.

- ***Small targeted grants for Internet access and adoption***

Small targeted grants of direct funding for Internet access and adoption are needed to spur broadband connectivity throughout Tribal Lands but are unavailable to many Tribal Entities. Congress should allocate \$30 million for an NTIA small grants program on Tribal Lands to provide targeted grants for programs that are consistent with the goals of BTOP. This small grants program should include \$12 million for last mile proposals, \$6 million for public computer center proposals, and \$12 million for sustainable broadband adoption microgrants. Individual grants should be capped at \$250,000 for last-mile, \$100,000 for public computer centers, and \$100,000 for sustainable broadband adoption programs. Individual entities could be limited to three applications in each category. Using this approach, the NTIA could provide numerous small grants on a rolling basis for any of the purposes permitted by BTOP. Small grant applications could be accepted and approved on a rolling basis in a 60-day window. Consistent with the OMB Guidance of February 18, 2009, the NTIA should allocate a portion of the funds authorized for administration of the BTOP program to meaningful outreach and training for small entities that would be eligible for grants and loans provided by this fund.



- ***Federal funding targeted toward Tribal Entities of at least \$250 million to support deployment planning and infrastructure buildout***

Deployment of broadband infrastructure on Tribal Lands face substantial barriers including rural, rugged terrain that increase the cost of installing infrastructure, limited financial resources that deter investment by commercial providers, and a shortage of technically trained Tribal members to plan and implement improvements to deploy infrastructure across some Tribal Lands. Current programs through RUS and NTIA do not specifically target funding for projects on Tribal Lands. Congress should create a new Tribal Entity targeted Federal funding mechanism of at least \$250 million to support deployment planning and infrastructure buildout for Tribal broadband entities. In addition to critical infrastructure costs and deployment objectives, this mechanism should provide support in specific tactical needs for individual community feasibility studies, technical assistance, business plan development and implementation, and other deployment assistance. Furthermore, Congress should create Tribal specific authority and funding for RUS and NTIA to further enhance their existing programs to assist Tribes in creating and implementing broadband deployment and adoption plans.

- ***Ongoing Funds to Upgrade Federal Tribal Telecommunication Facilities***

Telecommunications facilities for Bureau of Indian Affairs and the Bureau of Indian Education are often woefully inadequate, relying on antiquated technology and infrastructure with limited capacity. Congress should provide the federal departments and agencies with key missions on Tribal Lands, such as the BIA, Indian Health Service, and Bureau of Indian Education, with continual funds to upgrade facilities on Tribal Lands to standards that support the current industry norms for high-capacity communications, (e.g. a fiber optic connection).

- ***Establish a Digital Excellence Fund***

Sustainable broadband interventions require ongoing support mechanisms. A Digital Excellence Fund should be established by Congress for at least \$30 million to fund fiber deployments and digital literacy and education programs. All users of the publicly subsidized fiber infrastructure shall contribute back to the fund, on a yearly basis, on an equitable and nondiscriminatory basis (as set by the FCC). Fifty percent of funds from the program will be allocated for the purpose of additional deployment of broadband infrastructure on Tribal Lands and fifty percent of funds from the program will be allocated to a Tribal Lands Broadband Technology Opportunities Program for the purposes of making available grants for innovative programs to encourage sustainable adoption of broadband service.

- ***Increase Tribal Access to FCC University Training Program***



There is an urgent lack of IT training and expertise within Tribal Entities that often hampers broadband implementation and adoption efforts. The FCC should make available to Tribal leaders and their appointed representatives opportunities to take part, on a no-cost and ongoing basis, in the Commission's internal FCC University training program.

Conclusion

When the Tribe is engaged, and its institutions and families are central to the planning, chances increase for the success of robust broadband networks. The FCC should recognize this fundamental fact: placing Tribes at the center of the process on Tribal Lands, and implementing actions that prioritize Tribes in planning, regulation and deployment is a necessary first step in achieving successful and enduring solutions to the deplorable and long standing lack of communications technologies in Tribal communities nationwide. The current environment, and especially the National Broadband Plan, represents this generation's best opportunity to avoid the tragedies of the past and close the digital divide that threatens to drive Tribes further and further behind the rest of the nation in terms of education, opportunity, and fundamental freedoms. We should not squander, but should embrace this unprecedented opportunity to bring these resources to all reaches of this land.

Respectfully submitted:

NATIVE PUBLIC MEDIA

By: _____/s/_____

Loris Ann Taylor
Executive Director
P.O. Box 3955
Flagstaff, AZ 86003
Telephone: (928) 853-2430

By: _____/s/_____

John Crigler
James E. Dunstan
GARVEY SCHUBERT BARER
1000 Potomac St., N.W. Suite 500
Washington, DC 20007
Telephone: (202) 965-7880
Counsel to Native Public Media

**NATIONAL CONGRESS OF
AMERICAN INDIANS**

By: _____/s/_____

Jacqueline Johnson Pata
Executive Director
1516 P Street, NW
Washington, DC 20005
Telephone: (202) 466-7767

By: _____/s/_____

Geoffrey C. Blackwell, Esq.
Chickasaw Nation Industries, Inc.
3034 Windy Knoll Court
Rockville, MD 20850
Telephone: (202) 253-4846
*Chairman, Telecommunications
Subcommittee of the National
Congress of American Indians
Chairman, Native Public
Media Tribal Advisory Counsel*



G A R V E Y S C H U B E R T B A R E R

Ms. Marlene H. Dortch, Secretary

December 24, 2009

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**SOUTHERN CALIFORNIA TRIBAL
CHAIRMEN'S ASSOCIATION**

By: _____/s/_____

Matthew R. Rantanen
Director of Technology
Director, Tribal Digital Village
P.O. Box 1470
Valley Center, CA 92082
Telephone: (760) 535-5907
*Member, Native Public Media
Tribal Advisory Council*

NEW AMERICA FOUNDATION

By: _____/s/_____

Sascha D. Meinrath
Director, Open Technology Initiative
1899 L Street, NW
Suite #400
Washington, DC 20036
Telephone: (202) 986-2700

By: _____/s/_____

Benjamin Lennett
Analyst, Open Technology Initiative
1899 L Street, NW
Suite #400
Washington, DC 20036
Telephone: (202) 986-2700