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

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan For Our Future	)	GN Docket No. 09-51
	)	
High-Cost Universal Service Support	)	WC Docket 05-337
	)	

To: The Commission

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

Native Public Media ("NPM") and the National Congress of American Indians ("NCAI"), through undersigned counsel, respectfully submit these Joint Reply Comments in response to the Notice of Inquiry and Notice of Proposed Rulemaking, released April 21, 2010 ("*CAF NOI/NPRM*").

I. THE MOST RECENT DATA CONCERNING BROADBAND DEPLOYMENT SIGNIFICANTLY OVERSTATE SUBSCRIBERSHIP IN INDIAN COUNTRY

Of the approximately 150 parties filing comments in this proceeding, only a handful address the fundamental challenges faced by Native Americans who reside on the far side of the "Digital Divide." While carriers jockey for position to maximize the funding that will flow to them from the proposed Connect America Fund, few confront the nature and extent of that divide. Indeed, even the Commission, although sympathetic to the plight of Native Americans, underestimates the chasm that separates Indian Country from the rest of America. In its *Sixth Broadband Deployment Report, Docket 09-137*, released July 20, 2010, the Commission concludes that 12.5 percent of all Native Americans subscribe to broadband. This is an appallingly low number, compared to the

national penetration level of 56 percent. Yet the Commission's 12.5 percent number substantially *overstates* the level of broadband subscriptions in Indian Country. The Commission's estimate counts all broadband subscribers residing in census tracts that include at least 50 percent "Native Homeland" land mass or 50 percent of the population covered in that census tract who live in Native Homeland areas.

> The Commission has in past broadband deployment reports examined broadband availability for various demographic groups, such as minorities, persons with disabilities, and Americans living in Tribal areas. In particular, the Commission has recognized that certain categories of these Americans are particularly vulnerable to not having access to broadband. In 2008, the Commission required Form 477 filers to report broadband connections by Census Tract permitting the Commission to conduct a demographic analysis of subscription patterns. This change enables us to examine the subscription rates in Native Homeland areas for the first time. We find that counties where at least half the population lives in a Native Homeland area or where at least half the land mass is a Native Homeland area also tend to have lower broadband subscription rates than the U.S. as a whole. We find that only 12.5 percent of all households on Native Homeland areas subscribe to a broadband service faster than dialup compared to 56 percent of all households nationwide.[1]

Anyone who has spent time in and around Native American reservations knows that inclusion of off-reservation homes will severely distort the data. There are many places where Tribal Lands abut urban areas, sometimes affluent urban areas.[2] By mixing Tribal Lands with as much as 49% non-Tribal Land and designating that mixture as "Native Homeland" the Commission skews the data that could determine broadband deployment to tribal communities. NPM and NCAI, therefore strongly urge the FCC to jettison the term and definition "Native Homeland" tied to only 50 percent actual Tribal

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[1] *Sixth Broadband Deployment Report*, ¶ 25 (footnotes omitted).

[2] *See, e.g.*, the Salt River Pima-Maricopa Indian community, whose lands abut Scottsdale, Tempe, Mesa, and Fountain Hills, all within Maricopa County, Arizona. To include data of Scottsdale residents, with per capita income of $39,158, nearly twice the national average, will no doubt severely overstate Pima subscribership. *See, http://quickfacts.census.gov/qfd/states/04/0465000.html.*

areas, and instead focus efforts on determining broadband availability and penetration on Tribal Lands, defined in 47 C.F.R. § 54.400(e) "as any federally recognized Indian tribe's reservation, pueblo, or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments."[3]

II. THE HIGH COST, LIFELINE AND LINK-UP PROGRAMS ARE CRITICAL TO INDIAN COUNTRY

Comments of the National Tribal Telecommunications Association ("NTTA"), the Navajo Nation Telecommunications Regulatory Commission ("NNTRC"), and the Cheyenne River Sioux Tribe Telephone Authority ("Cheyenne"), all highlight the importance of the High Cost, Lifeline, and Link-Up programs to Native Americans. As NTTA well puts it:

> Native communities are the worst-served in the United States, with an average service rate twenty to thirty-five percent below non-tribal communities. What this means is twenty to thirty five percent of Native Americans, including nearly 50 percent of Navajos, lack the ability to call 911 for help. A significant fact is 80 percent of native communities are located in price cap service areas. Therefore, regulatory broadband solutions must encompass price cap incentives to connect remote rural and tribal communities.[4]

Unless and until this fundamental need can be met, the Commission must do nothing to cut back support for these programs. NPM and NCAI agree with Cheyenne River's assertion:

> There is no question that in order to enable the continued provision of state-of-the-art telecommunications and data services on the Reservation specifically, and in Indian country generally, the Commission must continue to provide high-cost support to tribal providers. Such support is

[3] 47 C.F.R. §54.400(e).

[4] NTTA Comments, p. 9.

> the only mechanism by which the Commission can continue to encourage infrastructure investment, such as the transition to broadband-based services. Indian reservations are less populated than other communities, and, therefore, achieving economies of scale to justify infrastructure and technology improvements is not possible. Indian reservations are, therefore, the epitome of 'areas that would be unserved without such support or that depend on universal service support for the maintenance of existing broadband service.'[5]

NPM and NCAI also agree with NTTA that: "A tragic consequence of proposed measures to eliminate high-cost support, in the pursuit of efficiency, will be the elimination of small carriers from rural markets. This will reverse service and network gains in very hard to reach markets."[6] For these reasons, NPM and NCAI advocate a continued exemption for Indian Country.

III. REFORM OF USF MUST RECOGNIZE TRIBAL SOVEREIGNTY

Notwithstanding the Commission's recognition of the sovereign status of Tribes in the National Broadband Plan, and the need for government-to-government interaction, the administration and implementation of the Universal Service Fund remains out of sync with these key principles. Many Tribes continue to be frustrated by the fact that, as currently administered, the Universal Service Fund circumvents tribal communities and uses the states to implement key aspects of the program. Tribes, not states, are the proper authority to ensure that telecommunications services are delivered to Tribal Lands. NPM and NCAI support NTTA's statement that: "The heart of all tribal assertions of sovereignty is the separation of tribes from the jurisdictional rule or control of states. The Commission should directly administer the funds to tribes and should consult with tribal governments on the implications of the Universal Service proposals being considered by

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[5] Cheyenne Comments, p. 9.

[6] NTTA Comments, p. 6.

the Commission. This direct administration of funds and consultation process would strengthen the sovereign standing of tribal governments before the Commission."[7] Similarly, NPM and NCAI understand and support the efforts of the Navajo to have a greater say in the deployment of infrastructure and services on their Tribal Lands.

> The Navajo Nation government, and NNTRC in particular, have long been frustrated by their lack of control over the delivery of telecommunications services (including broadband) within the boundaries of the Navajo Nation. While we recognize the critical importance of USF program in general, and the High Cost and Lifeline/Link-Up programs in particular, we also recognize that reform is necessary. Consistent with Federal policy and the recommendations contained in the NBP, this reform must include the recognition that Tribes have a "place at the table" in the decisions that affect tribal lands.[8]

Finally, NPM and NCAI agree with basis of the comments on this issue submitted by Cheyenne. "Rather than dictate that telecommunications and data services providers must switch to broadband-based services, the Commission should engage in government-to-government consultations with Indian tribes to determinate the appropriate technology to serve individual Indian reservations and tribal populations, and also ensure that the proper funding assistance remains available to tribal telecommunications services providers."[9]

NTTA's Comments are in accord with those of Cheyenne, but also ask the FCC to overrule any Joint Board decision that fails to respect the sovereignty of any Tribes involved.[10] To this end, NPM and NCAI again call on the Commission to urge Congress to amend the Communications Act to establish a Tribal Seat on the USF Joint Board.[11]

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[7] NTTA Comments, p. 14.

[8] NNTRC Comments, pp 6 - 7.

[9] Cheyenne Comments, p. 7.

[10] NTTA Comments, pp. 12-13. "In the NPRM ... the Commission has given significant recognition to the unique status of and barriers for tribal communities. However, historically Tribes and Native governments have been precluded from State Joint Board policy deliberations.

IV. Create a Tribal Broadband Fund

NPM and NCAI's position on the NBP recommendation to establish a Tribal Broadband Fund is mirrored in Cheyenne River's comments.

> The establishment of a Tribal Broadband Fund that would provide high-cost support to providers of broadband-based services on Indian reservations and Indian country, Alaska Native villages and corporations, and Native Hawaiian lands would accomplish the Commission's goal of improving penetration rates in Indian country by ensuring the subsidization of telecommunications and data services for Indian, Alaska Native and Native Hawaiian people. The Tribal Broadband Fund would be carved out of the current USF monies and would be dedicated to assisting in the provision of tribal telecommunications and data services. This fund could be increased each year to match increases in the cost of investment in technology improvements, without depriving those providers who serve Indian country the assistance they need, since there is "no private sector business case" incentive in much of Indian country. Tribal telecommunications and data services providers are a small proportion of the total number of telecommunications and data services providers countrywide. Thus, setting aside a Tribal Broadband Fund would not be detrimental to the Commission's overall effort to cut costs in USF and high-cost support, and would be consistent with the Commission's stated goal to improve the penetration rates and the provision of telecommunications and data services in Indian country.[12]

The Comments of Sandwich Isles and Mescalero Apache Telecom Inc. ("Mescalero") echo this great need.

> A new universal service program, i.e. a Tribal Broadband Fund ("TBF"), should be implemented by the FCC to encourage broadband deployment on Tribal lands. The National Broadband Plan clearly summarizes the many

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This highlights the separation in regulatory stature and problem solving between Tribal and Native governments and state regulatory bodies. For example, in recommendations by the Joint Board, its recommendations are suffused with proposals to strengthen the role of state governments in the administration and distribution of federal universal service funds. However, the Joint Board neglects to discuss tribal sovereignty and tribal authority over their land and infrastructure services. The Commission must sufficiently modify the Joint Board's Recommended Decisions to preserve tribal governments' authority and the unique legal relationship between the Commission and tribal governments by excluding tribal communities from the proposed Universal Service funding policy."

[11] *See* National Broadband Plan, p. 146.

[12] Cheyenne Comments, p. 10.

benefits, including economic development, that will accrue to communities as a result of broadband services becoming readily available throughout America. The Native American groups, including native Hawaiians, have historically been significantly challenged by the federal government's "exile policies," supposedly aimed at resettling these groups on Tribal lands with the ability to sustain them culturally and economically.[13]

V. Tribes Need Access to Spectrum

Tribes must be provided with access to spectrum wherever possible. For example, as NTTA proposes, "The FCC should impose a moratorium on proprietary licensing for spectrum on Native lands and promote public broadband networks in Native communities for public, public safety and governmental use either permanently or on a pilot basis. If the FCC rejects an open spectrum use for Native communities, it should provide a tribal preference for tribal areas for proprietary licensing."[14] NPM and NCAI also support expansion of the Tribal Priority established for FM broadcasting[15] to other spectrum licensing. The Commission must fully assess spectrum use in Indian Country and reclaim spectrum not adequately used to provide telecommunications services to Tribal Lands. Once recaptured, such spectrum could be reallocated through the use of a Tribal Priority, assuring that it will end up in the hands of a party more concerned with service to Tribes, rather than bottom line profits.[16]

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[13] Mescalero Comments, p. 12.

[14] NTTA Comments, p. 30.

[15] *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, First Report and Order and Further Notice of Proposed Rule Making*, FCC 10-24 (February 3, 2010).

[16] *See* Cheyenne Comments, p. 5. "Rather, tribal telecommunications service providers serve the Indian reservation communities because tribal governments have determined that the utility is necessary for the health, safety and economic welfare of tribal members, and other providers do not serve the generally remote areas where reservations lie. By definition, Indian reservations do not have sufficient numbers of customers in order to achieve economies of scale that would justify the expenditure of funds for infrastructure build-out. USF and high-cost support, therefore, have been critically important to the provision of telecommunications services in Indian country.

VI. CONCLUSION

Those who struggle to provide service to Native Americans, including NTTA, Cheyenne and Mescalero, support many of the propositions set forth in the Joint Comments of NPM and NCAI. Their added voices make clear that as the FCC contemplates a Connect America Fund, it must ensure that such a fund benefits all Americans, and does not further deepen the Digital Divide. By empowering Tribes, bringing them into the process, and acknowledging both their sovereignty and jurisdictional authority to regulate telecommunications services within their borders, the Commission can go a long way toward ensuring that the divide is rapidly and fairly closed.

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August 11, 2010

Any changes to those funds will have an impact on Indian country telecommunications services."