

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

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

To: The Commission

**JOINT COMMENTS OF NATIVE PUBLIC MEDIA AND  
THE NATIONAL CONGRESS OF AMERICAN INDIANS  
TO SECOND FURTHER NOTICE OF PROPOSED RULEMAKING**

Native Public Media (“NPM”) and the National Congress of American Indians (“NCAI”) submit these Comments in response to the *Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making* (“*Second FNPRM*”) in the above-referenced proceeding.<sup>1</sup> In support of these Comments, NPM and NCAI submit:

**I. INTRODUCTION**

NPM and NCAI have been active participants in this proceeding since its inception. The Native Nations Priority<sup>2</sup> (the “Priority”) is a critical step to rectifying centuries of neglect and abuse to Native Americans, and could serve as a blueprint for similar policy changes across all communications services under the jurisdiction of the FCC. The Native Nations Priority is rooted in a strong foundation of constitutional and statutory law recognizing Tribes as sovereign governments and affirming the responsibility of those Tribes to advance the needs of their

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<sup>1</sup> *In the Matter of Policies to Promote Rural Radio Service, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making* (“*Second FNPRM*”), FCC 11-28, released March 3, 2011. The *Second FNPRM* appeared in the Federal Register on March 16, 2011. 76 Fed. Reg. 14632 (March 16, 2011).

<sup>2</sup> It has been suggested that rather than use the term “Tribal Priority,” the FCC should use the term “Native Nations Priority,” since the Priority applies to all Federally recognized Native American Tribes, plus Alaska and Hawaiian native peoples. NPM and NCAI will henceforth use the term Native Nations Priority to describe the Priority established in this proceeding.

members, including “maintaining and sustaining their sacred histories, languages, and traditions.”<sup>3</sup> The Native Nations Priority also furthers the statutory goal of distributing radio service fairly, efficiently and equitably, pursuant to Section 307(b). Efforts to expand Tribal ownership of radio stations serving Tribal communities comports with this mandate as it operates to distribute radio service fairly and equitably, especially among those communities that are currently least served by radio tailored to their needs and interests.<sup>4</sup>

As NPM and NCAI have pointed out previously, the “two-step” process of allocating a commercial channel and then auctioning off that allocation does not further the goals of the Native Nations Priority. As the *FNPRM* in this proceeding points out: “tribal applicants applying the priority to add an allotment to the Table of FM Allotments might still lose at auction.”<sup>5</sup> Although NPM and NCAI had proposed an enhanced Tribal Bidding Credit to ameliorate this potential problem, NPM and NCAI also further pointed out that Tribal bidding credits in other telecommunications services have never been successfully used.<sup>6</sup> In the *FNPRM* the FCC for the first time suggests that applicants for a channel that was allocated pursuant to the Native Nations Priority be required to demonstrate on the short-form application that they would qualify for the Priority in order to proceed to auction.<sup>7</sup>

## **II. NPM AND NCAI SUPPORT THE “THRESHOLD QUALIFICATION” REQUIREMENT FOR APPLICANTS FOR COMMERCIAL CHANNELS ALLOCATED PURSUANT TO THE NATIVE NATIONS PRIORITY**

The *Second FNPRM* proposes to minimize the possibility that a Tribe would expend the effort and expense to seek and achieve an allocation of a new commercial FM channel pursuant

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<sup>3</sup> *First R&O*, 25 FCC Rcd at 1587-88.

<sup>4</sup> *Second FNPRM*, ¶ 3.

<sup>5</sup> *FNPRM*, ¶ 64.

<sup>6</sup> *See, Second FNPRM*, ¶ 60.

<sup>7</sup> *Id.* at ¶ 62.

to the Native Nations Priority, only to lose in a bidding war to another commercial entity without any Tribal ties.<sup>8</sup> Instead, in order for an applicant to be in a position to bid at auction, it must demonstrate that it would have qualified for the Priority at the allocation stage, whether or not it had actually been the entity proposing the new allocation (the “Threshold Qualification”).<sup>9</sup> NPM and NCAI support this proposal.

**A. Use of Threshold Qualifications Would Further the Goal of the Native Nations Priority**

The bedrock goal of the Native Nations Priority is to recognize the political status of Tribes as sovereign governments, and to establish procedures whereby Tribes would be in a position to deliver much-needed service to their people through new broadcast facilities. By implementing a threshold qualification during the application filing window, the Commission would promote fair and equitable distribution of radio services while simultaneously protecting its commitment to work on a government-to-government basis with Tribal entities. This would be furthered by ensuring that where an allocation was made initially pursuant to a Priority, an entity not qualifying for such priority would not be able to usurp a broadcast service opportunity from a Tribal entity simply because it had better financial resources and could outbid a Tribal entity. Requiring bidders for a commercial station that was allocated pursuant to the Native Nations Priority to qualify for such priority makes logical sense and furthers the goals of the Native Nations Priority.

**B. Use of Threshold Qualifications Would Not Be Tantamount to a “Pioneer’s Preference”**

As the *Second FNPRM* points out, requiring such a Threshold Qualification would not be tantamount to a “pioneer’s preference” which would attach to the actual entity who proposed the

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<sup>8</sup> *Second FNPRM*, ¶ 62.

<sup>9</sup> *Id.*

allocation.<sup>10</sup> It would not reward only the applicant who had proposed the allocation, as was rejected by the Commission in 1998. It instead would apply to any applicants that could qualify for the Native Nations Priority for that particular allocation.<sup>11</sup> NPM and NCAI can foresee instances whereby multiple Tribes with adjacent reservations lands would qualify for the Native Nations Priority for a particular allocation. In such a situation, whatever the end result of bidding (or settlement, as discussed below), the allocation would nevertheless ultimately go to an entity that would qualify for the Priority. The goal of the Native Nations Priority would still be furthered.

### **C. Settlements Between Qualifying Tribal Applicants Should be Encouraged**

The *Second FNPRM* also asks whether the Commission should adopt an exception to Section 1.2105(c)<sup>12</sup> of the FCC's rules to allow mutually exclusive applications to remove the "MX" through an engineering solution or settlement.<sup>13</sup> Generally, Section 1.2105(c) prohibits applicants for licenses in the same geographic area from communicating or collaborating in any manner or negotiating settlement agreements. NPM and NCAI support the proposal to adopt such an exception as it promotes Tribal cooperation resulting in additional services to Tribal members. Further, given the unique nature of the government-to-government relationship between Tribes and the FCC, the FCC should encourage and facilitate discussions between qualifying applicants on ways that a settlement could be reached, including dropping in a second

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<sup>10</sup> *Id.* at ¶ 64.

<sup>11</sup> The FCC should make clear that the entity would qualify for the Native Nations Priority for the allocation it is filing the application for. For example, a Tribe located on the East Coast should not meet the Threshold Qualification requirement for a new FM channel allocated in California.

<sup>12</sup> 47 C.F.R. § 1.2105(c).

<sup>13</sup> *Second FNPRM*, ¶ 64.

(or third) channel to accommodate all qualifying Tribes, or the use of shared-time arrangements between two different qualifying Tribes.

### **III. OTHER ISSUES RAISED IN THE *SECOND FNPRM***

The Commission seeks comment on several additional issues related to the implementation of the Native Nations Priority, as discussed below.

#### **A. The FCC Should Not Adopt Policies That Would Allow a Channel Allocated Pursuant to the Native Nations Priority to Be Initially Licensed to a Non-Tribal Entity**

At paragraph 65 of the *Second FNPRM*, the Commission poses two questions related to what it should do if an allocation is made pursuant to the Native Nations Priority, but a qualified Tribal entity does not come forward and file an application for the allotment in a filing window.<sup>14</sup> First, the Commission asks whether “the Commission should permit non-Tribal applicants to seek construction permits through the auctions process for allotments for which potential Tribal applicants have not expressed an interest.” Second, the Commission asks “[i]n the event no applicant meets the threshold qualifications for the Tribal allotment in a filing window . . . whether the Commission should routinely include such allotments in subsequent windows.”

NPM and NCAI disagree with both of these propositions, as discussed below. To counter centuries of neglect and outright abuse to Native Americans, the FCC should not open a window of opportunity for Indian Country, and then slam it shut almost immediately if Tribes aren’t “shovel ready” to apply for and then build radio facilities on Tribal lands immediately. NPM and NCAI submit that it is vital that once an allocation is made pursuant to the Native Nations

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<sup>14</sup> *Id.* at ¶ 65.

Priority, that allocation should be reserved for initial licensing only to entities meeting the threshold for qualifying for the Priority.

First, given the paucity of experience, expertise, and capital in Indian Country, it is going to take many tribes several years, if not longer, to climb the learning curve on how to apply for, and then build a broadcast facility. Native Public Media (NPM) was founded in 2004 by leaders in Native public radio who saw the need for one central voice, leadership, and the opportunity for greatly expanded media access and participation among Native Americans. NPM works with Tribes and stations in building and advancing Native access to, ownership of, and participation in media. Since its inception, NPM has focused on using media (including radio and new media) as a tool for advancing economic development, preserving language and culture, promoting economic development, public safety, health and education, and facilitating engagement by Native Americans with the issues that affect Tribes and communities. In 2007, NPM worked with and assisted tribes in obtaining construction permits when the FCC opened a filing window for non-commercial educational radio stations, the first such filing opportunity in more than seven years. Thirty-eight tribes responded by filing 51 applications.

NPM knows first hand the unique problems encountered by Tribes in licensing and building a new broadcast facility on Tribal lands. Land use issues are sometimes very difficult for Tribes. In addition to meeting Tribal legitimate demands for preservation of sacred sites, tribal applicants must also deal with the cumbersome and extremely slow land use policies of the Bureau of Indian Affairs. Just locating a tower on Tribal lands becomes instantly more than twice as expensive and twice as time consuming than on adjacent non-tribal lands. Further, due to the rural locales of many tribal lands, securing engineers can be extremely difficult. As the conversion to digital platforms increases, new engineers are

focused on digital technology and finding analog radio engineers is becoming increasingly problematic as fewer and fewer engineers serve stations. It is not unusual to have one engineer serving upwards of 10 stations in various remote locations. Another challenge are building “seasons” which are often far shorter than for the rest of America. In some places, Tribes can count on less than six months a year to build because of poor roads and weather. Additionally, Construction takes longer in rural areas because of logistics. If a bolt breaks when you’re six hours from the nearest highway, there is no local Home Depot. Building is also far more expensive in these remote areas. For the same reason that it is expensive to deliver telecommunications to Indian country, it is equally expensive to build facilities for broadcast stations in Indian Country. This adds up to a much more expensive build-out than in non-Indian Country.

Access to capital for Tribes to construct broadcast facilities is also acute in Indian Country. In the current economic climate, access to capital is almost impossible for many Tribal entities. Federal funding makes up a larger share of rural tribal station budgets because they don’t have large population bases from which to raise funds and are challenged by economic conditions including higher unemployment rates and joblessness. This problem becomes quite clear when examining many of the Tribal facilities proposed and awarded in the 2007 NCE filing window. Many of those facilities planned to obtain funds through NTIA’s PTFP program. These entities are now facing the loss of those construction permits because those funding sources were no longer available. Raising funding for this more expensive construction can take longer.<sup>15</sup>

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<sup>15</sup> Often PTFP and CPB funding is the only or major source of funding. PTFP is the only source of construction funding and CPB funding can be up to 100% of a station’s budget to purchase programming

To suggest that the Native Nations Priority should somehow devolve into a “land rush,” where Tribes will have only a short time to participate or forever forfeit the opportunity to obtain a license is antithetical to the goals of the Native Nations Priority. The sovereign rights of Tribes over what happens on their reservations (including what broadcast facilities are licensed) demand that the Commission not adopt a “use it or lose it” approach to the Native Nations Priority. Instead, once an allocation has been made pursuant to the Priority, it should remain reserved for an applicant eligible to claim that Priority.

Second, NPM and NCAI can envision significant “gaming” of the system if commercial entities know that an allocation would be up for grabs if no qualified entity applied for it. There could be significant pressure put on Tribes by commercial entities to not apply for a newly allocated channel, in exchange for economic reward. A whole cottage industry and secondary market would be spawned if commercial interests understood that a channel could be allocated pursuant to the Native Nations Priority, and then the qualifying entity proposing the allocation simply disappeared at the application stage, freeing the allocation up to any commercial entity willing to outbid others. This could especially become a problem where the new channel is in close proximity to an urban area but still meets the 50-percent Tribal lands service requirement. The Commission cannot allow this to happen.

#### **B. The Role of Tribal Bidding Credits**

In the event that the Commission does not adopt a threshold qualifications approach, it should, nevertheless, implement a substantial Tribal Bidding Credit for all new commercial radio channels as NPM and NCAI previously suggested.

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and to operate the station. Tribal stations depend on CPB funding for between 50% to 100% of their station revenue.

As NPM and NCAI indicated in prior comments in this proceeding, neither are aware of even a single instance in which the New Entrant Bidding Credit (“NEBC”) has been used successfully by a Tribe or Tribal-controlled entity to win a commercial radio frequency in an auction. In all but the most rural and economically depressed areas, Tribes stand to be “outgunned” in the auction process by others who view the new allocation as an economic opportunity, not as a sovereign duty to provide services, including public safety and other information, to Tribal members.

NPM and NCAI therefore supported a separate, *and additive*, new Tribal Bidding Credit (TBC) of 35%. In cases where the Tribal applicant would also qualify for the NEBC, a NEBC of 25% should also be available, such that a total bidding credit of 60% would be available to new entrant Tribes. In instances where a Tribe or Tribal-controlled entity was seeking a second license to serve its members, only the 35% TBC should be available.

NPM and NCAI continue to believe that this maximum 60% bidding credit would go a long way to reverse the decades of neglect and generations of economic benefits that have gravitated into the pockets of entrenched media companies. Knowing that a 60% bidding credit is available to a Tribe, a non-Tribal applicant will have to seriously want the license to pay such a premium.<sup>16</sup> In the absence of adopting the Threshold Qualification standard discussed above, NPM and NCAI continues to believe that such a combination of bidding credits strikes the proper balance the Commission is seeking.

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<sup>16</sup> The participation of a Tribe in both the allocation and licensing of a new facility licensed to Tribal areas will also put any non-Tribal entities on notice that even if they are willing to pay such a premium for the license, the Tribe whose lands the allocation were intended to serve will be watching their performance closely to ensure that the station serves the Public Interest of the Tribe, not just some vague Federal Public Interest standard. Throw up a stick, and feed it with satellite-delivered programming having no relation to the needs of the Tribe, and face a challenge at license renewal.

#### **IV. CONCLUSION**

Any changes in communications access, infrastructure and deployment must take into consideration tribal sovereignty as Tribes actively engage in nation building by creating sustainable economic development, education, public safety and other vital community systems. When tribes are at the center of the planning and implementing process on Tribal lands, this contributes to achieving successful and enduring solutions to the deplorable and long-standing lack of communications technologies in Tribal communities nationwide.

NPM and NCAI supports the proposed Tribal Threshold Qualification. This qualification would ensure that, for commercial allocations subject to the two-step allocation and licensing process, a Native Nations Priority protects broadcast services at both the allocation and licensing stages. In the alternative, should the Commission decide not to adopt this qualification, NPM and NCAI respectfully recommend that the Commission adopt a Tribal Bidding Credit to enable Tribal entities to compete fairly with commercial entities during filing windows.

Respectfully submitted,

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