

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

REPLY COMMENTS OF GILA RIVER TELECOMMUNICATIONS, INC.

Gila River Telecommunications, Inc. (“GRTI”), by its attorneys, hereby submits these reply comments in the above-referenced proceeding¹ in which the Federal Communications Commission (“FCC” or “Commission”) seeks comment on procedures for increasing the ownership of radio stations by Tribes and Tribal-owned entities.² As described in detail herein, GRTI supports a number of FCC’s proposals, as well the proposals outlined in the joint comments filed by the Native Public Media (“NPM) and the National Congress of American Indians (“NCAI”) in the above-captioned proceeding (“NPM/NCAI Comments”).³

¹ Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, *Second Report and Order, First Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, 26 FCC Rcd 2556, FCC 11-28 (rel. Oct. 14, 2010) (“*Second NPRM*”).

² The term “Tribe” or “Tribal” as referenced herein means any Indian tribe, band, nation, pueblo, village or community which is acknowledged by the federal government to constitute a government-to-government relationship with the United States and eligible for the programs and services established by the United States for Indians. As used herein, “Tribal Lands” mean “reservations.” “Reservations” are defined as any federally recognized Indian tribe’s reservation, pueblo or colony.

³ Joint Comments of Native Public Media and The National Congress of American Indians to Second Further Notice of Proposed Rulemaking in MB Docket No. 09-52, RM 11528 (April 15, 2011) (“*NPM/NCAI Comments*”). NPM/NCAI is the only party other than GRTI to have filed comments in response to the FCC’s *Second NPRM*.

Initially, for the reasons set forth in GRTI's comments⁴ and the NPM/NCAI Comments (collectively referred to as "Tribal Radio Comments"), the FCC should not accept an application for a commercial FM channel allotted pursuant to the tribal priority established by the FCC (the "Tribal Allotment Priority")⁵ unless such applicant qualifies for a Tribal Allotment Priority for the allotted channel (the "Tribal Application Threshold Requirement"). The Tribal Allotment Priority would be a hollow right without a Tribal Application Threshold Requirement to accomplish the FCC's policy objective of fostering Tribal-ownership of radio stations serving Tribal Lands.

The FCC's Tribal Allotment Priority is an important tool for use during the FM channel allotment stage by Tribes and Tribal-owned entities to secure the allotment of a channel for a new FM station to serve Tribal Lands. Unfortunately, the Tribal Allotment Priority provides no assistance to Tribes or Tribal-controlled applicants during the FM application or auction stage. Given the two-step nature of the commercial FM licensing process, a Tribe or Tribal-controlled entity may successfully petition the FCC to allot a channel for a new commercial FM station by employing the Tribal Priority at the first stage, but then ultimately be outbid at the auction and not be granted a construction permit in the second stage. For this reason, and for the reasons set forth in the NPM/NCAI Comments, GRTI reiterates its support for the Tribal Application Threshold Requirement. Alternatively, in the event the FCC is unable to enact the Tribal Application Threshold Requirement, GRTI supports the creation of a separate and additive tribal

⁴ Comments of Gila River Telecommunications, Inc. to Second Further Notice of Proposed Rulemaking in MB Docket No. 09-52, RM 11528 (April 15, 2011) ("*GRTI Comments*").

⁵ The Tribal Allotment Priority is a Section 307(b) priority which extends only to (1) tribes; (2) tribal consortia; and (3) entities that are 51 percent or more owned or controlled by a tribe or tribes. The Tribal Allotment Priority applies during the allotment stage of commercial FM licensing proceedings and fits between the traditional Priority (1) and co-equal Priorities (2) and (3). See Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, *Notice of Proposed Rulemaking*, 24 FCC Rcd 5239, FCC 09-30, ¶¶3, 22. (rel. Apr. 20, 2009); see also *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, First Report and Order and Further Notice of Proposed Rule Making, 25 FCC Rcd 1583, 1584-85 (2010).

bidding credit as proposed by NPM/NCAI (“Tribal Bidding Credit”). As initially proposed by NPM/NCAI, a 35% Tribal Bidding Credit would be available to Tribes or Tribal-owned entities that participated in the allotment proceeding for the channel being auctioned. The Tribal Bidding Credit would be separate from the 25 percent new entrant bidding credit, for a total maximum bidding credit of 60 percent.

GRTI also supports NPM/NCAI’s proposal that the Commission adopt an exception to or policy for waiver of Section 1.2105 of the FCC’s rules⁶ to allow Tribal and Tribal-owned applicants to remove any “mutual exclusivity” through engineering solution or settlement. Section 1.2105(c) of the FCC’s rules generally prohibits mutual exclusive applicants for licenses in the same geographic area from discussing or negotiating settlement agreements.⁷ Creating an exception to or establishing a waiver policy of Section 1.2105(c) of the FCC’s rules for Tribes or Tribal-owned applicants would allow Tribes on adjacent Tribal Lands that file mutually exclusive applications (for a channel allotted pursuant to the Tribal Priority) to have an opportunity to resolve mutual exclusivity through engineering solutions or settlement rather than bid against each other at an FCC auction. This exception would encourage Tribes that apply for the same channel to work together to develop solutions that are mutually beneficial to all Tribal applicants. Such result may facilitate a “win-win” solution where the Tribes involved have the opportunity to work out a technical or business solution that will enable each to provide radio service to their Tribal communities, as opposed to a “win-lose” situation where only one Tribe will be able to secure the authorization through an FCC auction.

GRTI also supports NPM/NCAI’s position that the FCC should not adopt any rule or policy that would allow a FM channel allotted pursuant to the Tribal Allotment Priority to be

⁶ 47 C.F.R. §1.2105(c).

⁷ *Id.*

initially awarded to an applicant that is neither a Tribe nor Tribal-owned entity. In this proceeding, the Commission asks whether it should permit non-Tribal owned applicants to secure construction permits through the auction process for allotments for which Tribes or Tribal-owned applicants have not expressed an interest. The FCC also asks if no applicant meets the Tribal Application Threshold Requirement for the Tribal allotment in a filing window whether the Commission should include such allotments in subsequent windows.⁸ Once an allotment is made pursuant to a Tribal Allotment Priority, GRTI, like NPM/NCAI, urges the FCC to continue to reserve the Tribal-specified allocation for only those parties qualified under the Tribal Application Threshold Requirement. As NPM/NCAI points out, not all Tribes are “shovel ready” to apply for and build radio facilities on Tribal Lands.⁹ For many of reasons cited by NPM/NCAI, some Tribes may not be immediately ready to construct radio facilities (*e.g.*, lack of experience or expertise, difficulty securing engineers, access to capital, and land issues, etc.).¹⁰ For those Tribes, the FCC should not foreclose their opportunity to bring the benefits of Tribal-owned radio service to their community. Rather the FCC should preserve the allotment for Tribal applicants in order to permit those Tribes without “shovel ready” radio facilities the opportunity to build facilities to serve the Tribal communities—which were specifically intended to be served by the FCC’s initial FM allotment.

In the *Second NPRM*, the FCC broadly asks parties to comment on potential barriers that may discourage Tribal participation in the radio auctions and licensing process.¹¹ While some Tribes may not be “shovel ready” to build FM radio stations, other Tribes and Tribal-controlled

⁸ *Second NPRM* at ¶65.

⁹ *NPM/NCAI Comments* at pgs. 5-8.

¹⁰ *See id.*

¹¹ *Second NPRM* at ¶65.

entities, like GRTI, are prepared, and indeed eager, to construct radio facilities to serve the needs of their Tribal communities. Even prepared Tribes and Tribal-owned applicants face two often insurmountable hurdles in the FCC's radio licensing process – lack of available AM and FM spectrum and lengthy delays in processing of the required filings by the FCC. GRTI has commented on the lack of available FM spectrum in its initial comments in this proceeding.¹² With respect to the processing delays for new FM stations, for example, once a Tribal applicant petitions the FCC for a new FM channel allocation, it typically takes a minimum of one year before the FCC acts on the petition.¹³ Once the FCC grants the allocation, the applicant cannot immediately apply for a construction permit for the newly created channel allocation. Rather, the interested applicant must wait months and sometimes years for the FCC to open a new FM filing window so that it can apply for a construction permit for the newly created channel. Thus, the time period for ultimately awarding a construction permit to the Tribe or Tribal-owned applicant is not tied to when the channel is allocated but largely dependent on when the FCC decides to announce a filing window for presently vacant new FM allotments, including the new

¹² See *GRTI Comments* at 6-7.

¹³ Often there is a significant lag between the time the applicant files a petition for a new FM channel and the time the FCC places such petition on public notice. When the comment and reply comment periods end, it can take months for the FCC to make a final determination on whether to grant the FM allocation. For example, in September 2009, Educational Media Foundation proposed allocating Channels 224C2 and 232C2 at Fairbanks, Alaska. File Nos. BNPH-20090924ABX and BNPH-20090924ABV, respectively. The FCC did not release a public notice announcing the petition for rulemaking until the following May (nearly 8 months after the petitioner proposed the new FM station). See Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Fairbanks, Alaska), *Notice of Proposed Rulemaking*, MB Docket No. 10-81, RM-11600, 25 FCC Rcd 4666 (rel. May 3, 2010). The reply comment period expired in July 2010, and it was not until November 2010 that the FCC granted the application for a new FM allocation. See Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Fairbanks, Alaska), *Notice of Proposed Rulemaking*, MB Docket No. 10-81, RM-11600, 25 FCC Rcd 16102 (rel. Nov. 19, 2010). In this example, more than a year's time went by from when the petitioner proposed the new FM allotment and the time the FCC granted the new allocation. Consider too, that this represents the time period for just the initial FM allocation phase since the FCC did not open an application filing window for the Fairbanks FM station at the time the FCC channel was allotted. It takes months and sometimes years after the FCC awards the FM allocation for the FCC to open a FM filing window so that interested applicants may apply for a construction permit for the allocated FM station. In fact, to date the FCC has not established an FM filing window for the Fairbanks allotment.

FM channel allotted to the underserved Tribal community. Given the FCC's current processing procedures for new FM stations and the dearth of radio stations owned and controlled by Tribes and Tribal-owned entities, it will be many years before Tribal communities ever realize any tangible benefits generated from the policies proposed in this proceeding. GRTI submits that these existing FCC procedural obstacles to implementation of the policy objectives proposed herein should be addressed in this proceeding.

Given compelling public policy reasons for increasing Tribal-owned radio stations serving Tribal Lands, the FCC should consider expediting the processing of petitions for rulemaking to allocate a new FM channel to serve Tribal Lands, as well as place applications for new AM, full power FM and low power FM stations by Tribes or Tribal-owned applicants on a separate fast track.¹⁴ Thus, GRTI urges the FCC to establish an "expedited processing" system for applicants who meet the Tribal Application Threshold Qualification and to "fast-track" such applications for new FM and AM radio stations, which propose service to Tribal Lands.¹⁵ Such "expedited" and "fast track" processing and consideration would occur at all stages of the FM and AM licensing process. Under this proposed scenario, a Tribal applicant could begin building FM or AM radio facilities within months of initially proposing such facilities, as opposed to the years that it can sometimes take today. Thus, in addition to the creation of a Tribal Threshold

¹⁴ Given the scarcity of Tribal-owned radio stations, the FCC should also consider opening separate filing windows for AM and Low Power FM radio station applications targeted to stations serving Tribal Lands.

¹⁵ The following illustration demonstrates how "expedited consideration" could work in the Tribal radio licensing context. For example, once a qualified Tribal applicant petitions the FCC for a new channel allotment, the FCC could start a "30 day stop-clock" for placing such application on public notice. After the required comment and reply-comment time periods expire, the FCC could act on the Tribal applicant's petition within "60 days" of the reply comment filing deadline. Once the FCC acts on the Tribal applicant's petition for a new FM allocation, the FCC could open a separate filing window for the new FM allocation within 30 days of such grant. The filing window would be specific to that particular Tribal allocation and would be open to all qualified applicants with preference given to those applicants satisfying the Tribal Applicant Threshold Requirement.

Application Requirement, the FCC should consider implementing “fast-track” consideration of Tribal FM and AM radio applications.¹⁶

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For the reasons set forth herein, GRTI supports the creation of a Tribal Application Threshold Requirement, an exception to or waiver to Section 1.1205(c) of the FCC’s rules as it applies to Tribal applicants, and expedited consideration and processing of proposals for new FM channels and applications for new AM, FM and low power FM radio stations by Tribes or Tribal-owned entities proposing to serve Tribal Lands. As described above, GTRI opposes the proposal to allow FM channels allotted pursuant to the Tribal Allotment Priority to be initially licensed to a non-Tribal entity.

Respectfully Submitted,

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¹⁶ Expedited consideration of applications for new radio service to Tribal Lands would be based on the recognition, consistent with the FCC’s statutory mandate, of the sovereign rights and responsibilities of federally-recognized Tribes. *See* Statement of Policy on Establish a Government-to-Government Relationship with Indian Tribes, *Policy Statement*, 16 FCC Rcd 4078 (2000). Consistent with the Supreme Court precedent, the proposed “fast-track” consideration of radio applications would be conferred upon Tribes and their members “not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the [Bureau of Indian Affairs] in a unique fashion.” *Morton v. Mancari*, 417 U.S. 535, 554 (1974). Indeed, the recognition of Tribes, Tribal members and their instrumentalities, including Tribally-owned businesses, as politically classified for special rights and special treatment dates back to the Constitution and the power of the Federal government to regulate Commerce between the United States and the various Tribes. U.S. Const. Art. I, § 8, cl. 3. Expedited treatment of Tribal radio applications not only advances the Commission’s relationship with, and responsibility to, Tribes but also furthers the Commission’s policy of promoting Tribal self-sufficiency and economic development.