

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

In the Matter of)
)
Improving Communication Services for) WT Docket No. 11-40
Native Nations by Promoting Greater)
Utilization of Spectrum Over Tribal)
Lands)

To: The Commission

**JOINT REPLY COMMENTS OF THE NAVAJO NATION TELECOMMUNICATIONS
REGULATORY COMMISSION**

The Navajo Nation Telecommunications Regulatory Commission (“NNTRC”) respectfully submits these Reply Comments in response to the Notice of Proposed Rulemaking in WT Docket 11-40 (“*Tribal Spectrum NPRM*”). In support of these Reply Comments, NNTRC respectfully submits:

I. INTRODUCTION

The Navajo Nation consists of 17 million acres (26,111 square miles) in portions of three states (Arizona, New Mexico, and Utah). As the chart below indicates, it is comparable in size to West Virginia, which is considered a rural state, ranked 29th in population density. The Navajo Nation, were it a state, would rank 48th in size; only Montana (6.5 persons per square mile), Wyoming (5.4) and Alaska (1.2) are more rural.¹

¹ See http://en.wikipedia.org/wiki/List_of_U.S._states_by_population_density.

<i>Table 1: Geographic and Pop. Comparison</i>	Navajo Nation	West Virginia
Size (miles squared)	26,111	24,231
Population (in area)	~180,000	1,818,470
Pop per square mile	6.9	75

Unemployment consistently hovers at 40 percent on the Navajo Nation, and over 50 percent of the population exists below the poverty line, with per capita incomes just over \$7,000 per year.¹ The FCC’s Broadband Map data for the Navajo Nation finds that 40.2 percent of the Navajo population has access to no wireless service providers while the national average with no wireless access is 1.5 percent.² Wireless broadband is available to 53.4% the Navajo population while the national average availability is 96.9 percent. The Navajo (Diné) people clearly reside on the far side of the “digital divide.”

The NNTRC was established pursuant to Navajo Nation Council Resolution ACMA-36-84 in order to regulate all matters related to telecommunications on the Navajo Nation. Telecommunications is defined broadly under the Navajo Nation Code to include broadband and “any transmission, emission or reception (with retransmission or dissemination) of signs, signals, writings, images, and sounds of intelligence of any nature by wire, radio, light, electricity or other electromagnetic spectrum.”³

The NNTRC is committed to the protection of the public welfare, regulation and the security of the Navajo Nation and its people with regard to telecommunications. Its purpose is to service, develop regulation and to exercise the Navajo Nation’s inherent governmental authority

¹ See <http://www.navajobusinessdevelopment.com/information/navajo-nation-demographics.html>.

² <http://www.broadbandmap.gov/summarize/native-nations/navajo-nation>.

³ 21 N.N.C. § 503 (V).

over its internal affairs as authorized by the Navajo Nation Council pursuant to NNTRC's Plan of Operation and the Navajo Telecommunications Regulatory Act.⁴

The NNTRC is authorized to establish methods, procedures, schedules, permits, respective fees and reasonable rates of compensation for telecommunication services on the Navajo Nation. The NNTRC is further authorized to establish hearing procedures, investigation procedures and impose fines and other sanctions according to established schedules for violations of all telecommunications law, regulations, rules, orders, and policies on the Navajo Nation. The NNTRC works in collaboration with states, including their Public Regulatory Commissions, to discuss their roles, responsibilities, and respective jurisdictions.

The Telecommunications Regulatory Commission is specifically authorized, pursuant to the Navajo Telecommunications Regulatory Act, to act as the intermediary agency between the Navajo Nation and the Federal Communications Commission, including representing the Navajo Nation in proceedings before the Commission, intervening on behalf of the Navajo Nation on matters pending before the Commission, and filing comments in rule making proceedings.

II. A VALID MAP OF SPECTRUM USAGE IS NECESSARY

The *Tribal Spectrum NPRM* notes that the coverage data presented are at best "estimates" of spectrum usage.⁵ In a study released April 25th, 2011, entitled "Verification Analysis of the National Broadband Map," IDinsight produced data coverage maps for the State of Arizona, in order to compare NTIA's National Broadband Map and data accumulated by IDInsight's "Scout" software.⁶ Those maps show huge areas of the Navajo Nation empty – meaning that there is no

⁴ Codified at 2 N.N.C. §§ 3451 -55; 21 N.N.C. §§ 501-529

⁵ *Tribal Spectrum NPRM*, n. 6 ("These coverage figures are Commission staff estimates based on American Roamer database for 3G technologies").

⁶ The study is available for download at:
http://idinsight.com/documents/Verification_Analysis_of_National_Broadband_map.pdf.

data as to service availability. NNTRC has been frustrated over the years of not even knowing where service is actually available on Navajo. Moreover, it is often difficult to tell when service is “available” from a technical coverage standpoint, and when it is actually marketed to the Navajo people. If carriers don’t market the service to our people with retail points of presence on the Navajo Nation and with marketing materials in the Navajo language, our people are unable to subscribe to the service, thus effectively making us “unserved.”

Prior to any significant rule changes, therefore, NNTRC agrees with the request made by Native Public Media (NPM) and the National Congress of American Indians (NCAI) that the FCC undertake immediately a consultation with Tribes in order to assess and map the actual availability of telecommunications services in Indian Country. This consultation should include:

- a) Making all of the FCC’s raw data (such as data collected on the FCC Form 477) available to Tribes with FCC assistance in interpreting those data;
- b) Working with Tribes to determine actual technical availability of service (coverage); and
- c) Working with Tribes to determine instances of “marketing redlining” – where a carrier covers a reservation, but simply ignores it by not marketing to a Tribe, or putting burdens on Native Americans by failing to have a physical retail point-of-presence on the reservation.

III. NNTRC SUPPORTS MANY OF THE PROPOSAL THE *TRIBAL SPECTRUM NPRM*

A. The FCC Should Extend the Current Tribal Licensing Priority to As Many Wireless Radio Services as Possible

NNTRC agrees with the efforts of NPM and NCAI to extend the Tribal Priority beyond AM and FM broadcasting to other wireless services. The Commission proposes at paragraphs 35-40 of the *Tribal Spectrum NPRM* to establish a Tribal Priority for unassigned wireless radio services licenses.⁷ The same policy grounds, and constitutional support, apply to services

⁷ *Tribal Spectrum NPRM*, ¶¶ 35-40.

beyond broadcast radio.⁸ The Tribal Priority, along with other possible rule changes (including the “build-or-divest” policy discussed below), are vital for bringing critically needed services to Indian Country.⁹

B. The FCC Should Establish a “Build-Or-Divest” Process for Spectrum Use in Indian Country

NNTRC supports the “build-or-divest” proposal in the *Tribal Spectrum NPRM*.¹⁰ As noted in the *Tribal Spectrum NPRM*, the traditional economic engine of telecommunications rollout – residential customers – just doesn’t work in Indian Country. Either the potential subscribers per mile were too low for rural Tribes, or the expected rate of return per subscriber was too low to justify further deployment based on their economic models. Yet because of buildout requirements in many services that consider a system built, and a service area served, based on a percentage of the overall geographic service area, carriers have been able to effectively “redline” out Tribal lands, yet still maintain control of the spectrum within those Tribal lands, without any further requirement to offer service into Indian Country.

⁸ See *Rural Radio Report and Order*, ¶ 12.

“As the D.C. Circuit explained in 2003, the Supreme Court’s decisions leave no doubt that federal government action directed at Indian tribes, ‘although relating to Indians as such, is not based on impermissible racial classifications.’ As set forth above, the Tribal Priority established herein will further our Section 307(b) mandate and other Commission policies by enabling Indian tribal governments to provide radio service tailored to the needs and interests of their local communities. Furthermore, as discussed above, we find that Indian tribal governments are uniquely situated to provide such service to tribal lands. Accordingly, we believe that the Tribal Priority is consistent with the Equal Protection Clause of the Fifth Amendment.” (Citations omitted).

⁹ NNTRC also agrees with NPM and NCAI that a special Tribal window should be opened for all new wireless spectrum the FCC intends to license. Doing so would provide Tribes with the opportunity to apply for spectrum that would specifically serve Tribal lands before other carriers had the opportunity to buy up large swaths of spectrum which might or might not ever deliver service to Indian Country. To be successful, however, Tribes must be given sufficient time to design systems and prepare applications.

¹⁰ *Tribal Spectrum NPRM*, ¶¶ 53-63.

If carriers choose not to serve Tribal lands, then they should be required to return that geographic portion of their license so that another carrier (either a Tribe, a Tribally-controlled entity, or even a third-party carrier) can have an opportunity to provide service in those areas.¹¹ NNTRC agrees with NPM and NCAI that the FCC should adopt a process whereby Tribes can force carriers to either provide service to the Tribe, or relinquish that geographic area of their license, and allow a Tribal Entity to provide such service on the reservation. The FCC should make clear in any rule change that an entity such as the NNTRC, which is empowered by the Navajo Tribal government to regulate telecommunications services within the borders of the Navajo Nation, would be the proper entity to file the Notice of Intent. If the spectrum can be reclaimed for the geographic area of the Tribal Lands, it can either be licensed to a Tribal Entity qualifying for the Tribal Priority discussed above, or can be opened up for bidding to outside carriers willing to commit to meet the buildout requirements on the Tribal Lands. Either scenario is far better than the current scheme in which carriers can ignore Tribal Lands while still maintaining vast geographic licenses for years at a time.¹²

Finally, the “build-or-divest” model should be applied to all licenses, not just new licenses issued going forward. For far too long carriers have ignored Indian Country without any risk of losing pieces of their geographic licenses. A Tribe should be allowed to file a Notice of Intent to proceed with a build-or-divest proceeding against any carrier who currently does not meet the buildout requirement for the Indian Lands under the Tribe’s sovereign authority.

¹¹ See Exhibit A, NCAI Resolution MKE-11-007 (calling for a “build-or-divest” approach to incumbent licensees).

¹² Similarly, NNTRC agrees with the proposal in paragraph 61 to allow a Tribe to enter into secondary market negotiations with a third-party carrier to provide service to the Tribal Lands subject to the build-or-divest proceeding.

C. The FCC Should Establish a Formal Negotiation Process to Promote the Use of Secondary Markets to Make Spectrum Available in Indian Country, But only in Conjunction with a Tribal Priority and Build-Or-Divest Mechanism

The *Tribal Spectrum NPRM* seeks comment on whether use of secondary market negotiations might speed deployment of services to Indian Country.¹³ NNTRC agrees with other commenters that the secondary markets currently do not function in a way that allows for Tribal participation.¹⁴ But without both the Tribal Priority and build-or-divest, there will continue to be little or no incentive for carriers to engage in secondary market negotiations, no matter what types of rules are written to require good faith negotiations. Without the risk that they could lose the spectrum unless they come to the table to negotiate in good faith, carriers have no incentive to lease their spectrum to Tribal Entities, at least not at a price that Tribes could afford to pay. Any rules adopted for secondary market negotiations must acknowledge the sovereignty of the Tribal government and its ability to regulate carriers providing service within its borders.

D. The Proposed “Tribal Lands Construction Safe Harbor” Must Include a Demonstration that the Service is being Marketed to the Tribal Lands

The *Tribal Spectrum NPRM* proposes to establish a “Tribal Lands Construction Safe Harbor” whereby any carrier providing service to 75 percent of the geographic areas of the Tribal Lands covered by the license.¹⁵ NNTRC supports this proposal, but as pointed out above, and in the Joint Reply Comments of NPM and NCAI, the service must not only be technically available, but the carrier must demonstrate that it actually markets the service to the Tribe and show that it has Tribal customers.

¹³ *Tribal Spectrum NPRM*, ¶ 41-43.

¹⁴ Southern California Tribal Chairmen’s Association, Ex Parte Letter, GN Docket Nos., 09-47, 09-51, 09-137, Feb. 9, 2011.

¹⁵ *Id.* at ¶¶ 64-67.

E. Eligibility Criteria

NNTRC agrees with the eligibility criteria set forth in the *Tribal Spectrum NPRM*.

NNTRC would note that the proposed definition of “Tribal Lands” set forth at paragraph 18 needs to include “checkboard” areas such as exist in the Navajo Eastern Agency in New Mexico.¹⁶ Similarly, establishing eligibility rules for the proposed changes similar to those adopted in the FM Tribal Priority also had the benefit of consistency.¹⁷

NNTRC believes that the Commission should extend the new rules to as many services as possible.¹⁸ Regardless of the regulatory scheme used to assign licenses to a particular service, the fundamental physics of spectrum use is the same. If a carrier has a license to use a particular frequency within the Navajo Nation, and does not offer service to Tribal Lands, the carrier should be subject to the proposed changes.

In terms of defining “unserved,” and “underserved,”¹⁹ NNTRC again urges the FCC to make sure that a service is ***actually available*** before declaring any land area as “served”. There is a huge difference between licensed service area, technical service area, and actual service area. Carriers have traditionally argued that since they are licensed to serve an area, it is served. The history of telecommunications on the Navajo Nation is replete with many instances where carriers will provide service to roads and highways that run through Navajo, but offer no service to Navajos themselves. Those areas are therefore technically served. But unless and until the carrier actually markets its service on Tribal Lands, their service isn’t actually available.

¹⁶ *Tribal Spectrum NPRM*, ¶¶ 68-74.

¹⁷ *Id.* at ¶ 23.

¹⁸ *Id.* at ¶ 19.

¹⁹ *Tribal Spectrum NPRM*, ¶¶ 28-31.

NNTRC supports the more stringent 85 percent test proposed at paragraph 30, rather than the far more lenient 65 percent test proposed in paragraph 28.²⁰ On the Navajo Nation, which is so vast, there are nonetheless population centers such that a carrier could meet the 65 percent test and still leave the vast majority of the Navajo Nation unserved. A stricter 85 percent coverage metric would require extension of service to more areas on Navajo.

V. CONCLUSION

NNTRC agrees that the *Tribal Spectrum NPRM* is a vital next step in correcting the errors in telecommunications policy as it has existed for nearly 80 years. The Navajo Nation is ready to participate fully in the information economy, but needs both the infrastructure and the regulatory clout to require carriers to provide service on the Navajo Nation comparable to that offered to the rest of the country. Only by creating mechanisms whereby tribal-centric deployment models can be used, and freeing up spectrum for such deployment, can the Digital Divide be narrowed.

Respectfully submitted,

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²⁰ Compare *Tribal Spectrum NPRM*, ¶ 28, with ¶ 30.