

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

In the Matter of)
)
Improving Communications Services for) CG Docket No. 11-41
Native Nations)
)
To: The Commission)

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

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Summary

Virtually all of the commenters in this proceeding recognize that access to broadband on Tribal lands lags far behind that in the rest of the country. There is also consensus that the Commission has the authority to help rectify the problem.

Consultation with Tribes is necessary in order to carry out any Commission initiatives in Indian Country. To be “meaningful,” that consultation must go beyond procedural opportunities extended to all interested parties and provide for direct negotiations between the Commission and affected Tribes before any federal undertaking is initiated. The federal government must adequately fund the Office of Native Affairs and Policy so that ONAP can carry out its role in consultations.

NPM and NCAI urge the Commission to adopt a broad definition of “Tribal lands” that encompasses both Hawaiian Homelands and Alaskan Native Village Statistic Areas. Only a broad definition would allow the Commission to carry out its policy goals.

NPM and NCAI support the creation of a Tribal priority for the allocation and licensing of all spectrum. The policy and constitutional grounds for the Tribal priority adopted for broadcast services apply equally to non-broadcast services.

The Commission should take a “tribal-centric” approach to economic development. The “tribal-centric” approach harnesses the government’s trust relationship with Tribes and its duty to engage in meaningful consultation.

The Commission should work with Tribes with much needed public safety and homeland security issues in order to reduce crimes that do not respect national borders.

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Native Public Media (“NPM”) and the National Congress of American Indians (“NCAI”) respectfully submit these Reply Comments in response to the issues posed in the above-captioned Notice of Inquiry (“NOI”).¹

**I. COMMENTS DOCUMENT THE “DIGITAL DIVIDE” AND THE FCC’S
AUTHORITY TO ACT TO ASSIST TRIBES IN BRIDGING THIS DIVIDE**

Native Americans face unique problems in acquiring communications services, particularly high-speed Internet Service.² Virtually all of the commenters recognize the relative unavailability of broadband on Tribal lands and agree that the Commission should undertake aggressive and innovative measures to meet the telecommunications service needs of Native Nations.³

¹ The Commenters wish to acknowledge the assistance of Michael Erzingher, Summer Associate at Garvey Schubert Barer, for his help in researching and drafting these Reply Comments.

² NOI at ¶ 2.

³ See, e.g., Comments of the Iowa Tribe of Oklahoma at 2 (“Although we are less than 20 miles from a major university where broadband is readily available in multiple forms from multiple carriers and even high speed research connections such as the National Light Rail (NLR) area are also available, our land has nothing more than traditional T1’s. These circuits are unreliable due to the age of the cable and its integrity being compromised where it crossed the Cimarron River which forms our northern boundary.”) See also, Comments of Winnebago Tribe of Nebraska at 1; Comments of Warm Springs Telecommunications Co. at 7.

Only two commenters – AT&T and South Dakota Telecommunications Association (“SDTA”) – take a contrary point of view. Both question whether sufficient data exist upon which the Commission can reasonably act.⁴ Although, in principle, AT&T supports broadband access for Native Nations, it concludes that Commission action would be inappropriate based on current data.⁵ SDTA acknowledges that broadband accessibility problems concerning Native lands may exist in other states but claims that Tribal lands in South Dakota are sufficiently served.⁶

If perfect data were a prerequisite for Commission action, nothing could ever be done. While data confirming the extent of inaccessibility could always be better,⁷ existing data leave no doubt of the existence of a Tribal Digital Divide. The extensive record in this proceeding documents the pressing need for funding to enable Tribes to offer affordable broadband services to their peoples.

There also is consensus among the commenters that the Commission has the authority to establish a Native Nations Broadband Fund. The Commission has a statutory duty to remedy the lack of access to broadband telecommunications and information services and to make them available to all citizens at comparable rates.⁸ As Gila River Telecommunications, Inc. points out, several provisions of the Communications Act of 1934 support the creation of a fund. The

⁴ AT&T maintains that the “Commission should first publish a more complete and refined analysis of its data before addressing broadband availability and subscribership.” AT&T Comments at 2. SDTA Comments at 10.

⁵ AT&T Comments at 1.

⁶ SDTA Comments at 10.

⁷ One mechanism for obtaining better data is suggested by the American Library Association which recommends that the Office of Native Affairs and Policy (“ONAP”) “use the opportunity presented by the NOI to develop a clear and concise matrix for tracking broadband use and adoption on tribal lands. ONAP should make the results of information collected publicly available.” Amer. Library Ass’n Comments at 10.

⁸ 47 U.S.C. § 254 (b)(3).

Commission has authority to create a Native Nations Broadband Fund “pursuant to Sections 214 and 254 of the Communications Act, which mandate that the Commission address the needs of unserved areas and because, as a matter of law, the Fund will further the Commission’s policy to promote a government-to-government relationship with federally-recognized Tribes.”⁹ NPM and NCAI agree that the Communications Act grants the FCC statutory authority to assist Tribal governments in seeing that telecommunications services are provided to their members.

II. TRIBAL CONSULTATION IS CRITICAL TO BRIDGING THE DIGITAL DIVIDE

Parties who commented on the role of government consultation with Tribes agree with NPM and NCAI that “meaningful consultation” holds the best promise for rectifying long-standing inequities and bridging the Digital Divide. Consistent with its statutory mandate, the Commission has a duty of trust that requires it to adhere to fiduciary standards in dealing with Tribes.¹⁰ The goals set forth in the NOI can be achieved only if the Commission consults with Tribes *before* any federal undertaking that could impact Tribal interests.¹¹ Meaningful consultation cannot be satisfied merely by traditional notice and comment opportunities,¹² nor by well-intended open-door policies. Meaningful consultation requires active agency outreach and direct government-to-government negotiations.¹³

⁹ Gila Telecommunications, Inc. Comments at 16-17.

¹⁰ NPM & NCAI Comments at 3, citing *U.S. v. Mitchell*, 463 U.S. 206 (1983); see *Standing Rock Telecomms., Inc. Petition for Designation as an Eligible Telecommunications Carrier*, Memorandum Opinion and Order on Reconsideration WC Docket 09-197 (Jun. 22, 2011) (*Standing Rock Reconsideration Order*) (the designation of a certain Tribal telecommunications carrier as an eligible telecommunications carrier “...is founded on both the historical federal trust relationship we share with federally recognized Tribes...”).

¹¹ *Id.* at 4-5.

¹² See 5 U.S.C. § 553.

¹³ *Quechan Tribe of the Fort Yuma Indian Reservation*, 755 F. Supp. 2d 1104 (S.D.C.A. 2010) (hereinafter *Quechan Tribe*).

Sovereign entities are, by definition, self-governing and retain sovereign status over activities on Tribal lands that affect their members. As the Commission pointed out in the NOI, “[i]t is well established that federally recognized Tribes have inherent sovereignty and self-determination and exercise jurisdictional powers over their members and territory with the obligations to ‘maintain peace and good order, improve their conditions, establish school systems, and aid their people ...’ within their jurisdictions.”¹⁴ Accordingly, the Commission should defer to the expertise of Tribes on matters concerning Tribal lands. By contrast, notice and comment rulemaking procedures place Tribes on the same footing with non-Tribal parties who lack sovereign status. Granting Tribes only the rights conferred by the Administrative Procedure Act would not adequately safeguard Tribal interests or satisfy the FCC’s duty to engage in meaningful consultation.¹⁵

Consultation is of scant value unless it takes into account the unique nature of Tribal governments. For example, Tribal governments frequently operate on schedules different from the federal government. Respecting the calendars of Tribal governments by adopting more flexible timing provisions or liberally permitting waivers of Commission deadlines would accommodate Tribal governments.

SDTA contends that the Tribes of South Dakota are fully served.¹⁶ Before the FCC gives credence to this contention, it should not only review 477 and other relevant data, but meet with

¹⁴ NOI at ¶ 4.

¹⁵ Failure to adopt procedures that will enable consultation with Tribes is analogous to the Commission promulgating rules on telecommunications implicating matters outside the jurisdiction of the United States that directly impact foreign sovereign jurisdictions without meaningful consultation with the foreign jurisdiction. If the Commission is precluded from engaging in unilateral measures against foreign sovereign nations, it should not treat Native sovereign nations any differently. Indeed, the Commission must make additional efforts to consult with Tribes because, unlike foreign sovereigns, Tribes are decentralized and do not possess the power and voice of their foreign counterparts.

¹⁶ Comments of SDTA at 2-3 (95% coverage).

the affected Tribes. The Cheyenne River Sioux, Crow Creek Sioux, Lower Brule Sioux, Pine Ridge, Rosebud, Sisseton Wahpeton Sioux, Standing Rock Sioux, and Yankton Sioux are likely to have a quite different perspective on how well they are served. Direct input from affected Tribes should be accorded the same weight as would be given to the findings of a state PUC. The FCC must also provide adequate technical assistance and an opportunity for the affected Tribes to comment. In short, the FCC must solicit input from Tribes about Tribal interests rather than accept second-hand assertions of private carriers seeking to advance their own economic interests.

III. THE FCC SHOULD ADOPT A NUMBER OF MEASURES PROPOSED IN THE NOI

A. Adoption of a Tribal Priority for Broadband is Critical

NPM and NCAI urge the Commission to extend the Tribal Priority beyond broadcast services so that Native Nations can provide much-needed communications services to their members.¹⁷ The policy and constitutional grounds for the Native Nation priority adopted in the *Rural Radio Report and Order* apply for broadcast licensing proceedings, with equal force, to non-broadcast services.¹⁸ The Tribal Priority, along with other rule changes such as the “build-

¹⁷ See NPM and NCAI Comments at 8; *also see, e.g., Tribal Spectrum NPRM*, ¶35, n. 70 (citing NPM/NCAI November 2009 Joint Comments at 19 and December 2009 Ex Parte Joint Comments at 19 in National Broadband Plan proceeding); Joint Reply Comments of NPM and NCAI in WT Docket 10-90 (“Connect America Fund”), filed August 11, 2010 at 7; Joint Reply Comments of NPM and NCAI in WT Docket No. 10-208 (“Mobility Fund”), filed December 16, 2010 at 11.

¹⁸ In *Rural Radio Report and Order*, ¶ 12, the Commission stated:

“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).

or-divest” policy, is vital for bringing critically needed services to Tribes. As pointed out by the Iowa Tribe of Oklahoma, without priority status, the interests of Tribes may be subordinated to those of non-Tribal parties, whose activities could create barriers that deter investment by Tribes.¹⁹ The Office of Hawaiian Affairs of the State of Hawaii asserts that extending the Tribal priority to wireless services would lead to improvements in “economic self-sufficiency, health, education, culture, land & water, and governance”.²⁰ NPM and NCAI concur.²¹

B. Native Nations Broadband Fund

Only SDTA opposes the creation of a Native Nations Broadband Fund. Based on its claims that SDTA members already make broadband services available to more than 95% of the households within its service area, which includes Tribal lands,²² SDTA maintains that a Native Nations Broadband Fund would create economic inefficiencies due to duplicative funding. It suggests that the Commission focus on broadband adoption rather than deployment.²³ SDTA, however, does not explain what inefficiencies would result, nor show that universal service inefficiencies arising out of potential duplicative funding likely would be greater than the

¹⁹ Iowa Tribe of Oklahoma Comments at 2.

²⁰ Office of Hawaiian Affairs Comments at 2.

²¹ See Alapaki Nahale-a Comments at 1 (a tribal priority will allow for public interest benefits in health, culture, and economics); *see also* State of Hawaii, Office of Hawaiian Affairs Comments at 2 (improved access to telecommunications for Native Hawaiians will lead to improvements in most if not all of the OHA’s priorities: economic self-sufficiency, health, education, culture, land & water, and government); *see generally* National Tribal Telecomms. Ass’n Comments at 10; South California Tribal Digital Village Comments at 3.

²² South Dakota Communications Ass’n Comments at iii and 2.

²³ As NPM and NCAI have demonstrated on numerous occasions, the only detailed study of use of broadband by Native Americans indicates that their demand for, and use of, broadband equals or exceeds that of non-Native Americans. *See New Media, Technology and Internet Use in Indian Country: Quantitative and Qualitative Analyses*, published by NPM and New America Foundation (available for download at <http://www.nativepublicmedia.org/images/stories/documents/npm-naf-new-media-study-2009.pdf> . While programs to spur adoption of broadband may be needed among some sectors of Native Americans (e.g., older Tribal members, or those for whom English is not their primary language, certainly among young Native Americans), they are more than ready to leap across the Digital Divide, if only they were provided access to broadband equivalent to that of their non-Native brothers and sisters in America.

benefits obtained from increased competition and the provision of new service to areas unserved by SDTA members. SDTA's argument is better designed to prevent "duplicative" competition and to insure the continued profits of incumbent providers.

C. Native Nations Business Models

NPM and NCAI advocate a "tribal-centric" approach to economic development. As the Commission stated in its NOI, "tribal-centric" business models – those that actively engage the Native Nation, its core community institutions, and members in deployment and adoption planning – have a greater chance of establishing sustainable service on Tribal lands.²⁴ That approach is intimately related to the unique relationship between the FCC and Tribes, and goes beyond business models for universal service funding.²⁵ The "tribal-centric" approach harnesses both the government's trust relationship with Tribes and the government's duty to solicit Tribal input before initiating a federal undertaking.²⁶

Commenters advocate a variety of different and sometimes overlapping business models for dispersing funds from a Native Nations Broadband Fund, including a cost-based (rate-of-return based) model,²⁷ a private investment model,²⁸ a model that supports native-owned telecommunications carriers which have developed over the last decade,²⁹ a self-sustaining regulatory services model,³⁰ a best-practices model,³¹ an empowerment and promotion of Native community economic self-determination model,³² and a "not one size fits all" model.³³

²⁴ NOI at ¶ 12.

²⁵ NPM & NCAI Comments at 10.

²⁶ *Id.*

²⁷ Alexicon Telecomms. Comments at 5.

²⁸ CenturyLink Comments at 2-4.

²⁹ Iowa Tribe of Oklahoma Comments at 3.

³⁰ National Tribal Telecomms. Ass'n Comments at 18.

The tribal-centric approach encompasses these other models. It does not discount any particular model. Even CenturyLink, which regards the private-investment model as more efficient than government ownership, acknowledges that Tribal ownership may be better than private ownership.³⁴ NPM and NCAI support the implementation of a tribal-centric approach with the inherent flexibility to allow Tribes to determine individual business models that best accommodate their economic goals.

The key to developing viable service in Indian Country is to anchor that service in Tribal institutions. The traditional economic model developed by private carriers over the last century extends service only to residences that can afford service at prevailing market rates. That model has utterly failed in Indian Country, as evidenced by the fact that POTS subscribership on Tribal lands lags some 30 percent behind near ubiquitous deployment in the rest of America. The tribal-centric approach provides service first and foremost to anchor institutions such as Tribal Chapter Houses and facilities where critical government services are offered. Tribes have traditionally been communally oriented, even in the face of long distance travel. Designing business models that recognize the communal nature of Tribal life is the only way to make sure that service is provided throughout reservations rather than at the periphery, and of serving all

³¹ PCIA Comments at 5-6.

³² Council of Native Hawaiian Advancement Comments at 12.

³³ Warm Springs Telecomms. Co. Comments at 11.

³⁴ CenturyLink Comments at 4. CenturyLink lauds the benefits of a private-investment model. However, CenturyLink states “that in some cases the service providers that will qualify to tap into such a fund will be owned and operated by Tribes....[a]nd in other situations, private operators—perhaps utilizing tribal labor and community resources—will be a better fit.” CenturyLink, therefore, acknowledges that a private investment model will not work in all cases and that under some circumstances, Tribal ownership would be a better approach. CenturyLink makes clear that a single approach will not work in all circumstances, putting its business model advocacy in a similar if not the same posture as Warm Springs’ “not one business fits all” approach and PCIA’s best practices approach.

Tribal members rather than small pockets of higher population density where the cost of expanding services is low.

D. Native Nations Adoption and Utilization

A Native Nations Broadband Fund could serve a wide range of purposes, including planning or pilot programs, computer literacy programs, interconnecting anchor institutions, and providing services to the general public.³⁵ The American Library Association (“ALA”) aptly notes that, “absent action, broadband adoption rates will continue to be uneven.”³⁶ As the Native Public Media and New America Foundation New Media Study points out, Tribes are eager to adopt broadband services when services are available.³⁷ The critical component is not convincing Tribal members that broadband is an exciting new form of communications technology, but getting broadband deployed in Indian Country.

E. Tribal Lands

Of those who commented on the issue, most advocate a broad definition of Tribal lands that includes Hawaiian Homelands and Alaskan Native Village Statistic Areas.³⁸ NPM and NCAI favor adoption of a definition of Tribal lands similar to that adopted for radio licensing purposes and the Tribal Lands Bidding Credit,³⁹ but with provisions that would also allow Tribes

³⁵ See NPM and NCAI Comments at NCAI Resolution MKE-11-004.

³⁶ American Library Ass’n Comments at 8.

³⁷ See NOI at ¶ 11 and NPM/NAF New Media Study.

³⁸ Commenters include Alapaki Nahale-a; Alexicon Communications Consulting; State of Hawaii, Office of Hawaiian Affairs; Native Telecom Coalition for Broadband; Council for Native Hawaiian Advancement; and Southern California Tribal Digital Village.

³⁹ See NOI at 12 note 60 (defining “tribal lands” as meaning “reservation” as defined by the Bureau of Indian Affairs (“BIA”); the BIA defines “reservation” 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).

without land holdings to demonstrate their qualifications.⁴⁰ The Commission adopted a similar approach in the *Rural Radio Order*⁴¹ by permitting “landless” Tribes to claim a tribal priority based upon a showing of functional equivalency.⁴² Other commenters, including the State of Hawaii, Office of Hawaiian Affairs, share the views of NPM and NCAI.⁴³

F. Eligible Telecommunications Carrier Designations

Traditionally, the FCC has not consulted with Native Nations in designating eligible telecommunications carriers (“ETC”) that serve Tribal lands. As the Commission now appears to recognize, that tradition is contrary to the principles of Tribal sovereignty and government-to-government relationships.⁴⁴ The Commission has recently noted that, “Tribal governments play a vital role in serving the needs and interest of their local communities, often in remote, low-income, and underserved regions of the country,”⁴⁵ and that “Tribal governments should play an integral role in the process for designating carriers who receive Universal Service Fund (“USF”) support to serve Tribal lands.”⁴⁶ The Commission should codify these principles in rules that

⁴⁰ See NOI at ¶ 12.

⁴¹ MB Docket No. 09-52, Second Report and Order, FCC 11-28 (March 3, 2011).

⁴² *Id.*

⁴³ See NPM and NCAI Comments at Attachment 1 - NCAI Resolution MKE-11-004; *see also* State of Hawaii, Office of Hawaiian Affairs at 2-3 (the Commission should, in addition to allocating resources to Native Hawaiians on Hawaiian Home Land, allocate resources to areas of Hawaii with high concentrations of Native Hawaiians not located on Hawaiian Home Lands); Council for Native Hawaiian Advancement Comments at 14-15 (supports the definition of tribal lands utilized in *Rural Radio Order* because it broadly applies to Native communities, and encompasses the needs of Native communities that go beyond those geographically located on reservations as defined by the Commission in determining eligibility for the Lifeline and Link-Up programs).

⁴⁴ See *supra* at 3-4.

⁴⁵ *Standing Rock Order on Reconsideration* at ¶ 2.

⁴⁶ See NPM and NCAI Comments at 13, citing to NOI, pp 13-14, citing National Broadband Plan, at 146. See also NPM and NCAI Comments at Attachment 1 - NCAI Resolution MKE-11-007; *see also Standing Rock Order on Reconsideration* at ¶ 6 (“[t]he Commission strongly encourages the participation of Tribal authorities in the designation process of carriers seeking to serve on Tribal lands.”).

make any request for an ETC designation to serve Tribal lands subject to consultation with relevant Native Nations.⁴⁷

In its recent *Standing Rock Order on Reconsideration*, the Commission addressed the “issue of whether a Tribe should be permitted to serve all residents of its Reservation for the purposes of receiving universal service support.”⁴⁸ The Commission designated Standing Rock Telecommunications, Inc. (“Standing Rock”) as an ETC throughout the *entire reservation*, holding that the Commission “has a long-standing policy of promoting Tribal self-sufficiency and economic development and of helping to ensure that Tribes have adequate access to communications services.”⁴⁹ The Commission based its ruling on a finding that Standing Rock’s proposal to serve the entire community is in the public interest.⁵⁰

The Commission found that expanding Standing Rock’s ETC designation throughout the entirety of the Standing Rock reservation would allow the Tribe “to own and operate the critical communications infrastructure needed to protect the health and safety of Tribal consumers, spur local economic development, preserve Tribal language and culture, and further the education of consumers through distance education programs.”⁵¹ NPM and NCAI urge the Commission to make these findings core principles as it develops criteria for determining which telecommunications carriers are eligible to receive monies from the Universal Service Fund or the Native Nations Broadband Fund.

⁴⁷ See NPM and NCAI Comments at 13.

⁴⁸ *Standing Rock Order on Reconsideration* at ¶ 8.

⁴⁹ See *Standing Rock Order on Reconsideration* at ¶ 2.

⁵⁰ *Id.* at ¶ 15.

⁵¹ *Id.* at ¶ 2.

G. Satellite-Delivered Broadband

The Commission should be wary of granting satellite services eligibility to receive federal funding to serve Tribal lands. There are significant questions as to whether satellite broadband services currently available are an effective substitute for terrestrial broadband services.⁵² The benefits of satellite technology are offset by limitations from which terrestrial broadband services generally do not suffer. Satellite services are limited by the amount of bandwidth satellites can provide. As Internet content becomes increasingly bandwidth-intensive and more readily available, the limitations of satellite services will become more problematic.

Consultation with Tribes is particularly important on the issue of satellite service. Because satellite service has no physical connection to Tribal lands, stories are rampant of providers who swoop in, install dishes, and then disappear, to be heard from only as invoices pour in, while service quality suffers and local technical support is nowhere to be found. More importantly, satellite cannot be “THE” answer for Indian Country. The diversity of topography, population density, and reservation size among the various Tribes means that one size is likely to fit none.

Should the Universal Service Administrative Company (“USAC”) use a Native Nations Broadband Fund to subsidize satellite broadband services that would have reached Tribes without federal monies, an issue would arise as to whether such grants were a waste of federal funds.⁵³ Making satellite broadband providers eligible to receive grants from a Native Nations Broadband Fund would also conflict with the very purpose of the Fund, which is to support

⁵² Warm Springs Telecommunications Company maintains that satellites are a poor substitute for fiber based networks because of the technology’s limited capacity and poor quality of service. *See* Warm Springs Telecomms. Co. Comments at 17.

⁵³ *See generally* 47 C.F.R § 54.717 (requiring USAC to administer the universal service support mechanisms to prevent fraud, waste, and abuse).

ETCs in the deployment, retention, or upgrading of broadband services that would either be impossible or cost inefficient but for adequate federal funding. Satellite broadband services are available regardless of the federal funding.⁵⁴ Funding satellite broadband providers would therefore not stimulate new services, but subsidize costs already incurred.

Globalstar, an MSS carrier, maintains that its new, second-generation constellation satellites can bridge the Digital Divide between Native Nations and the rest of the nation.⁵⁵ NPM and NCAI do not dispute Globalstar's assertion that it will provide a state-of-the-art MSS system, but a system capable of delivering only 256 kbps cannot bridge the Digital Divide in the face of consumer demand for much higher bandwidth.⁵⁶ Indeed, 256 kbps is not considered to be broadband by the FCC.⁵⁷ MSS technology may suffice for individual Tribal members, but will not satisfy the much greater bandwidth needs of Tribes that seek to reach the same level of broadband adoption and usage as governmental bodies in the rest of the nation. The considerable lag time between design and deployment of satellites results in an inability to keep up with the

⁵⁴ See *infra* at note 61.

⁵⁵ See Globalstar Comments at 1.

⁵⁶ *Id.* at 3. (“With its new constellation and ground systems, Globalstar will provide consistently reliable service to existing voice and duplex data customers throughout its global footprint, including advanced (and affordable) voice, two-way data, and messaging services, with data speeds of 256 kbps for fixed and mobile service.”)

⁵⁷ *Sixth Broadband Deployment Order*, ¶ 5, FCC 10-129 (released July 20, 2010).

The National Broadband Plan recommends as a national broadband availability target that every household in America have access to affordable broadband service offering actual download (i.e., to the customer) speeds of at least 4 Mbps and actual upload (i.e., from the customer) speeds of at least 1 Mbps. This target was derived from analysis of user behavior, demands this usage places on the network, and recent experience in network evolution. It is the minimum speed required to stream a high-quality—even if not high-definition—video while leaving sufficient bandwidth for basic web browsing and e-mail, a common mode of broadband usage today that comports directly with section 706's definition of advanced telecommunications capability. As the target for the broadband capability that the National Broadband Plan recommends should be available to all Americans, this speed threshold provides an appropriate benchmark for measuring whether broadband deployment to all Americans is proceeding in a reasonable and timely fashion. It is by this benchmark that we find that broadband remains unavailable to approximately 14 to 24 million Americans. (Footnotes omitted.)

ever-increasing demand for more bandwidth. As a consequence, dependence on satellite delivered services could ultimately increase rather than narrow the Digital Divide in Indian Country.⁵⁸

LightSquared Subsidiary LLC (“LightSquared”) is in the process of deploying a 4G hybrid MSS/ATC network. While LightSquared’s network offers a promising solution for bridging the Tribal Digital Divide, it is not a substitute for the virtually limitless bandwidth speeds terrestrial cable providers offer. Although LightSquared promises to provide subscribers with high-speed broadband services with speeds similar to terrestrial fixed broadband and to add capacity as demand grows,⁵⁹ its promise rests on an unproven assumption—that its service is not detrimental to the GPS system.⁶⁰

H. Public Safety and Homeland Security

There is general consensus on the need for the implementation, maintenance, and upgrading of telecommunications networks that enhance public safety and homeland security communications.⁶¹ There is also special concern that “the absence of broadband [on tribal lands] impedes...public safety.”⁶² According to the Native Tribal Telecommunications Association: “[n]ative communities suffer from lack of adequate capacity and equipment and from geographic

⁵⁸ See NPM and NCAI Comments at 13-14.

⁵⁹ Contrast with broadband services with a maximum capacity of 256 kbps.

⁶⁰ See generally, IB Docket 11-109 (FCC proceeding to determine whether LightSquared’s proposal will interfere with GPS operations). See especially, Comments of the National Telecommunications and Information Administration (NTIA), filed July 7, 2011, in which it has concluded “that implementing the LightSquared planned deployment for terrestrial operations poses a significant potential for harmful interference to Global Positioning System (GPS) services.

⁶¹ See American Library Ass’n Comments at 4 (citing Commissioner Clyburn’s statement that “[w]e owe all of our citizens the benefits of a fully connected community, in order to promote public safety, educational and economic development in Tribal lands”).

⁶² Comments of Keith Modglin at 1. See Satellite Industry Ass’n Comments at 7. See also Council for Native Hawaiian Advancement Comments at 15.

and jurisdictional isolation from local and regional partnerships”⁶³; “[m]ost Native communities are not mapped for E-911 addresses”⁶⁴; and “GPS based residential coordinates are not available in most Native communities.”⁶⁵ Warm Springs Telecommunications Company notes that “interoperable public safety radio is a critical issue for tribal lands.”⁶⁶ Gila River Telecommunications, Inc. notes that it currently provides a public safety network, but the network requires funding for a critically needed upgrade.⁶⁷ The need for a Native Nations Broadband Fund to support public safety and homeland security networks on Tribal lands is critically important because Tribal communities are often “primary providers of public-safety services”⁶⁸ with “funding [that] comes primarily from the Tribe itself.”⁶⁹

The Tohono O’odham reservation located in Southwestern Arizona and Northern Mexico—split by an international border—is an area with increasing needs for up-to-date telecommunications infrastructure.⁷⁰ The Department of Justice maintains that the border “is the principal entry point for undocumented immigrants smuggled from Mexico, Central America, and South America”—as well as undocumented immigrants from countries such as Afghanistan, Iran, Iraq, and Pakistan.⁷¹ The region is also a gateway for drugs, weapons, and criminal gang

⁶³ Native Tribal Telecomms. Ass’n Comments at 25.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Warm Springs Telecomms.Co. Comments at 16.

⁶⁷ Gila River Telecomms. Inc. Comments at 21-22.

⁶⁸ National Tribal Telecomms. Ass’n Comments at 5.

⁶⁹ *Id.* at 27.

⁷⁰ See *generally* Testimony of the Honorable Ned Norris, Jr., Vice Chair of the Tohono O’odham Nation-Arizona before the Senate Commerce Committee on S. 2295 Border Infrastructure and Technology Integration Act, S. REP. NO. 253 (June 17, 2004).

⁷¹ *National Drug Threat Assessment 2010*, U.S. Southwest Border Smuggling and Violence, Department of Justice, available at <http://www.justice.gov/ndic/pubs38/38661/swb.htm>.

smuggling.⁷² Funding for public safety and homeland security would enable the Tohono O’odham Nation to set up improved alert systems that would assist the Department of Homeland Security and Border Patrol, as well as the Tohono O’odham people victimized by crimes that do not respect national borders.

The Quileute Nation—located on a 1.5 square-mile reservation bordered on one side by the Pacific Ocean and on three sides by the Olympic National Park—resides in low-lying areas susceptible to floods and tsunamis.⁷³ The Quileutes suffer from a lack of reliable cellular and broadband services that are needed to reach emergency personnel a life-threatening emergency.⁷⁴ The Quileutes are lobbying for relocation to higher grounds but, until then, are at risk of losing lives and property.⁷⁵ Public safety and homeland security funding would lessen the risks inherent in the very location of the Quileute lands.

IV. CONCLUSION

NPM and NCAI applaud the Commission’s efforts to rectify decades of policies that have ranged from complete neglect to deliberate disregard of the rights of Tribal sovereign nations. The creation of the Office of Native Affairs and Policy and the launching of initiatives such as this NOI are encouraging signs that a new era is in the making, and that closing the Digital Divide on Tribal lands is an achievable possibility. To advance that goal, NPM and NCAI recommend:

⁷² *Id.*

⁷³ See Richard Walker, *Quileute Officials Lobby D.C. for Safety Improvements*, Indian Country TODAY MEDIA NETWORK.com (Mar. 14, 2011), <http://indiancountrytodaymedianetwork.com/2011/03/quileute-officials-lobby-safety-olympic-national-park/>.

⁷⁴ *Id.*

⁷⁵ See *id.*

- The creation of a Tribal Priority for the allocation and licensing of all spectrum;
- The creation of a Native Nations Broadband Fund;
- The adoption of a “tribal-centric” approach to economic developments;
- Use of the consultation process in creating programs for the adoption of broadband;
- A broad definition of “Tribal lands;”
- Modification of the procedures for designating an Eligible Telecommunications Carrier (“ETC”);
- Use of satellite-delivered broadband as one, limited means of providing broadband services; and
- Funding of the Office of Native Affairs and Policy at levels that will enable it to engage in “meaningful consultation” with Tribes.

The stakes are high. As the Commission observed in its NOI, “[t]he lack of robust communications services presents serious impediments to Native Nations’ efforts to preserve their cultures and build their internal structures for self-governance, economic opportunity, health, education, public safety, and welfare – in short, a bright future for their peoples.”⁷⁶

⁷⁶ NOI at ¶ 1.

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