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
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208
	)	
	)	

To: The Commission

OPPOSITION OF NATIVE PUBLIC MEDIA AND THE NATIONAL CONGRESS OF AMERICAN INDIANS TO PETITION FOR RECONSIDERATION

NATIVE PUBLIC MEDIA
Loris Ann Taylor
President
P.O. Box 3955
Flagstaff, AZ 86003

NATIONAL CONGRESS OF AMERICAN INDIANS
Jacqueline Johnson Pata
Executive Director
1516 P Street, NW
Washington, DC 20005

James E. Dunstan
John Crigler
GARVEY SCHUBERT BARER
1000 Potomac St., N.W. Suite 500
Washington, DC 20007
Counsel to Native Public Media

January 9, 2012

SUMMARY

The *CAF Order* adopts certain Tribal Engagement Provisions to recognize the special needs of Native Nations, as well as recognizing the unique trust relationship and requirements for government-to-government consultation required under the Constitution and the Telecommunications Act. The Petitioners, however, urge the Commission to remove the Tribal Engagement Provisions of the *CAF Order,* arguing that such provisions are arbitrary and capricious, unsupported by the record, contrary to law, and an impingement of their First Amendment rights

The Tribal Engagement Provisions are fully supported by the record, which itself relies heavily on the work performed by the FCC on the National Broadband Plan, proceedings which NPM and NCAI participated in. Petitioners ignore the record and completely discount the work of Tribal groups to highlight the depth and breadth of the digital divide, instead citing as proof of full deployment eight cases representing barely one percent of the Federally-recognized Tribes in the United States

The Tribal Engagement Provisions are consistent both with the Telecommunications Act and general Indian Law. Petitioners' analysis of both is dated and rooted in a mindset reminiscent of centuries gone by. It ignores fundamental rights of Tribes to exclude outsiders from their borders, and the sovereign right to regulate non-Tribal activities on Tribal lands.

More than just Petitioners' commercial speech rights are implicated by their request. Rather, the FCC must balance the limited First Amendment rights they may have against the Indian Commerce Clause of the Constitution. Moreover, in situations where the Federal government is providing an economic benefit or subsidy, such as is the case with USF/CAF, it may impose conditions on the acceptance of such funding that places some burdens on free

speech. The FCC requiring carriers to discuss their marketing plans with Tribes does nothing more than ensure that Federal funds are being spent as Congress intended.

Finally, Petitioners argue that the Tribal Engagement Provisions will be overly burdensome, before ONAP has even had a chance, on a government-to-government basis, to work with Tribes to establish procedures.

The Commission should reject Petitioners' attempt to continue to reap the billions of dollars in Federal subsidies provided under USF/CAF, without doing anything to meet the needs of Native peoples. The Commission should heed the words of former Commissioner Copps: "The sad history here, as we all know, is many promises made, many promises broken. We need to turn the page, and I think we are beginning to do that now." The page will only be turned if the FCC maintains its commitment to fulfilling its trust relationship with Tribes and affirms the Tribal Engagement Provisions in the *CAF Order*.

Table of Contents

Page

SUMMARY ii

I. BACKGROUND 2

II. THE TRIBAL ENGAGEMENT PROVISIONS ARE FULLY SUPPORTED BY THE RECORD 3

III. THE TRIBAL ENGAGEMENT PROVISIONS ARE CONSISTENT WITH BOTH THE TELECOMMUNICATION ACT AND FEDERAL INDIAN LAW 7

IV. THE TRIBAL ENGAGEMENT PROVISIONS ARE FULLY SUPPORTED BY THE CONSTITUTION OF THE UNITED STATES 12

V. THE TRIBAL ENGAGEMENT PROVISIONS ARE NOT OVERLY BURDENSOME 16

VI. CONCLUSION 17

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
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

To: The Commission

OPPOSITION OF NATIVE PUBLIC MEDIA AND THE NATIONAL CONGRESS OF AMERICAN INDIANS TO PETITION FOR RECONSIDERATION

Native Public Media ("NPM") and the National Congress of American Indians ("NCAI"), through undersigned counsel, respectfully submit this Opposition to the Petition For Reconsideration ("the Petition") filed by the Rural Incumbent Local Exchange Carriers Serving Tribal Lands ("Petitioners"),[2] filed electronically on December 29, 2011, and posted in ECFS on

[2] According to the Second Erratum filed by the Petitioners on January 4, 2012, the Petitioners include the following 23 LECs: 3 Rivers Telephone Cooperative, Inc.; Big Bend Telephone Company, Inc.; Butler-Bremer Communications; Clear Lake Independent Telephone Company; Communications 1 Network, Inc.; Custer Telephone Cooperative, Inc.; Emery Telecom; Gold Star Communications, LLC; MAC Wireless, LLC; Manti Telephone Company; Midstate Communications, Inc.; Northeast Louisiana

December 30, 2011, in response to the FCC's *Connect America Fund Order ("CAF Order")*.[3] In support of this Opposition, NPM and NCAI submit:

I. BACKGROUND

The *CAF Order* takes a major positive step toward fulfilling the FCC's obligations to empower Native Tribes to help guide the deployment of high speed broadband in Indian Country, by recognizing certain sovereign rights of Tribes over their internal affairs.[4] Commissioner Copps, in his Statement accompanying the release of the *CAF Order* said it best:

> We are also moving toward a fuller appreciation of what tribal sovereignty means and of the need to accord tribes the fuller and more active role they must have in order to ensure the best and most appropriate deployment and adoption strategies for their areas and populations. I feel encouraged that we are at long last positioning ourselves to make progress by working more closely and creatively together. The sad history here, as we all know, is many promises made, many promises broken. We need to turn the page, and I think we are beginning to do that now.[5]

Included in the *CAF Order* are provisions requiring carriers seeking government support from the Universal Sevice Fund ("USF") or the new Connect America Fund ("CAF") for service to Tribal Lands to engage Tribal governments, including, at a minimum, to hold discussions that include: (1) a needs assessment and deployment planning with a focus on Tribal community

---

Telephone Company, Inc.; NNTC Wireless, Inc.; Public Service Telephone Company; Penasco Valley Telephone Cooperative; Inc.; Sagebrush Cellular, Inc.; Smithville Telecom, LLC; Strata Networks; Walnut Telephone Company, Inc.; Wapsi Wireless, LLC; West Texas Rural Telephone Cooperative, Inc.; Wiggins Telephone Association; and WUE, Inc.

[3] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Reform – Mobility Fund; Report and Order and Further Notice of Proposed Rulemaking*, WC Dockets No. 10-90, 07-135, 05-337, 03-109; CC Dockets No. 01-92, 96-45; GN Docket No. 09-51; WT Docket No. 10-208, released November 18, 2011, , §54.313(a)(9)("*CAF Order*").

[4] *See, e.g., CAF Order*, ¶ 484 ("We also adopt Tribal engagement requirements and preferences that reflect our unique relationship with Tribes. We believe that these measures should provide meaningful support to expand service to unserved areas in a way that acknowledges the unique characteristics of Tribal lands and reflects and respects Tribal sovereignty.").

[5] *Id.*, Statement of Commissioner Michael J. Copps.

anchor institutions; (2) feasibility and sustainability planning; (3) marketing services in a culturally sensitive manner; (4) rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and (5) compliance with Tribal business and licensing requirements.[6]

The Petitioners oppose any obligation to engage Tribes and Tribal leaders in exchange for receiving the financial support of the USF and the CAF. Instead, they urge the Commission to remove the Tribal Engagement Provisions of the *CAF Order*. They argue that such provisions are unsupported by the record (and therefore arbitrary and capricious), contrary to law, and constitute an infringement of First Amendment rights. None of these arguments are persuasive. The FCC's actions in this regard are fully supported by the record in these proceedings and consistent with sound, historic constitutional principles. This Petition is a throwback to a time before Tribal sovereignty rights had been recognized by the Commission. It is too late to turn back the clock, however. Petitioners should not be allowed to seek to reap the benefit of their incumbent status, and the economic support provided by USF or CAF funding, while ignoring the sovereign right of Tribal governments to determine the needs of Native peoples.

II. THE TRIBAL ENGAGEMENT PROVISIONS ARE FULLY SUPPORTED BY THE RECORD

The Petitioners argue that the *CAF Order* is arbitrary and capricious because there is insufficient record evidence to support the conclusion that the Tribal Engagement Provisions are "vitally important to the successful deployment and provision of service."[7] In so arguing, Petitioners turn a blind eye to a decade of proceedings at the FCC, including the comments filed in this proceeding by NPM and NCAI, as well as other Tribal Nations and organizations.

---

[6] *CAF Order*, ¶ 637 (hereinafter, "the Tribal Engagement Provisions").

[7] *Petition*, p. 3, *citing CAF Order*, ¶ 636.

In support of the Tribal Engagement Provisions, the *CAF Order* cites to, and relies upon the *National Broadband Plan ("NBP").* The *NBP* is replete with evidence of the unique status and needs of Tribes, as well as the need for Tribal involvement, and government-to-government consultation.[8] To argue that the record does not support the enactment of the Tribal Engagement

---

[8] *See, e.g., NBP,* p. 23 ("Those living on Tribal lands have very low adoption rates, mainly due to a lack of available infrastructure. What little data exist on broadband deployment in Tribal lands suggest that fewer than 10% of residents on Tribal lands have terrestrial broadband available."); pp. 76 & 97 ("The FCC should take into account the unique spectrum needs of U.S. Tribal communities when implementing the recommendations in this chapter."); p. 97 ("Facilitating access to the FCC's spectrum dashboard described in Recommendation 5.1 will be critical to helping Tribal communities use spectrum or identify non-Tribal parties that hold licenses to serve Tribal lands. To enhance Tribal access to such information, future iterations of the spectrum dashboard should include information identifying spectrum allocated and assigned in Tribal lands. If the FCC conducts spectrum utilization studies in the future, those studies should identify Tribal lands as distinct entities."); p. 136 ("Throughout the USF reform process, the FCC should solicit input from Tribal governments on USF matters that impact Tribal lands."); p. 146 ("In recognition of Tribal sovereignty, the FCC should solicit input from Tribal governments on any proposed changes to USF that would impact Tribal lands. Tribal governments should play an integral role in the process for designating carriers who may receive support to serve Tribal lands. The ETC designation process should require consultation with the relevant Tribal government after a carrier files an ETC application to serve a Tribal land. It should also require that an ETC file a plan with both the FCC (or state, in those cases where a carrier is seeking ETC designation from a state) and the Tribe on proposed plans to serve the area."); p. 146, Box 8-3 ("The United States currently recognizes 564 American Indian Tribes and Alaska Native Villages (Tribes).89 Tribes are inherently sovereign governments that enjoy a special relationship with the U.S. predicated on the principle of government-to-government interaction. This government-to-government relationship warrants a tailored approach that takes into consideration the unique characteristics of Tribal lands in extending the benefits of broadband to everyone. Any approach to increasing broadband availability and adoption should recognize Tribal sovereignty, autonomy and independence, the importance of consultation with Tribal leaders, the critical role of Tribal anchor institutions, and the community oriented nature of demand aggregation on Tribal lands."); *Id.* ("Available data, which are sparse, suggest that less than 10% of residents on Tribal lands have broadband available. The Government Accountability Office noted in 2006 that "the rate of Internet subscribership [on Tribal lands] is unknown because no federal survey has been designed to capture this information for Tribal lands." But, as the FCC has previously observed, "[b]y virtually any measure, communities on Tribal lands have historically had less access to telecommunications services than any other segment of the population." Many Tribal communities face significant obstacles to the deployment of broadband infrastructure, including high buildout costs, limited financial resources that deter investment by commercial providers and a shortage of technically trained members who can undertake deployment and adoption planning. Current funding programs administered by NTIA and RUS do not specifically target funding for projects on Tribal lands and are insufficient to address all of these challenges. Tribes need substantially greater financial support than is presently available to them, and accelerating Tribal broadband deployment will require increased funding."); p. 184 ("Developing and executing a plan to ensure that Tribal lands have broadband access and that Tribal communities utilize broadband services requires regular and meaningful consultation with Tribes on a government-to-government basis, as well as coordination across multiple federal departments and agencies."); *id.* ("Tribal governments must interact with multiple federal agencies and departments on a wide range of

Provisions is tantamount to admitting that Petitioners have not read the *NBP*, or simply choose to ignore it.

After recognizing the dire situation in Indian Country in the *NBP*, the FCC opened several proceedings and received hundreds of comments related to the special telecommunications needs of Tribes.[9] NPM and NCAI have filed comments in most, if not all of these proceedings, and have consistently supported the efforts of the FCC to recognize Tribal sovereignty and foster a more active role for Tribes in the regulatory process. Other groups such as the National Tribal Telecommunications Association (NTTA), and the Navajo Nation Telecommunications Regulatory Commission (NNTRC) have done the same. NPM and NCAI have worked hard over the past decade to keep the unique circumstances and special needs of Tribes front and center with the FCC. For example, there are more than a dozen citations in the NBP directly to the filings or publications of NPM and/or NCAI.

---

programs. Because broadband is a critical input to the achievement of goals in many areas, including education, health care, public safety and economic development, the federal government should establish a Federal-Tribal Broadband Initiative to coordinate both internally and directly with Tribal governments on broadband related policies, programs and initiatives. The initiative will include elected Tribal leaders or their appointees and officials from relevant federal departments and agencies. The FCC should create an FCC-Tribal Broadband Task Force consisting of senior FCC staff and elected Tribal leaders or their appointees to carry out its commitment to promoting government- to-government relations. The task force will assist in developing and executing an FCC consultation policy, ensure that Tribal concerns are considered in all proceedings related to broadband and develop additional recommendations for promoting broadband deployment and adoption on Tribal lands.")

[9] *See, e.g., Improving Communications Services for Native Nations, Notice of Inquiry*, CG Docket No. 11-41, released March 4, 2011 (48 pleadings filed as of 11/20/11); *Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands, Notice of Proposed Rulemaking*, WT Docket No. 11-40, released March 3, 2011 (27 pleadings filed as of October 28, 2011); Policies to Promote Rural Radio Service and to Streamline Allotment Assignment Procedures, Second Report and Order, MB Docket No. 09-52 (released March 3, 2011); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of Telecommunications Act of 1996 (Eighty Broadband Progress Notice of Inquiry)*, GN Docket 11-121, released August 5, 2011 (36 filings as of October 21, 2011); *Telecommunications Carriers Eligible to Receive Universal Service Support*, WC-09-197 (ETC designation proceedings).

Petitioners' argument that comments of NPM, NCAI, and other Tribal organizations somehow support or "favor" Petitioners' position could not be more misguided.[10] NPM and NCAI emphatically submit that they do ***not*** support Petitioners' argument that the Tribal Engagement Provisions are unnecessary for incumbent local exchange carriers such as themselves. Instead, NPM and NCAI have consistently argued for a "seat at the table" that will allow Tribes a voice in how of telecommunications services will provided to Native peoples. NPM and NCAI support the Tribal Engagement Provisions outlined in the *CAF Order*.

The Petitioners challenge the conclusion that Tribes lack access to broadband.[11] They first claim that the National Broadband Map shows that much of Indian Country is served.[12] They arrive at this position by minimizing the *CAF Order's* qualification on the accuracy of the National Broadband Map ("NBM").[13] Petitioners acknowledge that: "While there are some issues with the NBM data, for example, the NBM states that the broadband record set is not complete for some reservations, the data shows that the Commission's claims about the lack of broadband access are based on old data that the Commission continues to recycle from one proceeding to the next,"[14] but nevertheless identify eight (of 565) Federally- recognized Tribes which they claim either by firsthand knowledge or by reference to the National Broadband Map, to have near 100% broadband availability. Based on this selective and unsupported showing, Petitioners conclude that no special provisions for Tribes are necessary. The FCC must reject this argument. By choosing only the eight best cases representing only 1.2% of all Federally-

---

[10] *Petition*, pp. 4-5.

[11] *Petition,* pp. 5-7.

[12] Id., pp. 6-7.

[13] *CAF Order*, ¶ 335, n. 231.

[14] *Petition*, p. 7.

recognized Tribes, the Petitioners habitually ignore the other 98 percent many of whom have first-hand experience of the immense Digital Divide. NPM and NCAI agree that "one size fits none," and petitioning the FCC to reverse itself and negate the Tribal Engagement Provisions before they have even begun to be implemented is absurd in light of substantial evidence of the lack of broadband deployment in Indian Country.

III. THE TRIBAL ENGAGEMENT PROVISIONS ARE CONSISTENT WITH BOTH THE TELECOMMUNICATION ACT AND FEDERAL INDIAN LAW

The Petitioners also argue that the Tribal Engagement Provisions violate the Communications Act and Federal Indian Law by requiring them to comply with Tribal business and licensing requirements.[15] The Petitioners' analysis fails to recognize, as Commissioner Copps so clearly stated, that the FCC is "moving toward a fuller appreciation of what tribal sovereignty means and of the need to accord tribes the fuller and more active role they must have in order to ensure the best and most appropriate deployment and adoption strategies for their areas and populations."[16] Stuck in the last century, Petitioners rely on *Western Wireless*[17] as the summit of Indian Telecommunications Law and ignore the last decade of FCC and court jurisprudence. As the *CAF Order* points out, over the past ten years the FCC has come to recognize how deep the "Digital Divide" is, and how much work is required to bridge that divide in Indian Country.[18] The *CAF Order*, as well as the other proceedings cited therein, recognize

---

[15] *Petition*, pp. 8-11, *citing CAF Order*, ¶ 637.

[16] *Supra,* n. 5.

[17] *In the matter of Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota; Federal-State Joint Board on Universal Service*, 16 FCC Rcd 18145 (FCC 2001)

[18] *CAF Order*, ¶ 636, *citing Improving Communications Services for Native Nations, CG Docket No. 11-41, Notice of Inquiry*, 26 FCC Rcd 2672, 2673 (2011) (*Native Nations NOI*); *Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum Over Tribal Lands, WT Docket No. 11-40, Notice of Proposed Rulemaking,* 26 FCC Rcd 2623, 2624-25 (2011) (*Spectrum Over Tribal Lands NPRM*); *Connecting America: The National Broadband Plan*, prepared by staff of the Federal

both the unique status and sovereign rights of Tribal Nations, as well as the Federal government's fiduciary responsibility it has with these sovereign nations.[19]

> Tribes are inherently sovereign governments that enjoy a special relationship with the U.S. predicated on the principle of government-to-government interaction. This government-to-government relationship warrants a tailored approach that takes into consideration the unique characteristics of Tribal lands in extending the benefits of broadband to everyone. Any approach to increasing broadband availability and adoption should recognize Tribal sovereignty, autonomy and independence, the importance of consultation with Tribal leaders, the critical role of Tribal anchor institutions, and the community oriented nature of demand aggregation on Tribal lands.[20]

This approach is consistent with the current Administration's declaration in this area,[21] and the Federal mandate to consult with Indian tribes on a government-to-government basis under Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*.[22] "The Commission, in accordance with the federal government's trust responsibility, and to the extent practicable, will consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources."[23]

Communications Commission, March 10, 2010 (*National Broadband Plan*) at 152, Box 8-4.

[19] *Id. See also , CAF Order,* ¶¶ 484, 636, 1219.

[20] *National Broadband Plan*, p. 146 (Box 8-3).

[21] *See* http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president.

> History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between federal officials and tribal officials has greatly improved federal policy toward Indian tribes. Consultation is a critical component to creating a sound and productive federal-tribal relationship. The federal government must take the lead in coordinating among the various agencies with responsibilities vis-à-vis tribes, and establishing lines of communication with those tribes so that broadband access is available to every person in the United States.

Id. at p. 184.

[22] Executive Order No. 13175, 65 Fed. Reg. 67249 (November 9, 2000).

[23] *Tribal Policy Statement,* 16 FCC Rcd at 4081.

The Petitioners conveniently ignore this historic precedent, as well as recent decisions that explain why it is essential that Tribes participate in Commission proceedings that affect Tribal lands. In *Standing Rock Telecommunications, Inc. Petition for Designation as an Eligible Telecommunications Carrier (Reconsideration),* FCC 11-102 (released June 22, 2010), the Commission recognized the rights of Tribal authority over telecommunications carriers serving their lands.

> We also find that this conclusion aligns with the nature of Tribal sovereignty. Congress usually intends that its "statutes . . . be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." This canon is "rooted in the unique trust relationship between the United States and the Indians." The Commission has recognized its "fiduciary duty to conduct [itself] in matters affecting Indian tribes in a manner that protects the interest of the tribes" and its corresponding obligation to interpret "federal rules and policies . . . in a manner that comports with tribal sovereignty and the federal policy of empowering tribal independence." Recognizing that all residents of the Reservation reside within a sovereign community better respects the inherent sovereignty of Tribal governments than a rigid policy that defines the requisite minimum geographic area as the population of a wire center regardless of its conformance with political and jurisdictional boundaries.

Id. at ¶ 15 (footnotes omitted).

Petitioners' reliance on *Montana v. U.S.* is wholly misplaced.[24] First, the Tribal Engagement Provisions (including the requirement that carriers comply with Tribal business and licensing requirements) are not requirements placed on carriers by Tribes. They are requirements placed on Commission licensees by the FCC, and are consistent with Congressional intent. *Montana v. U.S.* involved the issue of whether a Tribe could regulate the activities of non-Tribal members on non-Tribal Lands. Courts since *Montana* have questioned whether the so-called "*Montana* Exceptions" are applicable to situations involving the activities of non-Tribal members on Tribal Lands.[25]

---

[24] *Petition,* pp. 9-10, *citing Montana v. U.S.* 450 U.S. 544 (1981).

[25] *See Water Wheel Camp Recreational Area, Inc. v. Larance*, 642 F.3d 8021, 8039-40 (9th Cir. 2011).

Moreover, courts since *Montana* have recognized an inherent (aboriginal) right to exclude non-Indians from Tribal lands.[26] In *Water Wheel*, the Colorado River Indian Tribes entered into a long-term lease with a non-Indian corporation to operate a marina, convenience store, bar, trailer and camping spaces on lands held in trust for the Tribe on the shore of the Colorado River. After the lease expired, the non-Indian lessee refused to vacate the premises or negotiate a new lease. The Ninth Circuit Court concluded:

> We hold that under the circumstances presented here, where there are no sufficient competing state interests at play, *Nevada v. Hicks*, 533 U.S. 353, 359-60 (2001), the tribe has regulatory jurisdiction through its inherent authority to exclude, independent from the power recognized in *Montana v. United States*, 450 U.S. 544 (1981). Because regulatory jurisdiction exists, we also consider whether adjudicative jurisdiction exists. In light of Supreme Court precedent recognizing tribes' inherent civil authority over non-Indian conduct on tribal land and congressional interest in promoting tribal self-government, we conclude that it does.

Id. at 8026. The Court continued by stating that the inherent sovereign right to exclude non-members from Tribal lands includes the right to regulate their activities on those lands, again independent of the other two prongs of *Montana*.

> We must therefore conclude that the [Tribe]'s right to exclude non-Indians from tribal land includes the power to regulate them unless Congress has said otherwise, or unless the Supreme Court has recognized that such power conflicts with federal interests promoting tribal self government. *Iowa Mut. Ins. Co.*, 480 U.S. at 18 ("Tribal authority over activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." (internal citations omitted)); *Merrion*, 455 U.S. at 146 (noting the "established views that Indian tribes retain those fundamental attributes of sovereignty . . . which have not been divested by Congress or by necessary implication of the tribe's dependent status"); *Santa Clara Pueblo*, 436 U.S. at 56 ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.").

---

[26] *Id.*

Id. at 8039-40.

Federal courts have recognized that the entry onto Tribal Lands and the provision of service to Tribal members is a "consensual relationship" triggering the rights of Tribes to regulate, to the extent allowed under Federal and state law, the activities of non-Tribal members. In *Big Horn County Elec. Co-Op v. Adams*, 53 F.Supp.2d 1047 (D. MT 1999), *aff'd in part, reversed in part*, 219 F.3d 944 (9th Cir. 2000), for example, the local electrical utility co-op challenged a 3 percent tax against the value of the facilities on the reservation, and a companion regulation that prohibited the co-op from passing that tax down to subscribers on the reservation. The Montana Federal District Court, in supporting the Crow Tribe's ability to exercise its authority over the utility, analyzed the activity as follows:

> *Montana* defines consensual relationships with the tribe or its members as 'commercial dealings, contracts, leases, or other arrangements.' Big Horn voluntarily undertook to set up an electricity distribution network, in part on the Crow Indian Reservation. Big Horn delivers electricity to the Crow Tribe and its members and it charges a fee for that delivery. Big Horn's activities constitute a 'consensual relationship' as defined in *Montana*. The existence of a consensual relationship therefore allows the Tribe to use its retained inherent sovereign power and exercise civil jurisdiction and authority over the 'activities' or 'conduct' of Big Horn County Electric Co-op, even on non-Indian fee land.

53 F.Supp.2d at 1051-52. This analysis was confirmed on appeal by the Ninth Circuit.

> The district court correctly concluded that Big Horn formed a consensual relationship with the Tribe because Big Horn entered into contracts with tribal members for the provision of electrical services. While the agreements creating Big Horn's rights of way were insufficient to create a consensual relationship with the Tribe, see *Red Wolf*, 196 F.3d at 1064, Big Horn's voluntary provision of electrical services on the Reservation did create a consensual relationship.

219 F.3d at 951.[27] In the same vein, a telephone company that enters Tribal lands and voluntarily provides services to Tribal members (as opposed to merely running wires through

[27] The Appeals Court in *Big Horn* ultimately overturned the three percent tax on the electric co-op based on the finding that the tax was levied on the value of the assets of the co-op and not on the activities of the co-op. Whereas the Tribe had jurisdiction over the activities of the co-op, it did not have jurisdiction over the assets, which were located on rights-of-way granted by

rights-of-way that traverse Tribal Lands) has equally entered into a "consensual relationship" with the Tribe.

The Tribal Engagement Provisions of the *CAF Order* are therefore consistent both with the Telecommunications Act of 1996, and Federal Indian Law. Carriers that accept government benefits afforded under USF/CAF may be required to comply with regulations promulgated by the FCC, pursuant to its delegated authority under the Telecommunication Act and Section 214 to implement USF, when those regulations recognize the validity of Tribal business and licensing requirements. Such an arrangement is similar to commonplace requirements that FCC licensees comply with other local, state and federal requirements. The Tribal Engagement Provisions strike a proper balance between the rights of the Federal government, Tribal rights (both aboriginal as well as those granted through Treaties and Congressional statute, and further recognized by federal court decisions) and telephone carriers seeking the benefits afforded under USF.

IV. THE TRIBAL ENGAGEMENT PROVISIONS ARE FULLY SUPPORTED BY THE CONSTITUTION OF THE UNITED STATES

The Petitioners argue that their First Amendment rights are infringed by requiring them to hold discussions with Tribes with regard to "marketing services in a culturally sensitive manner" on Tribal lands.[28] The Petitioners argue that under the *Central Hudson* test,[29] the marketing of their services is protected commercial speech, and the FCC has overstepped

---

Congress. 219 F. at 951.

[28] *Petition*, p. 11, quoting *CAF Order*, ¶ 637.

[29] *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

constitutional bounds by requiring carriers to discuss their marketing materials with Tribal governments.[30]

Petitioners' First Amendment argument ignores the fact that commercial speech is not an unrestricted right, but may, as here, be balanced against other constitutional rights. Under the Constitution, Congress was granted the power to "regulate Commerce . . . with the Indian Tribes," (the "Indian Commerce Clause")[31] while the President was empowered to make treaties, necessarily including Indian treaties, with the consent of the Senate.[32] The Supreme Court early on had to deal with the jurisdictional relationship between the Federal government, the states and Tribes. In *Cherokee Nation v. Georgia*,[33] Chief Justice Marshall concluded that Tribes (at least those residing on reservations) were akin to states. The next term, in *Worcester v. Georgia*,[34] Justice Marshall again addressed the status of Tribes with respect to states and state laws. There, several missionaries convicted of entering the Cherokee Nation without first obtaining a license from the state governor appealed their convictions. The Supreme Court overturned the convictions, concluding that the course of relations between the Federal government and the Cherokees provided ample evidence that the Federal government "manifestly consider[s] the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive."[35]

The FCC has long recognized the constitutional rights of Tribes as sovereign entities. "It is well-established that federally recognized Tribes have inherent sovereignty and self-

---

[30] *Petition*, pp. 11-12.

[31] U.S. Const. Art. I, § 8, cl. 3.

[32] U.S. Const. Art. II, § 2, cl. 2.

[33] 30 U.S. (5 Pet.) 1 (1831)

[34] 31 U.S. (6 Pet.) 515 (1832).

[35] *Id.* at 557.

determination, and exercise jurisdictional powers over their members and territory with the obligations to 'maintain peace and good order, improve their condition, establish school systems, and aid their people...' within their jurisdictions. In 2000, the Commission formally recognized this sovereignty in its Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes." *In the Matter of Improving Communications Services for Native Nations (Notice of Inquiry)*, FCC 11-30, CG Docket No. 11-41, ¶ 4 (released March 4, 2011), *citing Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, 16 FCC Rcd 4078, 4080 (2000) (*Tribal Policy Statement*).

> The federal government has a trust relationship with federally recognized Tribes, and this historic trust relationship requires the federal government to adhere to certain fiduciary standards in its dealings with Tribes. In this regard, the federal government has a longstanding policy of promoting Tribal self-sufficiency and economic development, as embodied in various federal statutes. As an independent agency of the federal government, we recognize our own general trust relationship with, and responsibility to, federally recognized Tribes. The Commission also recognizes 'the rights of Indian Tribal governments to set their own communications priorities and goals for the welfare of their membership.' We believe any inquiry into potential solutions to communications deployment challenges on Tribal lands will benefit from the inclusion of Hawaiian Home Lands, as, much like Tribal lands, these lands have a trust status for Native Hawaiians, both as homesteads and for non-Native economic development activities that benefit the Native Hawaiian community. Thus, any approach to deploying communications services, removing barriers to entry, and increasing broadband availability and adoption must recognize Tribal sovereignty, autonomy, and independence, the unique status and needs of Native Nations and Native communities, the importance of consultation with Native Nation government and community leaders, and the critical role of Native anchor institutions.

Id. at ¶ 5 (footnotes omitted). In short, the First Amendment rights of Petitioners must be balanced against the Indian Commerce Clause of the Constitution.

Central Hudson involved an outright ban on electric utility advertising to promote the use of electricity; it did not involve the grant of a federal benefit subject to certain conditions. Where a Federal benefit is involved, the government has latitude to subject the grant to certain

conditions, even if the conditions affect First Amendment rights. In *Rust v. Sullivan*,[36] the Supreme Court upheld a "gag order" that prohibited family planning clinics that accept federal funds from engaging in abortion counseling or referrals. The Court found that "the government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for purposes for which they were authorized."[37] Similarly, in *National Endowment for the Arts v. Finley*,[38] the Supreme Court upheld the constitutionality of a federal statute (20 U.S.C. § 954(d)(1)) requiring the NEA, in awarding grants, to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public."

In seeking the substantial government benefit of receipt of USF funds, Congress has since 1996 required that carriers first seek designation as an Eligible Telecommunications Carrier (ETC),[39] and agree to conduct themselves in a certain manner. Under Section 214(e)(1)(B), ETC's must agree to "advertise the availability of such services and the charges therefor using media of general distribution."[40] Thus, prior to enactment of the *CAF Order*, carriers wishing to take advantage of the Federal subsidy offered under USF had to agree to accept conditions that limited the absolute right to free speech. In place for 15 years, this existing restriction on commercial speech has never been successfully challenged. Indeed, such an advertising requirement is merely an example where the government is "insisting that public funds be spent for purposes for which they were authorized."[41] The requirement that ETC's that

---

[36] 500 U.S. 173 (1991).

[37] *Id.* at 196.

[38] 524 U.S. 569 (1998).

[39] 47 U.S.C. § 214(e).

[40] 47 U.S.C. § 214(e)(1)(B).

[41] *Rust v. Sullivan,* 500 U.S. at 196.

choose to receive USF/CAF support for service to Tribal Lands discuss their advertising with Tribes is a further instance of ensuring that the government benefit be spent in the manner in which Congress authorized.

If Petitioners seek an absolute freedom from any conditions Congress places on ETC's, they are free to give up their ETC status and forego USF/CAF support. Alternatively, they can engage the applicable Tribal government in a "discussion" of marketing services. Like the FCC's political broadcast rules,[42] the purpose of the rules is not to prohibit speech, but to increase the level of dialog and the availability of information to the public.

V. THE TRIBAL ENGAGEMENT PROVISIONS ARE NOT OVERLY BURDENSOME

Finally, Petitioners argue that the Tribal Engagement Provisions are overly burdensome.[43] This argument is, at best, premature. The parameters of the Tribal Engagement Provisions have not yet been specified. The *CAF Order* delegates to its Office of Native Affairs and Policy (ONAP) the duty of crafting such engagement rules.[44] Petitioners apparently believe that ***any*** engagement with Tribes is overly burdensome. In Petitioners' view, customers never know best. That view goes a long way toward explaining why the Digital Divide has occurred and why it is widening and deepening in Indian Country. The original wireline, monopoly providers of telephone service were not compelled, by law or economics, to provide communications service to Indian Country. Carriers such as Petitioners, continuing that tradition, don't see any business benefit from engaging with their Native American customers,

---

[42] See 47 C.F.R. §§ 73.1940 – 1944.

[43] *Petition*, p. 13.

[44] *CAF Order*, ¶ 637 ("We envision that the Office of Native Affairs and Policy ("ONAP"), in coordination with the Wireline and Wireless Bureaus, would utilize their delegated authority to develop specific procedures regarding the Tribal engagement process as necessary").

yet fight for the right to collect huge subsidies from USF to deploy service onto Tribal Lands. NPM and NCAI is confident that ONAP can establish procedures that provide substantive input by Tribes, while imposing a minimal constitutional burden on carriers.

VI. CONCLUSION

NPM and NCAI fully support the Tribal Engagement Provisions in the *CAF Order*. Such provisions are constitutional, consistent with statute and Federal Indian Law precedent, and truly are "vitally important" to the successful deployment and continued provision of telecommunications services to Native peoples. NPM and NCAI will continue to work with the FCC in championing the rights of Tribes to access services necessary to safety and health, self-governance, capacity building, education, and economic development.

Respectfully submitted,

NATIVE PUBLIC MEDIA

By: /s/
Loris Ann Taylor
President
P.O. Box 3955
Flagstaff, AZ 86003

NATIONAL CONGRESS OF AMERICAN INDIANS

By: /s/
Jacqueline Johnson Pata
Executive Director
1516 P Street, NW
Washington, DC 20005

By: /s/
John Crigler
James E. Dunstan
GARVEY SCHUBERT BARER
1000 Potomac St., N.W. Suite 500
Washington, DC 20007
Counsel to Native Public Media

Dated: January 9, 2012