

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

**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

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

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## SUMMARY

Native Public Media (“NPM”) represents the interests of over 40 Native owned public radio stations and the National Congress of American Indians (“NCAI”) is a forum for federal-Tribal policy on major issues confronting Native peoples. NCAI and NPM have been the voice of American Indians and Alaska and Hawaii Native Peoples in Tribal telecommunications before the FCC, Congress and other federal agencies.

Today, approximately 90% of Native Americans living in Indian country do not have access to broadband connectivity. NPM and NCAI welcome the FCC’s efforts to advance the deployment of telecommunications services to Native Americans. Insufficient data exists to give an adequate picture of the spectrum usage and service availability of advanced services over Tribal lands. In order to fully understand the true availability of telecommunications service on Tribal lands, the Commission must, as a threshold matter, consult with Tribal governments.

NPM and NCAI urge the FCC to take a number of steps to promote deployment of services over Tribal lands. These steps include: (1) expanding the Tribal Priority to advanced wireless services; (2) establishing a build or divest process for spectrum use over Tribal lands; (3) establishing a formal and mandatory negotiation process between both current and future licensees and Tribal governments; (4) the inclusion of a demonstration of service requirement as part of any Tribal-lands safe harbor; (5) significant modification of the Tribal Lands Bidding Credit; and (6) the adoption of well defined eligibility criteria for Tribes to obtain spectrum, as set forth in the NPRM.

If the Commission is devoted to delivering services to Tribal communities, it will promote tribal-centric deployment models and free up spectrum for such deployment. This is the only way that the Digital Divide can be narrowed.

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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 Notice of Proposed Rulemaking in WT Docket 11-40 (“*Tribal Spectrum NPRM*”). In support of these Reply Comments, NPM and NCAI respectfully submit:

**I. INTRODUCTION**

As an organization dedicated to community broadcasting, NPM represents the interests of over 40 Native owned public radio stations that serve Native nations as well as non-Native listeners throughout the United States.<sup>1</sup> Since its launch in 2004, NPM’s principal focus has been on supporting existing Native American public radio stations and promoting ownership for

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<sup>1</sup> NPM, formerly known as the "Center for Native American Public Radio," is an independent 501c3 organization incorporated in the State of Arizona. A list of the NPM member stations can be found at [http://www.nativepublicmedia.org/index.php?option=com\\_content&task=view&id=26&Itemid=48](http://www.nativepublicmedia.org/index.php?option=com_content&task=view&id=26&Itemid=48).

more Native communities by serving as an advocate, national coordinator, and resource center. Advocating on behalf of member Tribes from across the entire United States, in consensus based decision making, NCAI is a forum for federal-tribal policy on major issues confronting Native peoples, including the myriad challenges of communications access and deployment. NCAI coordinates with the Federal Communications Commission on a number of Tribal outreach and education efforts. NPM and NCAI have co-hosted several of the Commission's Indian Telecommunications Initiatives ("ITI") regional workshops and roundtables. NCAI co-hosts with the Commission the annual "FCC-NCAI Dialogue on Increasing Tribal Telecommunication," between Commission officials and members of the NCAI Telecommunications Subcommittee.

Since the creation of NCAI's Telecommunications Subcommittee in 2001, NCAI has adopted many resolutions that articulate national policy positions on the deployment of telecommunications, broadcast and broadband services throughout Indian Country. NPM is an active participant in NCAI's Telecommunications Subcommittee. NPM and NCAI provided substantial input to the National Broadband Plan (NBP), as reflected in the *Tribal Spectrum NPRM*.<sup>2</sup> NPM and NCAI appreciate the Commission's efforts to assist tribes in developing communications policies and are pleased to submit these joint reply comments to the Commission.

There are 4.1 million American Indians and Alaska Natives ("Indians" or "Native Americans") in the United States and 565 federally recognized American Indian Tribes and Alaska Native Villages ("Tribes" or "Tribal Nations"), all inherently sovereign government

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<sup>2</sup> See, e.g., *Tribal Spectrum NPRM*, footnotes 4, 33, 34, 37, 70, 87, 96.

entities with their own political and Tribal structures. The National Broadband Plan (“NBP”)<sup>3</sup> recognized the unique plight of Native Americans, the vast majority of whom live on the other side of the “Digital Divide.” Indeed, most live on the far end of the Digital Divide, in some of the most remote and impoverished areas of the United States.

Today, approximately 90 percent of Native Americans living in Indian Country do not have high-speed access to the Internet. The economic, cultural and human significance of that fact cannot be underestimated. Connecting Indian Country with the rest of the world can reverse centuries of isolation and neglect. The NBP recognizes the principles of Tribal sovereignty and self-determination and the importance of enabling Tribal Nations to shape the future health and welfare of their communities with this critical infrastructure. Broadband has the potential to assist Native American people in securing their rightful place in a world economy of ideas and opportunities.

NPM and NCAI believe that the FCC now has a better understanding of the needs and opportunities for Indian Country than at any time in recent memory. This understanding is aided by the newly established Office of Native Affairs and Policy at the Commission and the needs of Indian Country are no longer a footnote. Concepts such as a “tribal-centric” deployment models and “core community institutions” are becoming part of the Commission’s vocabulary. The Commission now understands that traditional carriers, for whatever reason, have often stopped infrastructure deployment at the borders of Indian Country, regardless of whether those borders are in remote areas or adjacent to highly populated areas.

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<sup>3</sup> See Federal Communications Commission, *Connecting America: The National Broadband Plan*, (rel. Mar. 16, 2010) (“NBP”).

## II. A TRUE ASSESSMENT OF ACTUAL SPECTRUM USE ON TRIBAL LANDS IS NECESSARY

As a threshold matter, NPM and NCAI must note that there remains insufficient data on actual spectrum usage and service availability in Indian Country. The *Tribal Spectrum NPRM* notes that the coverage data presented are at best “estimates” of spectrum usage.<sup>4</sup> In a study released April 25<sup>th</sup>, 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.<sup>5</sup> Those maps show huge areas of the Navajo Nation empty – meaning that there is no data as to service availability. This is a common occurrence in Indian Country. Not only have native peoples been largely ignored during the information revolution, no one has even bothered to collect data on telecommunications availability and usage in Indian Country.

Moreover, “coverage” doesn’t necessarily mean actual availability of a particular service. As the *Tribal Spectrum NPRM* points out, licensees can meet the buildout requirements of many geographically licensed spectrum without having to deliver service to Indian reservations.<sup>6</sup> In addition, even on reservations where service technically is available, if carriers don’t market the service to Native peoples (with retail points of presence on a reservation, and with marketing materials in indigenous languages), much of Indian Country is left unaware of services, or unable to subscribe because the distances to travel off-reservation to sign up for service are too great.

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<sup>4</sup> *Tribal Spectrum NPRM*, n. 6 (“These coverage figures are Commission staff estimates based on American Roamer database for 3G technologies”).

<sup>5</sup> The study is available for download at: [http://idinsight.com/documents/Verification\\_Analysis\\_of\\_National\\_Broadband\\_map.pdf](http://idinsight.com/documents/Verification_Analysis_of_National_Broadband_map.pdf).

<sup>6</sup> *Id.* at ¶ 29 (“In all of these services, geographic area-based licensees can satisfy construction requirements without necessarily constructing a network capable of providing service to all residents of their license area, leaving some areas, possibly including Tribal lands, with only minimal levels of service or no service at all”).

Juxtaposed against the unknown availability of service in Indian Country are the findings of NPM and New America Foundation in *New Media, Technology and Internet Use in Indian Country: Quantitative and Qualitative Analyses*,<sup>7</sup> that demonstrate that where service is actually available to Native Americans, they are active users of telecommunication services.

Prior to any significant rule changes, therefore, NPM and NCAI urge the FCC to 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.

Only through engaging in this consultative process, and getting the input of Tribes, can the FCC understand the true nature of the availability of service in Indian Country.

### **III. NPM AND NCAI SUPPORT THE PROPOSALS SET FORTH IN THE *NPRM***

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

The Commission proposes at paragraphs 35-40 of the *Tribal Spectrum NPRM* to establish a Tribal Priority for unassigned wireless radio services licenses.<sup>8</sup> As early supporters of the

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<sup>7</sup> The study is available for download at:  
<http://www.nativepublicmedia.org/images/stories/documents/npm-naf-new-media-study-2009.pdf>.

<sup>8</sup> *Tribal Spectrum NPRM*, ¶¶ 35-40.



Tribal Priority for allocating future broadcast allocations and licenses,<sup>9</sup> NPM and NCAI have urged its extension to other telecommunications services.<sup>10</sup> The same policy grounds, and constitutional support, apply to services beyond broadcast radio.<sup>11</sup> 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. Attached as Exhibit A is NCAI Resolution MKE-11-007, adopted at the Mid-Year Conference Session of the National Congress of American Indians, June 13-16, 2011, calling for the extension of the Tribal Priority to wireless spectrum.

NPM and NCAI also support the Commission’s proposal to open a Tribal Priority window prior to opening up new spectrum to all bidders.<sup>12</sup> 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

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<sup>9</sup> See, *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, First Report and Order and Further Notice of Proposed Rule Making*, 25 FCC Rcd 1583, 1588 ¶ 9 (2010) (“*Rural Radio Report and Order*”).

<sup>10</sup> 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, p. 7; Joint Reply Comments of NPM and NCAI in WT Docket No. 10-208 (“Mobility Fund”), filed December 16, 2010, p. 11.

<sup>11</sup> 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).

<sup>12</sup> See *Tribal Spectrum NPRM*, ¶ 39.

time to design systems and prepare applications. In many instances, Tribes need more time to secure the technical support that are often not readily available on tribal homelands (as compared to established telecommunications carriers who most often enjoy in-house technical expertise) to make their proposals “shovel ready.”<sup>13</sup> NPM and NCAI believe that Tribes and Tribally-controlled entities will be able to meet all the legal, technical and financial requirements to qualify for a license in any specific Wireless Radio Services.<sup>14</sup> However, the barriers to entry for tribal providers remain challenging and the Commission should be prepared to accept and process application that request waivers of one or more of these qualifications based on unique circumstances facing Tribes that might make full compliance impossible or extremely difficult.<sup>15</sup>

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

The second change in FCC rules that would provide Tribes with access to spectrum is the proposed “build-or-divest” rule changes proposed in the *Tribal Spectrum NPRM*.<sup>16</sup> As noted in the *Tribal Spectrum NPRM*, and as NPM and NCAI have demonstrated repeatedly in comments in other proceedings,<sup>17</sup> the economic environment in Indian Country fundamentally is different from the economic conditions that have driven the demand for telecommunication services elsewhere in America. Carriers accustomed to deploying services based on residential

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<sup>13</sup> The outreach efforts described in paragraph 39 are vital – Tribes must be aware of these opportunities, and have sufficient time to prepare viable applications.

<sup>14</sup> See *Tribal Spectrum NPRM*, ¶ 40.

<sup>15</sup> NPM and NCAI would submit that waivers of technical qualifications would be judged more strictly than requests for waivers of financial qualifications. Given the very different funding profiles of Tribes and Tribal entities, compliance with commercial financial qualifications may not be appropriate for some Tribes and Tribal entities.

<sup>16</sup> *Tribal Spectrum NPRM*, ¶¶ 53-63.

<sup>17</sup> See, e.g., NPM and NCAI, Joint Comments, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 05-337, July 12, 2010 at 9; NPM and NCAI, Joint Reply Comments, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 05-337, Aug. 11, 2010 at 7.

subscribers per mile have historically stopped at the borders of 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.

This *must* change. 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.<sup>18</sup> The *Tribal Spectrum NPRM* suggests that a process should be established whereby a Tribe or Tribal Entity could file a Notice of Intent to initiate a build-or-divest process after a carrier has notified the FCC that it has complete the buildout requirements to maintain its license.<sup>19</sup> NPM and NCAI submit that this is too long and too late. Rather, the FCC should require carriers who receive permits or licenses for spectrum that includes Tribal Lands to provide a progress report no later than halfway through the buildout period specifically addressing their intent and timetable for deployment to Tribal Lands and whether it intends to achieve the buildout requirement percentage on Tribal Lands within the required buildout period. A Tribal Entity then should be able to file a Notice of Intent to commence a build-or-divest proceeding anytime after a progress report is filed by a carrier in which it indicates that it will not

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<sup>18</sup> See Exhibit A, NCAI Resolution MKE-11-007 (calling for a “build-or-divest” approach to incumbent licensees).

<sup>19</sup> *Tribal Spectrum NPRM*, ¶ 54.

meet the buildout requirement on the Tribal Lands covered by that spectrum.<sup>20</sup> That Notice of Intent should not place the burden on the Tribal Entity to demonstrate that construction on Tribal Lands has not occurred; rather, the Commission should place the burden of proof on carriers to demonstrate that they have met the buildout requirements on Tribal Lands during the period required for initial construction. Absent such a showing, the license should be terminated for all Tribal Lands.

NPM and NCAI are concerned that if the Commission were to adopt the process proposed in paragraphs 54 and 55, carriers would be granted an automatic extension of time in which to deliver service to Tribal Lands. Carriers could choose not to serve Tribal Lands, wait for a Notice of Intent to be filed, and then come back with a plan for deployment that could stretch their time to achieve buildout to twice the initially allotted time for completing construction. The build-or-divest process thus could be “gamed” by carriers in such a way that it would make little sense to include Tribal Lands in their initial deployment plans.<sup>21</sup>

NPM and NCAI further submit that the Notice of Intent should be filed by a Tribe itself (or its regulatory body), not just a Tribal Entity that seeks to serve the Tribal Lands in question.<sup>22</sup> A Tribe should have the right to notify the FCC that its citizens are not being served by the licensed carrier and trigger a process whereby that spectrum is reclaimed, regardless of whether

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<sup>20</sup> As proposed in the *Tribal Spectrum NPRM*, ¶ 54, a Tribal Entity would also be allowed to file a Notice of Intent following the carrier’s filing of a notice of construction. The Commission should further amend its rules to require a carrier’s notice of construction to document whether the buildout requirements had been achieved on all Tribal Lands covered by the license.

<sup>21</sup> NPM and NCAI is similarly concerned with the statement in paragraph 58, wherein the Commission asks whether divesting and relicensing spectrum on Tribal Lands might run afoul of technical rules, and introduce interference issues. There has been anecdotal evidence over the years that some carriers were using Tribal Lands as interference buffers between adjacent systems. Paragraph 58 seems to lend credence to this. While some inter-carrier interference coordination is always required with adjacent systems, the Commission’s comment that “it may be possible that existing technical rules are insufficient to allow incumbent and Tribal licensees to operate effectively” is very disturbing.

<sup>22</sup> See, *Tribal Spectrum NPRM*, ¶ 59.

the Tribe or a Tribal Entity is ready, willing, and able to provide service immediately. 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.<sup>23</sup>

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.

**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.<sup>24</sup> Unfortunately, the history of secondary market negotiations between Tribes and established carriers is not good. Most wireless carriers have sophisticated in-house secondary market teams, backed by high powered (and high priced) outside attorneys. Tribes without experience and expertise are at a distinct disadvantage. The Comments of the Southern California Tribal Chairmen’s Association highlight this disparity:

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<sup>23</sup> Similarly, NPM and NCAI agree 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.

<sup>24</sup> *Tribal Spectrum NPRM*, ¶ 41-43.

Negotiating these licenses requires too many cost prohibitive steps that lead to negotiations with a group of corporations that have the ability to purchase this spectrum and sit on it, for what has been termed as, “Future Plans.” Somehow these “Future Plans” never include the tribes. The cost of legal representation for discovery, for negotiation, and contracting immediately makes the task more than we can support. Finally, these failed negotiations are all kept private and cloaked in secrecy by these costly legal agreements. What could be potentially good to learn or share about the process is never to be shared, so every new tribe that tries it has to start from scratch and learn the hard way. Every corporation probably has to learn the hard way too about tribes. We have often looked at these opportunities in the past, and have come to realize that they are actually not effective opportunities for tribes. Presently, for tribes, pursuing a secondary market license is a dead-end business strategy at best.<sup>25</sup>

NPM and NCAI are concerned that 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. As mentioned above, service to Indian Country doesn’t fit easily into traditional carrier economic models, and therefore the price carriers might be willing to sell for may be far higher than what a Tribe can afford and still hope to deliver service to its citizens. This in turn creates access and affordability challenges for Native subscribers.

NPM and NCAI further disagree that negotiations should be subject to rules similar to those established for broadcast retransmission consent.<sup>26</sup> The retransmission consent rules were established so that two commercial entities could battle it out in a commercial market where both have significant market power. To require a Tribe or

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<sup>25</sup> Southern California Tribal Chairmen’s Association, Ex Parte Letter, GN Docket Nos., 09-47, 09-51, 09-137, Feb. 9, 2011.

<sup>26</sup> *Tribal Spectrum NPRM*, ¶ 48.

Tribal Entity to conduct itself as a purely commercial enterprise would be inconsistent with the principles of sovereignty and the inherent governmental authority of Tribes. Rather, secondary market negotiations should be conducted within the context of the government-to-government consultative process, whereby the Tribe's authority over its land and its citizens is recognized.

**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.<sup>27</sup> NPM and NCAI support this proposal with the same caveat expressed above – 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 at some subscription level more than *de minimis*.

**E. The FCC Should Significantly Modify the Tribal Lands Bidding Credit**

The *Tribal Spectrum NPRM* proposes a number of modifications to the Tribal Lands Bidding Credit (TLBC).<sup>28</sup> The history of the TLBC has not been a glowing one. Significant revisions are necessary to recognize the unique challenges inherent in bringing telecommunications services to Indian Country. Rather than emphasizing a program that attempts to put Tribes in a better position to bid head-to-head with huge telecommunications giants, the TLBC should be modified such that two key goals are accomplished: 1) such program must result in tribes actually attaining licensing in their communities; and, 2) that every

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<sup>27</sup> *Id.* at ¶¶ 64-67.

<sup>28</sup> *Id.* at ¶ 18.

Native community and tribal government be able to use spectrum over their lands or communities for public interest needs.<sup>29</sup>

NPM and NCAI support the concept of extending the three (3) year construction deadline for entities qualifying for the TLBC.<sup>30</sup> Because of the rural nature of many Tribal Lands, and because of the difficult economic conditions that pervade Indian Country making raising capital for construction so challenging, the FCC should provide a longer construction period for entities qualifying for the TLBC, up to five (5) years from license award. NPM and NCAI support the proposal of extending the 180-day certification requirement (requiring coordination with Tribal governments regarding siting of facilities and deployment of service on Tribal Lands), but only upon the written request of the Tribe.<sup>31</sup> Those entities which wish to avail themselves of the TLBC should actively engage with Tribes early in the process, and it should be the Tribe that determines both whether an extension is necessary, and whether the applicant is moving forward with the coordination process in good faith.

#### **F. Eligibility Criteria**

NPM and NCAI generally agree with the eligibility criteria set forth in the *Tribal Spectrum NPRM*. NPM and NCAI agree with the proposed definition of “Tribal Lands” set forth at paragraph 18.<sup>32</sup> Using the definition of Tribal Lands contained in Section 1.2110(f)(3)(i) (the Tribal lands bidding credit) lends consistency to that definition across Title 47 of the Code of

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<sup>29</sup> See Exhibit A, NCAI Resolution MKE-11-007.

<sup>30</sup> *Id.* at ¶ 72.

<sup>31</sup> As sovereign governments, Tribes have their own internal procedural, protocols and substantive rules that must be respected by both carriers and the FCC. Sometimes these rules result in the need for longer review periods, especially by Tribal agencies who must have multiple jurisdictional mandates, and often meet less frequently than other equivalent Federal or state regulatory bodies.

<sup>32</sup> *Tribal Spectrum NPRM*, ¶¶ 68-74.



Federal Regulations. Similarly, establishing eligibility rules for the proposed changes similar to those adopted in the FM Tribal Priority also had the benefit of consistency.<sup>33</sup>

In terms of what wireless services should be subject to the proposed changed rules, NPM and NCAI believe that the Commission should extend the new rules to as many services as possible.<sup>34</sup> 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 geographic bounds of a Tribal nation, and does not offer service to Tribal Lands, the carrier should be subject to the proposed changes.<sup>35</sup>

In terms of defining “unserved,” and “underserved,”<sup>36</sup> NPM and NCAI cautions the FCC that it must look hard at whether a service is *actually available*. As noted in the first section of these Joint Reply Comments, 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. Indian Country has seen many instances where carriers will provide service to roads and highways that run through Tribal Lands. 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.

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<sup>33</sup> *Id.* at ¶ 23.

<sup>34</sup> *Id.* at ¶ 19.

<sup>35</sup> The Commission suggests that because there is already a mechanism in the 800 MHz Cellular service that permit third parties to acquire and provide service to unserved areas, that service should not be subject to the proposed changes. *Id.* NPM and NCAI disagrees. As noted above, it is essential that Tribal governments have some jurisdiction over the services offered on their lands. Tribal governments need to power to trigger the mechanisms outlined in the *Tribal Spectrum NPRM*, rather than be subject to the vagaries and randomness of the economic models used by carriers to determine whether it would be profitable to extend service into Tribal Lands. Tribal governments need the ability, even in the 800 MHz service to call “foul,” and begin the spectrum reclamation process.

<sup>36</sup> *Tribal Spectrum NPRM*, ¶¶ 28-31.

NPM and NCAI support the more stringent 85 percent test proposed at paragraph 30, rather than the far more lenient 65 percent test proposed in paragraph 28.<sup>37</sup> In many rural Tribal nations, there are nonetheless clusters of populations whereby achieving the coverage of 65 percent of the population would still leave the vast majority of the land mass unserved. Many Tribes experience large geographic areas within their nations where there simply is no service. Having to drive many miles just to be able to make a 911 call (if indeed, 911 service is even available on the reservation), should not qualify as “service.” A stricter 85 percent coverage metric would require extension of service to more areas on Tribal Lands. If these population pockets are covered, it would make logical sense to provide the infrastructure to also cover the roads and highways that tie together these populations centers.

Finally, although the Commission notes that in many instances the proposed rule changes would result in singleton applications for either the Tribal Priority or for a replacement carrier at the end of a “build-or-divest” proceeding,<sup>38</sup> nonetheless, NPM and NCAI could see instances where Tribes with smaller land masses might end up with a mutual exclusive (MX) application to another Tribe. In such instances, the Commission should allow the Tribes ample opportunity, with FCC assistance on a government-to-government consultative basis, to amend their application to remove the mutual exclusivity prior to putting the applications into a competitive bidding posture.

#### **IV. COMMENTS OF OTHER PARTIES IN THIS PROCEEDING**

The comments filed by the Blooston Rural Carriers (“BRC”) further clarify the entrenched views of carriers seeking not to provide services to Tribal lands, but only to protect

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<sup>37</sup> Compare *Tribal Spectrum NPRM*, ¶ 28, with ¶ 30.

their business interests.<sup>39</sup> If the Commission and carriers are truly serious about providing service to unserved and underserved Tribal lands, investment backed expectations must bow to the higher need to deploy service.

BRC asserts that the presence of a healthy and robust industry is better for unserved or underserved Tribal lands, as opposed to a modest one-time infusion of cash.<sup>40</sup> Mere presence of industry to date has done nothing to promote service delivery to Tribal lands, as on many Tribal lands, there is no industry presence. While this NPRM specifically focuses on spectrum access issues, access to capital is also of utmost concern to Tribal entities. A capital infusion along with spectrum access reform will work jointly to lower barriers of entry for Tribal entities.

BRC, through its comments, argues that any mechanisms to provide spectrum access opportunities to Tribes be 100% voluntary for current licensees.<sup>41</sup> A voluntary approach, however, would only serve to perpetuate the problem as it would eliminate any requirement for meaningful collaboration between Tribes and incumbent service providers. NPM and NCAI urge the Commission to require current licensees as well as future licensees to participate in spectrum access where incumbents are impeding access to services over Tribal lands. Permitting discussions with Tribal entities or participation in access programs to be 100% voluntary would only serve to sanction the incumbents' "redlining out" Tribal lands and does nothing to promote service to these underserved and unserved areas. While BRC may "welcome" discussions with Tribal entities, it is highly unlikely that any would ultimately occur if carriers are not required to do so.

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<sup>38</sup> *Tribal Spectrum NPRM*, ¶ 38.

<sup>39</sup> *See*, Comments of the Blooston Rural Carriers, WT Docket 11-40, May 19, 2011 (*BRC Comments*).

<sup>40</sup> *Id.* at 2.

<sup>41</sup> *Id.* at 6.

BRC's suggestion that any priority should not apply to licenses issued on CMA (if larger sized) geographic area licenses is not only disingenuous, when coupled with their argument that a tribal safe harbor should be applied to CMA licenses, would only ensure that Tribal areas continue to receive the level of service that they have received to date – next to nothing. Exempting CMAs from a Tribal priority would prevent the type of service expansion envisioned by this NPRM. CMAs have been used as the basis for licensing cellular and advanced wireless services, the core of where Tribal expansion must occur. Not surprisingly, CTIA currently has a petition for rulemaking pending seeking to transition all cellular services to CMA-based licensing.<sup>42</sup> A grant of CTIA's proposal along with adoption of BRC's suggestions would render all cellular licenses off limits to Tribal entities thwarting the very progress the Commission seeks to promote.

Finally, BRC asserts that while it makes sense to have a Tribal Priority in the media context, BRC notes that it is unclear a similar tribal priority should exist in a common carrier context, as services are provided without regard to content.<sup>43</sup> This flawed understanding of the underlying rationale for an expanded priority rests on the flawed assumption that any service is provided at all. The impetus of this NPRM is specifically to increase service from nothing to something, a process that would not be necessary if any service were provided to so many Tribal lands. The only way to solve the lack of access problem facing Tribes is to require service providers to meaningfully engage with tribal entities and either provide services themselves or turn over fallow spectrum to Tribal entities so that they may provide service to their residents. BRC's suggestions, at their core, only promote the exemption of substantial spectrum from any rule changes simply because the profit interests of the large corporate licensees are not suited.

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<sup>42</sup> See, CTIA – The Wireless Association, Petition for Rulemaking, RM-11510, Oct. 8, 2008.

Verizon Wireless' ("Verizon") comments, resonating many of the suggestions propounded by BRC, urge the Commission to effectively maintain the status quo.<sup>44</sup> In its comments, Verizon first asserts that any Tribal priority should be available only for areas "not served" by wireless coverage.<sup>45</sup> Nowhere, however, does Verizon attempt to define what it means by "not served." If they intend for this to mean areas not covered by any wireless license, that definition would be untenable. Verizon merely pays lip-service to providing support and services to Tribal entities, while protecting their business interests. Moreover, their recommendations would simply not yield any quantifiable results for Tribal entities. At their core, Verizon only supports the FCC's recommendation to establish a safe harbor for carriers and giving Tribal entities priority access to future releases of spectrum. This only serves to allow currently licensed but unused spectrum to continue to lie fallow.

None of the Verizon proposals do anything to mitigate the dilemmas currently facing tribal entities. Verizon's suggestion that a build or divest process only commence after the licensee satisfy a final construction requirement all but ensures that the lack of real service continues for years to come, inconsistent with the nationwide 3G wireless service goals of the NBP. This is simply an unacceptable policy, if the Commission is truly committed to advancing communications over Tribal lands.

## **V. CONCLUSION**

The *Tribal Spectrum NPRM*, is the next logical step in implementing the National Broadband Plan. The comments in this proceeding and in other related proceeding make clear

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<sup>43</sup> BRC Comments at 3.

<sup>44</sup> See, Comments of the Verizon Wireless, WT Docket 11-40, May 19, 2011.

<sup>45</sup> *Id.* at 2.

that without fundamental change in the FCC's approach to spectrum in Indian Country, the next great advances in digital communication will once again exclude this country's first inhabitants. Classic market-driven economics have denied most Native Americans of the fruits of the information economy. 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. NPM and NCAI therefore requests that that the Commission consult with Tribes, and adopt the proposals set forth herein.

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  
Daniel Margolis  
GARVEY SCHUBERT BARER  
1000 Potomac St., N.W. Suite 500  
Washington, DC 20007  
*Counsel to Native Public Media*

June 20, 2011

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### Contact Info

**Name of Filer:** Native Public Media and the National Congress of American Indians  
**Email Address:** jcrigler@gsblaw.com  
**Attorney/Author Name:** John Crigler  
**Lawfirm Name (required if represented by counsel):** Garvey Schubert Barer

### Address

**Address For:** Law Firm  
**Address Line 1:** 1000 Potomac Street, N.W.  
**Address Line 2:** Suite 500  
**City:** Washington  
**State:** DISTRICT OF COLUMBIA  
**Zip:** 20007

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