

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

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

To: The Commission

**JOINT COMMENTS OF NATIVE PUBLIC MEDIA AND
THE NATIONAL CONGRESS OF AMERICAN INDIANS
TO FURTHER NOTICE OF PROPOSED RULEMAKING**

NATIVE PUBLIC MEDIA

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May 3, 2010

**NATIONAL CONGRESS OF
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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. EXTENDING THE TRIBAL PRIORITY TO TRIBES WITHOUT SIGNIFICANT LAND HOLDINGS	3
A. The Tribal Priority should be Clarified or Modified to Accommodate Tribes with Very Small Tribal Lands	4
B. Tribes That Lack Current Land Holdings Should Not be Denied the Benefits of the Tribal Priority	6
C. Tribes Lacking Current Land Holdings Should Be Allowed To Demonstrate That the Station Will Serve a Tribal Community.....	7
D. Criteria for Establishing the Equivalent of Tribal Lands.....	8
E. Consultation With Tribal Nations Is Required Now.....	10
III. IMPLEMENTATION OF A TRIBAL BIDDING CREDIT	11
A. The Tribal Bidding Credit must be different from the NEBC	11
B. A New, and Separate, Tribal Bidding Credit Is Required	12
C. A Four-Year Holding Period Should be Adopted For Any Entity Using the Tribal Priority, Tribal Bidding Credit and/or the NEBC.....	13
IV. CONCLUSION.....	14

SUMMARY

The Tribal Priority presents an unprecedented opportunity to empower Tribes to provide critical services to their members in Indian Country via new broadcast facilities. The two issues raised in the *FNPRM*, if properly implemented, will go far to ensure that the Tribal Priority is more than just a theoretical tool, but can be used in Indian Country in a practical manner.

Applying the Tribal Priority to Tribes with very small or non-existent current Federally recognized land holdings will open up the Tribal Priority to more than just the 312 Tribes that reside in areas commonly thought to represent Indian Country, reservation and pueblos. All 564 Federally recognized Tribes deserve access to the Tribal Priority. Those Tribes with very small land holdings need a slight modification to the Tribal Priority's 50 percent coverage test which can be accomplished by clarifying that the applicant's contour must contain at least 50 percent of Tribal lands, or the contour must serve 50 percent of the total Tribal lands of the applicant.

The Commission has a strong and flexible framework that has developed over the past 75 years to determine what constitutes a "community" for purposes of allocations and NCE applications. The same framework can be applied to Tribes without Federally recognized land holdings to demonstrate the existence and location of a Tribal Community, to which the Tribal Priority should apply. Any Federally recognized Tribe, in consultation with the FCC on a government-to-government basis, should be allowed to demonstrate where the Tribal Community resides, and where the Tribal Priority should be applied.

Unless licenses ultimately end up in the hands of Tribes or Tribal-controlled entities, the Tribal Priority will be nothing more than a paper policy. NPM and NCAI support the adoption of a Tribal Bidding Credit of 35%, in tandem with a potential New Entrant Bidding Credit of 25%, to provide Tribes, for the first time, with the real possibility of outbidding existing media companies for facilities that have been allocated to serve Indian Country.

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Native Public Media (“NPM”) and the National Congress of American Indians (“NCAI”) respectfully submit these Comments in response to the Further Notice of Proposed Rulemaking (“FNPRM”) in the above-referenced proceeding.¹ In support of these Comments, NPM and NCAI respectfully submit:

I. INTRODUCTION

In the *Tribal Priority Order and FNPRM*, the FCC adopted a 307(b) priority for Tribes, tribal consortia and entities controlled by Tribes. The Commission concluded:

We find that application of our traditional allocation priorities has not realized our Section 307(b) mandate to ‘make such distribution of licenses ... among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service’ with regard to tribal lands. . . Because of their status as sovereign nations responsible for, among other things, ‘maintaining and sustaining their sacred histories, languages, and traditions,’ Tribes have a vital role to play in serving the needs and interests of their local communities. A resolution submitted to the Commission by the National Congress of American Indians, for example, provides that tribal-owned stations have the potential to “support several fundamental missions of Tribal entities within their communities,

¹ *In the Matter of Policies to Promote Rural Radio Service, First Report and Order and Further Notice of Proposed Rule Making, (“Tribal Priority Order and FNPRM”),* FCC 10-24, released February 3, 2010. The FNPRM called for comments to be filed 60 days after publication in the Federal Register. The *Tribal Priority Order and FNPRM* appeared in the Federal Register on March 4, 2010. 75 Fed. Reg. 9797 (March 4, 2010).

which include increasing the deployment of services, strengthening local programming, providing public safety, obtaining diversity of viewpoint, creating cultural preservation and language revitalization, and prov[id]ing a modern technological outlet to engage community members, especially youth, in the positive development of their values, identity, and quality of life.’ Despite this, only 41 radio stations currently are licensed to federally-recognized Indian tribes or affiliated groups, representing less than one-third of one percent of the more than 14,000 radio stations in the United States. We conclude that the establishment of an allocation priority for the provision of radio service to tribal lands by Indian tribal government-owned stations will advance our Section 307(b) goals and serve the public interest by enabling Indian tribal governments to provide radio service tailored to the needs and interests of their local communities that they are uniquely capable of providing.²

The *Tribal Priority Order and FNPRM* also recognized both the Federal requirement and practical need for government-to-government coordination with Tribes on a going-forth basis.

We also find that the Tribal Priority adopted herein will advance the Commission’s longstanding commitment, in accordance with the federal trust relationship, ‘to work with Indian Tribes on a government-to-government basis ... to ensure, through its regulations and policy initiatives, and consistent with Section 1 of the Communications Act of 1934, that Indian Tribes have adequate access to communications services.’ Pursuant to that commitment, the Commission has recognized ‘the rights of Indian Tribal governments to set their own communications priorities and goals for the welfare of their membership.’ The new Tribal Priority will promote those sovereign rights by enabling Tribes to provide vital radio services to their communities.³

NPM and NCAI have been active participants in this proceeding and applaud the Commission’s efforts to encourage the future deployment of broadcasting services in Indian Country. The *Tribal Priority Order and FNPRM* is an excellent step in this regard. As the *FNPRM* makes clear, however, there are still two critical issues that must be addressed to ensure that the Tribal Priority is both fairly applied to all of Indian Country, and applied in a way that will give Tribes and Tribal-controlled entities a fair shot not only at allocating a new channel to serve their people, but acquiring a

² *Id.* at ¶ 8 (footnotes omitted).

³ *Id.* at ¶ 9 (footnotes omitted).

construction permit at the end of the process. Thus, the FCC requested further input on the issues of: 1) Extending the Tribal Priority to Tribes without significant Federally recognized lands; and 2) Adopting a Tribal Bidding Credit.

II. EXTENDING THE TRIBAL PRIORITY TO TRIBES WITHOUT SIGNIFICANT LAND HOLDINGS

Of the 564 Federally recognized Native American Tribes, only 312, or just over half, occupy reservations, pueblos, or other Federally recognized land holdings other than individual Tribal member allotments. Since the Tribal Priority was principally designed “to enable Tribes to fulfill their obligations, as inherently sovereign Nations, to aid the development, and perpetuate the language and culture of their members,”⁴ that laudatory goal applies to all Tribes, not just those who occupy certain geographic areas. In the *FNPRM*, the FCC seeks comment on whether, and how, the Tribal Priority should apply to “landless”⁵ Tribes.

⁴ *Id.* at ¶ 68.

⁵ While the Commission’s use of the term “landless” in the *FNPRM* is understandable in this instance, and conveys the Commission’s desire in developing the record, it is actually a misnomer. Tribal lands come in a number of forms, the common reservations and pueblos being only a portion of what is referred to as “Indian Country.” Indian lands include Trust Lands (where the Federal government holds legal title but the beneficial interest remains with Tribes); Restricted Fee Land (where individual Native Americans hold legal title with legal restrictions against alienation or encumbrance); Fee Land purchased by Tribes or individual Tribal members under a specific statutory authority, sometimes outside of designated reservations or pueblo; and Allotted Trust Lands which are held in trust for the use of individual Native Americans. So while not every Tribal Nation holds title to its own land, or has land held in trust or trust restricted status by the Federal government, it should be noted that every Tribal Nation has a historical, cultural, and community connection to certain lands or regions of the country. Tribes own and inhabit land in many different types of land tenure. These connections manifest themselves in many different ways, some dating to time immemorial. There are myriad different geo-political histories found among the Native Nations, and differing site specific results of the different eras of Federal Indian policies. Often these historical connections are also manifested in modern community connections, where a displacement of ownership has not meant a displacement of community or connective values. Throughout Indian Country these community connections have endured the loss of tens of millions of acres of land, outlasting the changes in land ownership or the checker-boarding fractionation of land interests. As discussed *infra*, the Commission should seize upon its opportunities to consult and work directly with Tribal Nations and their Tribal entities to employ case specific flexible approaches to arrive at appropriately suitable community licensing area designations allowing the operation of the Tribal Priority outside the bounds of current “Tribal Lands” areas.

We therefore consider, without proposing a specific rule, whether and how Tribes without tribal lands as defined herein and in the Rural NPRM can qualify for the Tribal Priority. For example, we consider whether a threshold tribal population, or tribal population density, could be taken into account in determining whether a tribal applicant meets the tribal coverage and community of license criteria of the Tribal Priority. We would also consider whether historical or contemporary cultural links could be taken into account in making the tribal coverage and community determinations. Should the fact that a currently landless Tribe or Tribes previously occupied the coverage area or proposed community of license be taken into account? Are there other factors that should be considered? We invite comment on these issues, and seek suggestions as to whether and how we might institute such a procedure.⁶

NPM and NCAI supports such an extension, which should include not only those Tribes without lands, but also those whose recognized lands are too small to qualify under the current Tribal Priority.

A. The Tribal Priority should be Clarified or Modified to Accommodate Tribes with Very Small Tribal Lands

The Tribal Priority adopted in this proceeding, applies a 50 percent test, which requires that 50 percent of a facility's contour cover Tribal lands. One problem with this approach however, is that there are a significant number of Tribes whose land areas are quite small. As shown in the image below, for example, there are at least 18 Tribes in San Diego County, California. Yet in total, the lands of all of these Tribes encompass just over 124,000 acres or 193 square miles of the 4,205 square miles in San Diego County.⁷

⁶ *FNPRM*, at ¶ 69.

⁷ See <http://www.sandiego.edu/nativeamerican/reservations.html>.



Image 1: Map of San Diego County Tribes

Source: http://www.census.gov/geo/www/maps/aian_wall_map/us_wall100.htm

None of these Tribes can take advantage of the Tribal Priority as currently written, because even if minimum Class A facilities were specified, the area of non-Tribal lands covered would be more than 50 percent of the contour, even though such facilities would easily cover 100 percent of the Tribal lands.⁸ To take another example, the Yurok Indian Reservation in northern California consists of a 44 mile long narrow strip of land along the Klamath River.⁹ It similarly would be impossible for the Yurok to take advantage of the Tribal Priority as written because it would be impractical to build a facility the contour of which covered at least 50 percent Yurok Tribal Lands.¹⁰ NPM and NCAI therefore urge the Commission to modify the Tribal Priority to specify that in order to qualify for the Tribal Priority, *either* the contour would

⁸ This problem is not unique to Southern California. The 2000 Census Bureau Map of “American Indians and Alaska Natives in the United States,” found at http://www.census.gov/geo/www/maps/aian_wall_map/us_wall100.htm depicts many dozens of Tribes whose Federally recognized lands are simply too small to qualify under the 50 percent test.

⁹ See, http://en.wikipedia.org/wiki/Yurok_Indian_Reservation.

¹⁰ Even the lobes of a highly directionalized facility would still extend far beyond the east and west edge of the Yurok Reservation, resulting in a failure under the 50 percent contour test.

have to encompass at least 50 percent of Tribal lands, *or* the contour covers at least 50 percent of the total Tribe's land. That slight modification would make the Tribal Priority available to the several dozen Tribes that could not currently meet the 50 percent contour test.¹¹

B. Tribes That Lack Current Land Holdings Should Not be Denied the Benefits of the Tribal Priority

As NPM and NCAI pointed out in its Comments and Reply Comments, Indian land status is complicated due to the legacy of Federal policies. Much Indian land is fractionated, or no longer recognized as Tribal lands. One of the tragic legacies of the policies of the United States from the 1800's through the late 1950's – the Removal and Reservation, the Assimilation and Allotment, and Termination and Relocation Eras¹² -- was that they were designed to eradicate Tribal cultures, absorb and subsume the indigenous populations, and eliminate American Indian land holdings. As a result, 45 percent of Tribes have either been removed from their original native lands, or those lands have been removed out from Tribal control.¹³ Many American Indian Tribes lack significant or congruous land parcels to call their own. Unconditionally limiting the Tribal Priority to “landed” Tribes would therefore condone past policies and

¹¹ One might suggest that for Tribes with very small Federally recognized lands, perhaps their needs could be met through low power FM (LPFM) facilities. LPFM is not an answer to the failure of broadcast services in Indian Country, however. First, by their nature, LPFM stations are a secondary service, subject to potential interference from or displacement by full power stations. The whole reason that the Tribal Priority is so desperately needed is because Tribes lack access to critical public safety, weather, and government information that only a full power station can provide. Further, while an LPFM station might be able to serve a smaller landed Tribe's entire area, in many of those cases, precisely because the landed area is so small, much of the Tribal Community lives elsewhere. A full power station is therefore necessary to reach not only Tribal lands, but adjacent areas where a substantial number of Tribal members reside.

¹² See David H. Getches et al., *Cases and Materials on Federal Indian Law*, 84–87 (4th ed. 1998).

¹³ Prior to the modern Self-Determination Era, which began in the late 1960's the Termination and Relocation Era generally sought to derecognize the rights of Tribes to govern and provide for their communities and citizens, and remove lands from recognition as part of reservations, and relocate thousands of Tribal families to urban and suburban communities nationwide.

unnecessarily limit the ability of federally recognized Tribes with either insignificant or no land holdings to utilize the Tribal Priority.

C. Tribes Lacking Current Land Holdings Should Be Allowed To Demonstrate That the Station Will Serve a Tribal Community

NPM and NCAI urge the Commission to adopt a policy whereby a Tribe seeking the Tribal Priority in an allocation proceeding or as part of an NCE application, but lacking a Federally recognized reservation, pueblo, or other Tribal land holdings, be allowed to demonstrate through a preponderance of evidence that the area to which they seek allotment or grant of an NCE facility serves a Tribal Community and thus is the functional equivalent of Tribal Lands. The Commission has adopted a similar procedure in allowing proponents to demonstrate that a “community” exists for purposes of the allocation rules. Some of the same indicia of a “geographically identifiable population grouping”¹⁴ used for purposes of commercial allocations or NCE window filings can be used in determining whether a “geographically identifiable [Tribal] population grouping” exists. In other words, the FCC already has a readily adaptable framework to apply the Tribal Priority for Tribes without Federally recognized lands.

For example, in *Bemidji and Red Lake, MN, Report and Order*,¹⁵ the Media Bureau determined that the existence of a Tribal government headquarters, public works department, public library, tribal courts, schools, a hospital, a retail center, and numerous businesses on the Red Lake Reservation qualified that portion of the Reservation as a “community” to which a new FM station could be allocated. Just last year, the Media Bureau reached a similar conclusion concerning the Seminole’s Big Cypress Reservation, finding that the clustering of central government offices, the Billie Swamp Safari Complex, the Swamp Water Café, the Ahfachkee

¹⁴ *Kenansville, FL, Report and Order*, 10 FCC Rcd 9831, 9832 (1995).

¹⁵ 10 FCC Rcd 4926 (MB 1995).

School and several business demonstrated sufficient indicia of “community” for allocation purposes.¹⁶ Although both of these cases involved Tribes on Federally recognized reservations, the same analysis could have been used to demonstrate both the existence and location of a Tribal Community for purposes of the Tribal Priority.

NPM and NCAI emphasize that whereas the determination of Tribal lands for other Federal purposes is steeped in almost 200 years of jurisprudence, for purposes of determining whether a Tribe is entitled to utilize the Tribal Priority, it is only necessary for the FCC to determine whether the Tribe proposes to serve a Tribal Community, and whether that Tribal Community can be sufficiently tied to a geographic area whereby a community of license can be determined.

D. Criteria for Establishing the Equivalent of Tribal Lands

There should be only a few “must haves” when it comes to demonstrating the existence of a Tribal Community and the equivalent of Tribal Lands, with other indicia left to the proponent to demonstrate via a preponderance of evidence. Nonetheless, NPM and NCAI have identified two requirements that the Commission should impose:

- 1) **The Tribe Must Be Federally Recognized.** Without Federal recognition, many of the other indicia, discussed below, will be too difficult to demonstrate or verify. The Tribal Priority thus needs to be limited to Federally recognized tribes.
- 2) **The Request for Application of the Tribal Priority For A Tribe Without Current Land Holdings Should Be Accompanied By a Formal Request By A Tribal Official With Proper Jurisdiction.** The Tribal Priority is based on the recognition of the sovereign authority of Tribes and their responsibilities toward Tribal members.

¹⁶ *Seminole Tribe of Florida*, DA 09-526 (Media Bureau, February 27, 2009).

Further, and consistent with the Commission's *Tribal Policy Statement*,¹⁷ the process of assessing whether the Tribal Priority should attach should be a government-to-government consultative process that should include a formal Tribal government request that the Tribal Priority be applied when there is no clear delineation of Federally recognized lands associated with the Tribe. That request would be made on behalf of the Tribe itself, if the Tribe is an applicant or seeks a commercial allocation, or on behalf of a Tribal-controlled entity that would qualify for the Tribal Priority.

Beyond those two prerequisites, a Tribe should be allowed to demonstrate the equivalent of Tribal Lands based on a variety of indicia of a definable Tribal Community,¹⁸ the same way that the Commission's current rules allow an applicant to demonstrate the existence of a community of license. The most probative evidence of a Tribal Community equivalent to Tribal Lands would be the geographic area in which the Tribe delivers services to its Tribal members. A second indicia of Tribal Community is the geographic area where the Federal government delivers services to the Tribe. In order to serve both Tribal lands and near reservation lands, as a result of checkerboarding, other Federal agencies have based their offerings based on service areas rather than strict definitions of Tribal Lands. While the Department of Energy, the Environmental Protection Agency and the Indian Health Service serve broad geographical regions where Indians reside, the Census Bureau defines tribal areas in terms of service areas.

¹⁷ *Establishing a Government-to-Government Relationship with Indian Tribes*, 16 FCC Rcd 4078 (2000) ("*Tribal Policy Statement*").

¹⁸ As used in this section "Tribal Community" should include the entire geographic area a Tribal proponent submits as the equivalent of Tribal Lands, not just an individual town.

The Census definition is the newest and is adaptive, meaning it is intended to account for changes over time and is in use by the Department of Housing and Urban Development.¹⁹

As with the current FCC framework for demonstrating the existence of a community for city of license purposes, the FCC's approach should be flexible and not overly burdensome on Tribes and Tribal-controlled entities. Since the Tribe has already been Federally recognized, there should be no need to rehash whether not the Tribe exists as a community. Rather, the process should be one of best identifying the Tribal area for cases where no Federally recognized Tribal lands exist.

E. Consultation With Tribal Nations Is Required Now

The framework discussed above is only a starting point of a necessary government-to-government consultation process that should be conducted on this issue. The FCC's new Tribal Office should be tasked with seeking additional input from Tribes as to what other indicia best serve as a proxy for Federal recognition of Tribal Lands so that the ultimate criteria is neither underinclusive (denying the Tribal Priority to Tribes that are deserving of it), or overinclusive (allowing Tribes to claim lands that are not legitimately part of Indian Country).²⁰

¹⁹ Tribal service areas include: American Indian reservations (AIRs); Off-reservation trust lands (ORTLs); Oklahoma tribal statistical areas (OTSAs); Tribal-designated statistical areas (TDSAs); State-designated tribal statistical areas (SDTSAs); Tribal census tracts (tribal tracts); Tribal block groups; Tribal subdivisions on AIRs, ORTLs, and OTSAs; Census designated places (CDPs) on AIRs, ORTLs, and OTSAs. The HUD/ Department of the Interior definitions build on the Census Definitions and includes near-reservation service areas, California Jurisdictional areas, and Congressionally mandated service areas. The HUD definition is related to service despite the area, while the Census definition is strictly statistical. *See* 25 U.S.C. 4101 *et seq*; 42 U.S.C. 3535(d); 63 FR 12349, Mar. 12, 1998; 24 CFR Code of Federal Regulations Part 1000 – Native American Housing Activities (Revised as of April 1, 2008); 73 FR 67470 (November 14, 2008).

²⁰ NPM and NCAI recognize the difficult issue of defining Tribal communities for Tribes without significant landholdings, and especially the fact that other Federal agencies deliver services to suburban and urban areas. In the context of a Tribal Priority for a broadcasting license a careful analysis must be undertaken to analyze the potential areas that may qualify based on the above characteristics, and others, but with the intent to not necessarily include certain regions so non-Native in their character or location, such as urban areas, so as to defeat the shared purposes here of both the Commission and the Tribes.

III. IMPLEMENTATION OF A TRIBAL BIDDING CREDIT

The second issue addressed in the *FNPRM* is whether a new Tribal Bidding Credit should be employed. NPM and NCAI agree that such a new Tribal Bidding Credit is essential. The entire rationale for the Tribal Priority will be for naught if at the end of the day, after applying the Tribal Priority for allocation purposes, construction permits nonetheless routinely fall into the hands of non-Tribes. As the *FNPRM* points out: “tribal applicants applying the priority to add an allotment to the Table of FM Allotments might still lose at auction.”²¹

A. The Tribal Bidding Credit must be different from the NEBC

Some commenters argue that since there are a paucity of Tribal license holders, the New Entrant Bidding Credit (NEBC) of up to 35% should be available to Tribes and thus, there is no need for a separate Tribal Bidding Credit. The fact is, however, that NPM and NCAI are unaware of even a single instance in which the NEBC has been used successfully by a Tribe or Tribal-controlled entity to win a commercial radio frequency in an auction. The reasons for this are many, including the historical exclusion of Tribes in the frequency allocation process, but also the vast discrepancy in economic power between most Tribes and large multi-billion media conglomerates strongly indicates that even if a Tribe were successful in applying the Tribal Priority to a new allocation, in all but the most rural and economically depressed areas, Tribes stand to be “outgunned” in the auction process by others who view the new allocation as an economic opportunity, not as a sovereign duty to provide services, including public safety and other information, to Tribal members.

²¹ *FNPRM*, ¶ 64.

B. A New, and Separate, Tribal Bidding Credit Is Required

NPM and NCAI therefore support a separate, *and additive*, new Tribal Bidding Credit (TBC) of 35%. The TBC would only be available to a Tribe or Tribal-controlled entity that participated in the allocation proceeding, as a *de facto* demonstration that it intended to provide service mainly to Tribes.²² In each instance, therefore, the 35% TBC would be available. In cases where the Tribal applicant would also qualify for the NEBC, a NEBC of 25% should also be available, such that a total bidding credit of 60% would be available to new entrant Tribes. In instances where a Tribe or Tribal-controlled entity was seeking a second license to serve its members, only the 35% TBC would be available.

NPM and NCAI believe that this maximum 60% bidding credit would go a long way to reverse the decades of neglect and generations of economic benefits that have gravitated into the pockets of entrenched media companies. Knowing that a 60% bidding credit is available to the Tribe that sought the allocation, a non-Tribal applicant will have to seriously want the license to pay such a premium.²³ As the FCC stated in the context of applying the Tribal Priority to a commercial station: “We recognize that the cost, complexity and uncertainty of participating in the Commission’s FM allotment and radio auctions processes have deterred tribal participation.

²² By “participating,” NPM and NCAI mean that a Tribe must have actively sought the allocation and application of the Tribal Priority. However, the ultimate applicant would not necessarily have to be the exact entity that sought the allocation. For example, NPM and NCAI can envision a situation where at the application stage, a Tribe that was responsible for the allocation might form a Tribal-controlled entity (as defined in the *Tribal Priority Order*), to apply for the actual station. In that event, the TBC should still apply. Further, a situation could arise whereby at the application stage several smaller adjacent Tribes might want to pool their resources to serve multiple areas of Tribal lands in a more efficient means. So long as the original Tribe proposing the allocation via the Tribal Priority is part of the applicant, the TBC should be made available.

²³ The participation of a Tribe in both the allocation and licensing of a new facility licensed to Tribal areas will also put any non-Tribal entities on notice that even if they are willing to pay such a premium for the license, the Tribe whose lands the allocation were intended to serve will be watching their performance closely to ensure that the station serves the Public Interest of the Tribe, not just some vague Federal Public Interest standard. Throw up a stick, and feed it with satellite-delivered programming having no relation to the needs of the Tribe, and face a challenge at license renewal.

We believe that it is important to provide a robust and meaningful opportunity for Tribes to pursue commercial licensing opportunities and to determine, over time, how commercial stations can best serve tribal needs.”²⁴ NPM and NCAI believe that such a combination of bidding credits strikes the proper balance the Commission is seeking.

C. A Four-Year Holding Period Should be Adopted For Any Entity Using the Tribal Priority, Tribal Bidding Credit and/or the NEBC

In response to the Commission’s request for comments on ensuring that the TBC (with or without use of the NEBC) does not result in the trafficking of stations,²⁵ by definition, by using the Tribal Priority at the allocation station, the Tribal applicant is already subject to a four-year holding period.²⁶ That same four-year holding period would apply to any entity using the Tribal Bidding Credit. As the Commission has already stated:

[W]e believe, for the reasons discussed in the Rural NPRM, that the four-year holding period is sufficient to discourage trafficking. We also believe that limiting the Tribal Priority to Tribes and entities controlled by Tribes substantially reduces the potential for trafficking. Further restrictions on alienability of radio facilities could potentially harm those communities that the Tribal Priority is intended to benefit. For example, a Tribe that has an existing facility, but is later able to move to another community or site that would provide superior signal coverage to tribal lands, might wish to sell the original facility in order to raise capital to build the newer, superior facility. We thus believe the proposed four-year holding period to be the wisest course, subject, as always, to further review if it appears that it does not serve its intended function of deterring trafficking.²⁷

NPM and NCAI agree that this four-year holding period strikes the proper balance and should be applied equally to the new Tribal Bidding Credit. For the sake of consistency, a four-year holding period (and not the NEBC’s five-year holding period) should likewise be applied in

²⁴ *Tribal Priority Order and FNPRM*, at ¶ 13.

²⁵ *See, Id.* at ¶ 66.

²⁶ *Id.* at ¶ 18.

²⁷ *Id.*

situations where the Tribal Priority was used at the allocation stage, and both the TBC and NEBC are used in an auction.²⁸

IV. CONCLUSION

NPM and NCAI fully applaud Tribal Priority as a vital new tool in empowering Tribes to provide critical services to their members in Indian Country. The two issues raised in the *FNPRM*, and addressed herein, will go far to ensure that the Tribal Priority is more than just a theoretical benefit to Tribes, but can be used in Indian Country in a practical manner. Applying the Tribal Priority to Tribes with very small or non-existent current Federally recognized land holdings will open up the Tribal Priority to more than just the 312 Tribes that reside on reservation and pueblos, but will make it fully available to all 564 Federally recognized Tribes once the Tribes work with the FCC to define where their Tribal Community exists. Providing applicants with a substantial Tribal Bidding Credit, in tandem with the New Entrant Bidding Credit, will provide Tribes, for the first time, with the real possibility of outbidding existing media companies for facilities that have been allocated to serve Indian Country.

²⁸ Although this represents a reduction by one year of the standard NEBC, as pointed out by the FCC and further demonstrated above, the likelihood that a Tribe or Tribal-controlled entity would undertake the years of effort to allocate a new commercial frequency in Indian Country, then use the TBC and NEBC to bid for and acquire the construction permit, all for the purpose of trafficking in the license are practically non-existent.

NPM and NCAI therefore request that the Commission adopt the proposal herein to the Tribal Priority.

Respectfully submitted,

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May 3, 2010

Your submission has been accepted

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Proceeding

Name	Subject
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