



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Fax-On-Demand 202 / 418-2830
TTY 202 / 418-2555
Internet: <http://www.fcc.gov>
<ftp.fcc.gov>

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COMMENT SOUGHT ON BROADBAND DEPLOYMENT AND ADOPTION ON TRIBAL LANDS

NBP Public Notice # 5

PLEADING CYCLE ESTABLISHED

GN Docket Nos. 09-47, 09-51, 09-137

Comment Date: November 9, 2009

Reply Comment Date: December 9, 2009

In this Public Notice, we seek comment on identifying and remedying barriers to broadband deployment and adoption on Tribal lands.¹ We intend this Public Notice to contribute to and facilitate the Commission's development of a National Broadband Plan (NBP) pursuant to the American Recovery and Reinvestment Act of 2009 (Recovery Act).²

The Recovery Act directs the Commission to create the NBP by February 17, 2010, to ensure that every American has access to broadband capability, and the statute establishes clear benchmarks for meeting that goal.³ To this end, on April 8, 2009, the Commission initiated a Notice of Inquiry (NOI) seeking comment on the approach to developing the NBP, key terms of the statute, and a number of

¹ As in previous Commission items, in this Public Notice we are using "Tribal lands," "Indian Country," and "Tribal areas" interchangeably. See, e.g., *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 the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act and A National Broadband Plan for Our Future*, GN Docket Nos. 09-137, 09-51, Notice of Inquiry, FCC 09-65, n. 174, (rel. Aug. 7, 2009) ("*Section 706 Sixth Report NOI*"). The terms "Tribal Nation," "Indian Tribes," or "Tribes" refer to any Indian or Alaska Native tribe, band, nation, pueblo, village, or community that is acknowledged by the Federal government to constitute a governmental entity necessary to enter into a government-to-government relationship with the United States and thereby be eligible for the programs and services established by the United States for Indians. See The Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, 108 Stat. 4791 (1994) (requiring the secretary of the Interior to publish in the Federal Register an annual list of all Indian Tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians).

² American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) ("Recovery Act"). See also *Section 706 Sixth Report NOI; Comment Sought on International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act*, GN Docket No. 09-47, Public Notice, 24 FCC Rcd 3908 (2009).

³ Recovery Act § 6001(k).

specific policy goals.⁴ In addition, the Commission has begun to hold a series of staff workshops “to promote an open dialogue between the FCC and key constituents on matters important to the National Broadband Plan.”⁵ In view of the comments and reply comments we have received in response to the NBP NOI and the workshop discussions we have held to date, we recognize that we must seek additional, focused comments on certain topics.⁶

This Public Notice seeks comment on specific barriers to broadband deployment and adoption in Indian Country⁷ and how can they be reduced or eliminated. An initial problem in addressing these issues is the current lack of data on the extent of broadband deployment and adoption on Tribal lands. The Commission acknowledged this lack of data in two related proceedings earlier this year – the *Rural Broadband Report*⁸ and the *Section 706 Sixth Report NOI*.⁹ The limited data from the 2007 Current

⁴ See generally *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Notice of Inquiry, 24 FCC Rcd 4342 (2009) (*National Broadband Plan NOI*).

⁵ FCC, Broadband Workshops, <http://www.broadband.gov/workshops.html> (last visited July 28, 2009); FCC, *The FCC and Broadband: The Next 230 Days* at 10–13, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291879A1.pdf (July 2, 2009).

⁶ See, e.g., *Comment Sought on Defining “Broadband,”* GN Docket Nos. 09-47, 09-51, 09-137, DA 09-1842 (rel. August 20, 2009); *Comment Sought on the Implementation of Smart Grid Technology*, GN Docket Nos. 09-47, 09-51, 09-137, DA 09-1842 (rel. Sept. 4, 2009); *Comment Sought on Telework*, GN Docket Nos. 09-47, 09-51, 09-137, DA 09-1842 (rel. Sept. 4, 2009).

⁷ “Indian Country” refers to: “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation; (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.” 18 U.S.C. § 1151 (2006). For the purpose of this document, Indian Country also includes Alaska Native Villages, Native Hawaiian Homeland, and Trust lands. Although section 1151 is a criminal statute, its definition of Indian Country applies in the civil context as well. We also clarify that for purposes of this Public Notice, the term “rural areas” may include Indian Country, although not all of Indian Country is considered rural. To the extent that sections of Indian Country are rural in nature, they are likely to face the same—and some additional—difficulties in achieving increased broadband deployment and adoption as faced by “rural areas.” See MICHAEL J. COPPS, ACTING CHMN., BRINGING BROADBAND TO RURAL AMERICA: A RURAL BROADBAND STRATEGY (May 22, 2009) (RURAL BROADBAND REPORT), attached to *Acting Chairman Copps Releases Report on Rural Broadband Strategy*, GN Docket No. 09-29, Public Notice, DA 09-1211 (rel. May 29, 2009), at para. 30, n. 54 (rel. May 29, 2009).

⁸ See RURAL BROADBAND REPORT, *supra* note 7, at para. 30 (noting that “many Tribal lands also lack broadband service, but we lack data describing availability of subscribership” as well as noting further that “[m]any Native Americans are still struggling to receive basic telephone service” and “have the lowest percentage of basic telephone service subscribers by group.” *Id.* (citations omitted) According to Native Public Media and the National Congress of American Indians, “only 65% of Native American households on Tribal Lands...have telephones, compared to the national average of over 97%.” See *Joint Comments of Native Public Media and the National Congress of American Indians, In the Matter of Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, NBP Public Notice #1: Defining Broadband* at 3 (August 31, 2009) (“*Joint Comments of NPM and NCAI*”).

⁹ See *Section 706 Sixth Report NOI* at para. 58 (noting that “the Commission has recognized the dearth of information regarding broadband deployment on Tribal lands,” posing seven data-related questions, and at note 175 citing the *Section 706 Fifth Report*, 23 FCC Rcd 9615, 9634, para. 38 (2008) (“finding subscribership to Internet access services at any speed on Tribal lands to be largely unknown because no federal survey has been designed to track this information”). See also U.S. Government Accountability Office, *Challenges to Assessing and Improving Telecommunications for Native Americans on Tribal Lands*, GAO-06-189 (Jan. 2006) (noting the lack of broadband subscribership data from Tribal lands because no federal agency gathers, tracks or surveys such data).

Population Survey of the U.S. Census Bureau regarding adoption indicates that American Indian/Alaskan Native households have a nationwide broadband subscription rate of at most 30 percent, by far the lowest subscription rate among any ethnic group identified.¹⁰ Moreover, broadband subscription rates are substantially lower in rural areas.¹¹

In recently filed Joint Comments, Native Public Media (NPM), an organization promoting radio broadcasting and media ownership by Native communities, and the National Congress of American Indians (NCAI), the largest national organization representing federally recognized Tribal government entities, estimate that “Tribal penetration [of broadband deployment] hovers somewhere around five percent (5%).”¹²

Request for Quantitative Data. The Commission therefore requests in this Public Notice that all parties submit any quantitative data, studies or analyses regarding the current extent of broadband deployment and adoption on Tribal lands. Such data beyond anecdotal information will better enable the Commission to make specific policy recommendations in the pending NPB for reducing or eliminating barriers to broadband deployment and adoption in Indian country.

The Commission makes this data request and issues this Public Notice fully cognizant of the political sovereignty of the Tribes and of their rights to govern their own affairs within their own borders, as well as of “the unique legal [and trust] relationship that exists between the federal government and Indian Tribal governments, as reflected in the Constitution of the United States, treaties, federal statutes, Executive Orders, and numerous court decisions.”¹³

Broadband Deployment in Indian Country. We understand that the low broadband subscription rates in Indian Country can be correlated with the rural nature of many of these Tribal lands and the lack of adequate broadband deployment. As NPM and NCAI note in their Joint Comments “[t]o put the population density issue into perspective, the United States as a whole consists of 3.79 million square miles with a population of approximately 307 million people, or 81 people per square mile. Most Tribal Nations have population densities far lower than that. The Hopi Nation has a population density of 3.1 persons per square mile, the Blackfeet Nation 4.26, and the Devil’s Lake Sioux Nation, 1 person per square mile.”¹⁴

NPM and NCAI state that low population density equates to higher cost to deploy broadband, which has resulted in Tribal lands being underserved. They note that “Tribes have been unable to encourage meaningful service from outside entities and have been forced to become *de facto* carriers of

¹⁰ See RURAL BROADBAND REPORT, *supra*, note 7, at para. 30, n. 56, citing NTIA, HOUSEHOLDS USING THE INTERNET, at tbl. 1.

¹¹ For example, whereas 39.6% of American Indian/Alaskan Native urban households using the Internet subscribe to broadband service, only 16.9% of American Indian/Alaskan Native rural households using the Internet subscribe to broadband service. *Id.* at tbls. 3, 5.

¹² See *Joint Comments of NPM and NCAI*, *supra* note 8, at 3. No source is cited for this estimate.

¹³ *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, 16 FCC Rcd 4078, 4080 (2000).

¹⁴ *Joint Comments of NPM and NCAI*, *supra* note 8, at 3. See also RURAL BROADBAND REPORT, *supra* note 7, at para. 113–116 (discussing the especially high costs of deploying and maintaining low density, rural broadband networks, including the purchase of equipment, obtaining access to rights of way, interconnection with other networks, network construction over difficult terrain, and the need for rural broadband networks to obtain access to adequate and affordable “middle mile” transport facilities, etc.).

last resort. This has been a costly effort for those tribes, but necessary for the provision of basic governmental services. Eight Tribes—out of 563—have had to form their own Tribally owned and operated telecommunications carriers. All eight Tribes that formed their own telecommunications entities have seen dramatic increases in service penetration rates. They average over 85% service gains in their communities (some are at 98% service connection attainment) since the formation of their own telecommunications service.” NPM and NCAI therefore conclude that “if broadband service can be delivered to Tribal lands at an affordable price, broadband will be adopted.”¹⁵

We seek focused comment on the tools and resources available to promote broadband deployment in Indian Country, consistent with the realities of the telecommunications marketplace on Tribal lands and the fiduciary trust relationship between the federal government and the Tribes. In particular:

1. Are there specific lessons that can be learned from the build-out of telephone lines to particular Tribal areas that can be applied to the deployment of broadband in Tribal land?
2. Are there specific examples of coordination or cooperation among Tribal, state and local governments in the build-out of telecommunications infrastructure on Tribal lands that could serve as models for the deployment of broadband?
3. What specific actions can the FCC and/or other federal agencies take to encourage or facilitate greater coordination and collaboration between the FCC, other federal agencies and Tribal, state and local governments to promote broadband deployment?¹⁶

Deployment and Mapping. The FCC has noted “that some state-sponsored and private mapping efforts may not encompass all areas or all providers within a particular state . . . particularly Tribal lands.”¹⁷ Accordingly:

4. What actions, if any, are states taking to include Tribal lands in their broadband mapping efforts?
5. Are there jurisdictional or other reasons why states do not or cannot include the Tribes in their broadband mapping efforts?
6. To what extent can data from the U.S. Census Bureau’s American Indian Tribal census tracts¹⁸ assist efforts to map broadband deployment and adoption in Indian Country?

¹⁵ *Id.* at 4.

¹⁶ *See, e.g.*, RURAL BROADBAND REPORT, *supra* note 7, at paras. 62–64, nn. 140–145 (discussing various aspects of “improving coordination and collaboration with Tribal governments, consortia, and organizations regarding broadband deployment in rural Tribal areas,” *e.g.*, closely consulting with the Tribes pursuant to the 2000 FCC Tribal Policy Statement, reaffirming FCC recognition of Tribal sovereignty and the government-to-government trust relationship between the Federal government and the tribes, fully utilizing and improving Tribal land bidding credits, continuing the long-standing Indian Telecommunications Initiative program to improve telecommunications services on Tribal lands, and before promulgating any new regulations conducting formal consultations with Tribal governments as may be required under Executive Order No. 13175, Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000)).

¹⁷ *See Section 706 Sixth Report NOI*, at 15, n. 101, *citing* RURAL BROADBAND REPORT at para. 104. *See also Comments of Native Star Network on the National Broadband Plan NOI*, *supra* note 4, at 3 (noting that state and local governments often overlook Tribal lands when collecting broadband data and “should not be relied upon” to ensure Tribal lands are included in state and local broadband plans).

¹⁸ American Indian Tribal census tracts are small, relatively permanent statistical subdivisions of a federally recognized American Indian reservation/off-reservation trust land, delineated by American Indian Tribal participants

For example, would the overlay of data compiled by carriers and ISPs with Tribal census tract data provide a clear and accurate view of broadband penetration rates in Indian Country? What specifically are the advantages and limitations of such an approach and how would the overlays be accomplished as a practical matter?

7. What other means of measurement can accurately capture broadband deployment on Tribal lands?

Adoption and Digital Literacy/Education. Digital literacy and education are key components of broadband adoption. NPM and the NCAI have noted in their Reply Comments on the NBP NOI “that the Commission cannot create a national broadband plan without emphasizing digital literacy training for areas currently unserved or underserved.” They note that “similar to the transition to digital television, the Commission must provide consumers with a better understanding of how to effectively utilize these new capabilities.”¹⁹ Additionally, the Pew American Home Life Project survey found that 40 percent of those who do not use the Internet “are not interested” or view it as “a waste of time.”²⁰ Accordingly:

8. What specific tools can the Commission and/or the Tribes utilize to promote digital literacy and education on Tribal lands?
9. Are there specific Tribal facilities which are serving or could serve as training locations, e.g., computing centers, tribe “chapter houses,” schools or libraries?
10. What percent of Tribal community centers, schools, and households are passed today by: a) fixed telephony; b) mobile telephony; c) cable services?

Adoption and Affordability. The Commission recently stated that another demand and sustainability factor is the affordability of broadband services to consumers. This factor may include ongoing subscription costs, computer equipment costs, and the costs of other customer premises equipment necessary to access broadband services. According to the Consumer Federation of America and the Consumers Union, only 15 percent of rural households with annual incomes less than \$25,000 have broadband subscriptions, whereas 45 percent of rural households with annual incomes greater than \$25,000 have broadband subscriptions. This suggests that the price of service and/or the cost of equipment can be a barrier to broadband adoption and sustainability in certain markets, including in Indian Country.²¹ Accordingly:

or the Census Bureau for the purpose of presenting data. Designed to be relatively homogeneous units with respect to population characteristics, economic status, and living conditions, Tribal census tracts average 2,500 people. Tribal census tracts are listed alphabetically on the U.S. Census Bureau’s *American Indian Tribal Census Tract Outline Maps*. See <http://www.census.gov/geo/www/maps/tbtrmaps.htm> See also U.S. Census Bureau, Policy Statement, *American Indian and Alaska Native (AIAN) Policy of the U.S. Census Bureau*, signed Oct. 21, 2008 (noting that this “policy outlines the principles to be followed in all Census Bureau interactions with federally recognized AIAN Tribal governments”), <http://factfinder.census.gov/home/aiian/index.html>.

¹⁹ See *NPM and NCAI July 2009 Reply Comments*, at 15.

²⁰ RURAL BROADBAND REPORT, *supra* note 7, at para. 106.

²¹ RURAL BROADBAND REPORT at para. 107. See also *Joint Comments of NPM and NCAI, supra* note 8, at 5, n. 11 (noting that according to the 2000 Census, the per capita income on Tribal lands was \$17,375, or less than half the national per capita income in 2008 of \$39,751, that the national Indian unemployment rate is over 30%, three times the current national average, and that “[c]ombining these two factors makes clear the challenges of bringing broadband...to Tribal lands”).

11. What can public and private entities do to promote broadband adoption? Should they consider programs such as making computers available at a discount to qualifying households or discounting monthly service to at-need consumers on Tribal lands?
12. Should programs such as Lifeline/Link Up be made available to assist in reducing the cost of broadband connectivity and service to homes in Indian Country, and if so, how should they be implemented and funded?

In the *Rural Broadband Report* Acting Chairman Copps noted that communities may also want to consider ways to aggregate or consolidate demand as part of developing a strategy for a sustainable broadband network. Participants in this effort could include individual consumers, businesses, educational institutions, health care facilities, and government agencies. Entities that can function as anchor tenants with adequate demand to both spur broadband infrastructure investment and ensure sustainability can function as an integral part of a rural broadband strategy.²² Accordingly, we seek comment on whether and how this demand aggregation approach could apply to the Tribes.

The Role of Broadband Service Providers. Qwest has recommended that “the Commission should consider a pilot program to support broadband services for low-income consumers,” presumably including rural and Tribal areas.²³ Because of the typically low population density and sometimes difficult terrain of these areas however, other carriers and broadband providers have been reluctant to serve these potential subscribers. Moreover, the political and legal sovereignty of Tribal lands and the need for carriers to understand Tribal jurisdiction and to obtain rights of way over Tribal lands further complicate entry of broadband providers.

Accordingly, we seek comment on:

13. The practical utility of establishing and promoting pilot programs to support broadband services such as the one proposed by Qwest? What role can or should the Commission play in establishing such a pilot or would the pilot be better administered by industry, some other non-governmental entity or via some type of industry/consumer advocacy partnership?
14. What actions, if any, can the FCC and/or the Tribes take to facilitate carrier entry into Tribal areas for the purpose of providing affordable and sustainable broadband service?²⁴

This matter shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s ex parte rules. *See* 47 C.F.R. §§ 1.1200, 1.1206. Persons making oral ex parte presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required. *See* 47 C.F.R. § 1.1206(b). Other rules pertaining to oral and written ex parte presentations in permit-but-disclose proceedings are set forth in section 1.1206(b) of the Commission’s rules, 47 C.F.R. § 1.1206(b).

All comments should refer to GN Docket Nos. 09-47, 09-51, and 09-137. Please title comments responsive to this Notice as “Comments – NBP Public Notice # 5.” Further, we strongly

²² *Id.* at para. 111.

²³ *See Qwest Comments on National Broadband Plan NOI*, at 14–16.

²⁴ *See Reply Comments of NPM and NCAI on the National Broadband NOI*, at 6–7.

encourage parties to develop responses to this Notice that adhere to the organization and structure of the questions in this Notice.

Comments may be filed using (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.²⁵ Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>.²⁶ Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
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For further information about this Public Notice, please contact Stephen Klitzman, Special Counsel, Office of Intergovernmental Affairs, at (202) 418-1763.

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²⁵ See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998).

²⁶ Filers should follow the instructions provided on the Federal eRulemaking Portal website for submitting comments.