

November 19, 2019

The Honorable Ajit Pai
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Pai,

We are writing you to give voice to the concerns raised by Tribal communities surrounding the implementation of the Tribal priority window to open up access to Educational Broadband Service (EBS) spectrum on Tribal lands, pursuant to the Federal Communication Commission's July 10, 2019, *Report and Order*.¹ Unless the Federal Communication Commission (Commission) takes immediate steps to address the concerns discussed below, Tribal communities will miss this opportunity, undermining the Commission's stated priority to close the digital divide in Indian Country.

The United States has a unique legal relationship with federally recognized Tribal governments, as set forth in the U.S. Constitution, treaties, statutes, Executive orders, and court decisions. The resulting federal trust responsibility imposes on the United States the highest moral and legal obligation toward Indian tribes, reflected in the Tribal consultation policies across federal agencies, including the Commission. The Commission's *Statement of Policy on Establishing and Government-to-Government Relationship with Indian tribes*² "recognizes its own general trust relationship with, and responsibility to, federally-recognized Indian Tribes" and commits that the Commission "to the extent practicable, will consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources."

As a Tribal telecommunications provider stated during a September 19, 2019, oversight hearing before the Senate Committee on Indian Affairs, at times the Commission's consultation "has been meaningful and engaging, at other times, it has been after the fact and harmful."³ We are deeply concerned that the Commission's actions skew towards "after the fact and harmful" and are inconsistent with the Commission's long-standing consultation guidance.

¹ *Transforming the 2.5 GHz Band*, WT Docket No. 18-120, Report and Order, FCC 19-62.

² FCC 00-207 (June 8, 2000).

³ *GAO Report on Tribal Access to Spectrum: Promoting Communications Services in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 116th Congress (2019) (testimony of Belinda Nelson, Chairperson, Gila River Telecommunications, Inc.).

Despite stated efforts to conduct outreach and meaningful Tribal consultation on the *Report and Order*, the Commission estimates that only eight of the 573 federally recognized Indian Tribes will participate in the Tribal application process.⁴ With just over one percent of all of Indian Tribes slated to participate, the Commission's own data acknowledges that Tribes will not be adequately informed about the Tribal priority window. Coupled with the Commission's request for expedited review and approval under the Paperwork Reduction Act of 1995, 5 C.F.R. §1320(13), we are concerned that the Commission is expediting the timeframe Tribes have to become informed about eligible EBS spectrum in their communities, jeopardizing the overall success of the Tribal window. Accordingly, we strongly suggest that the Commission allow itself additional time to redouble its Tribal outreach efforts, and to ensure all Tribes are provided with proper notice, guidance, and assistance to utilize this spectrum opportunity.

In addition to keeping the Tribal priority window open, we also request that the Commission provide Tribes with more fulsome information on when public notice of the Tribal priority window will be provided, how long the notice period will be, and how long the filing period will remain open. While the Commission has held two workshops to date and has plans to hold more, Tribes are reportedly unclear as to when the Commission will announce procedures through public notice.⁵

Finally, we urge the Commission to work with Tribes and the private sector to identify other means for Tribes to locate unused spectrum in lieu of the Universal Licensing System (ULS). Despite recent efforts to improve the usability of the ULS for Tribes, it remains difficult to use and is years away from receiving necessary updates.⁶ Accordingly, the Commission should keep the Tribal priority window open until the ULS is fixed, or the Commission provides Tribes with alternative resources to identify spectrum.

Our concerns and recommendations are consistent with the National Congress of American Indians resolution ABQ19-86C, titled *Providing for the Success of Tribal Nations in the 2.5 Gigahertz Broadband Tribal Priority for Wireless Networks* (attached). To address these concerns, we request that the Commission provide our offices with the following information, within 30 days of this letter and 30 days prior to any public notice regarding the Tribal priority window:

1. A list of all Tribes who are eligible for EBS spectrum;
2. A list of Tribes the Commission anticipates will apply for EBS spectrum;

⁴ Transforming the 2.5 GHz Band, Support Statement, 3060-1094, September 2019. The Commission's own data reports that as of 2018, 35% of Americans living on Tribal lands lacked access to broadband services compared to 8% of all Americans.

⁵ The *Report and Order* acknowledges Tribe's preference for at least a 90-day notice period prior to the opening of the priority filing window and a 60-day window for the filing of the application.

⁶ GAO's November 2018 report, *Tribal Broadband: FCC Should Undertake Efforts to Better Promote Tribal Access to Spectrum*, found that only 18 tribal entities held active spectrum licenses in bands that can be used to provide broadband services, and that only two of these tribal entities held administratively assigned EBS licenses in the 2.5 GHz frequency. GAO further concluded that the Commission does not analyze information on unused licensed spectrum that exists over tribal lands, and that the Commission does not make information on spectrum-license holders available in an easy or accessible manner.

3. Information identifying which EBS channel groups are available for all Tribes;
4. A list of government-to-government consultations with Tribes on the Tribal priority window;
5. Acknowledgement that each Tribe that is eligible for EBS spectrum have been notified of their eligibility in writing.

Please reach out to Christianna Barnhart (Christianna_Barnhart@schatz.senate.gov) with Senator Schatz, Anne McInerney (Anne_McInerney@murkowski.senate.gov) with Senator Murkowski, and Joshua Mahan (Joshua_Mahan@indian.senate.gov) on Senator Udall's Senate Committee on Indian Affairs to provide an update on the status of the Tribal priority window and the items listed above, no later than December 13, 2019.

Sincerely,



BRIAN SCHATZ
United States Senator



TOM UDALL
United States Senator
Ranking Member
Senate Committee on Indian Affairs



LISA MURKOWSKI
United States Senator



NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians Resolution #ABQ-19-87C

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TITLE: Creating Tribal Opportunities for Partitioning, Disaggregation, and Leasing of Spectrum for Wireless Services in Indian Country

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States and the United Nations Declaration on the Rights of Indigenous Peoples, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, there continues to be a dearth of reliable and affordable commercial mobile wireless services developed and deployed on tribal lands nationwide; and

WHEREAS, the Federal Communications Commission (FCC) released a Notice of Proposed Rule Making concerning the "Partitioning, Disaggregation, and Leasing of Spectrum," FCC 19-38, seeking comment on how to make more of the unused spectrum of existing spectrum licenses available, and evolve spectrum leasing as a potential means to increase availability of advanced telecommunications services in rural areas, and provide spectrum access by small carriers.

NOW THEREFORE BE IT RESOLVED, that the National Congress of American Indians (NCAI) calls upon the FCC to develop a Tribal Priority set aside mechanism for unused licensed spectrum over tribal lands, as defined in the FCC's definition of tribal lands (47 CFR 54.400(e)), and to include traditional and customary use areas, such as areas where subsistence fishing, hunting, and gathering occurs and where communications are unavailable for safety purposes; and

BE IT FURTHER RESOLVED, that NCAI calls upon the FCC to take action and complete the rulemaking it unanimously began in March of 2011, "Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands," FCC 11-29, including its numerous proposals for more structured good-faith secondary market negotiation processes, strengthened build out requirements, build or divest proposals, and other mechanisms that would place secondary markets licenses in the hands of tribal nations in order to end the persistent lack of wireless services on tribal lands nationwide; and

BE IT FURTHER RESOLVED, that where there are competing requests for partitioning licenses, that a related tribal application or request receive priority over any other entity or small carrier applying for the license over tribal lands; and

BE IT FURTHER RESOLVED, that NCAI calls upon the FCC to create a mechanism that encourages and allows existing spectrum license holders to assign available portions of spectrum blocks to tribal nations so that they may facilitate and provide service over their tribal lands; and

BE IT FURTHER RESOLVED, that NCAI requests that the FCC create a regulatory mechanism to provide tribal nations the opportunity of a first right of refusal for spectrum partitioning and disaggregation over their tribal lands to entities willing and able to deploy service over tribal lands; and

BE IT FURTHER RESOLVED, that NCAI requests that this resolution be filed as an ex parte comments in the appropriate FCC dockets, and also provided to the FCC-Native Nations Communications Task Force; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.


CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2019 Annual Session of the National Congress of American Indians, held at the Albuquerque Convention Center, October 20-25, 2019, with a quorum present.



Fawn Sharp, President

ATTEST:



Juana Majel Dixon, Recording Secretary