

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of )  
 )  
Transforming the 2.5 GHz Band ) WT Docket No. 18-120  
 )

To: The Commission

**EMERGENCY MOTION FOR STAY OF  
2.5 GHZ RURAL TRIBAL PRIORITY WINDOW  
OF  
NATIONAL CONGRESS OF AMERICAN INDIANS,  
AMERIND, SOUTHERN CALIFORNIA TRIBAL CHAIRMEN’S  
ASSOCIATION, AND PUBLIC KNOWLEDGE**

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**Date: July 20, 2020**

## INTEREST OF PARTIES

**National Congress of American Indians** (NCAI), founded in 1944, is the oldest, largest and most representative American Indian and Alaskan Native organization serving the broader interests of tribal governments and communities.

**AMERIND Risk Management Corporation** (AMERIND) is a tribal corporation formed under federal law by three federally recognized American Indian Tribes pursuant to Section 17 of the Indian Reorganization Act, 25 U.S.C. § 1524 (a Section 17 Tribal Corporation). AMERIND's charter, granted by the federal government, provides that it possesses tribal sovereign immunity. As a 100% tribally owned and operated company, AMERIND, through its Critical Infrastructure division, has been working on a pro-bono basis with tribes across the lower 48 states, Alaska Native Villages, and the Hawaiian Home Lands to bring awareness and to prepare for and complete the 2.5 GHz application process.

**Southern California Tribal Chairmen's Association** (SCTCA) is a multi-service non-profit corporation established in 1972 for a consortium of 20 federally recognized Indian tribes in Southern California. The primary mission of SCTCA is to serve the health, welfare, safety, education, cultural, economic and employment needs of its tribal members and descendants in the San Diego County urban areas.

**Public Knowledge** is a non-profit advocacy organization based in Washington, D.C. Public Knowledge promotes freedom of expression, an open internet, and access to affordable communications tools and creative works.

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ASSOCIATION, AND PUBLIC KNOWLEDGE**

Pursuant to Rules 1.41 and 1.43,<sup>1</sup> the National Congress of American Indians (NCAI), AMERIND Risk Management Corporation (AMERIND), The Southern California Tribal Chairmen's Association (SCTCA) and Public Knowledge (PK) (collectively NCAI, *et al.*), file this Emergency Motion for Stay of the 2.5 GHz Rural Tribal Priority Window (“Tribal Window”) currently scheduled to close on August 3, 2020. NCAI, *et al.* request that the Commission stay the close of the Tribal Window until February 1, 2021, an extension of 182 days.<sup>2</sup> The ravages of the COVID-19 pandemic, which began almost simultaneously with the opening of the Tribal Window on February 3,<sup>3</sup> have impacted American Indians and Alaska

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<sup>1</sup> 47 C.F.R. §§1.41, 1.43.

<sup>2</sup> January 30, 2021, the 180<sup>th</sup> day from August 3, is a Saturday. Monday February 1 is therefore the first business day following 180 days.

<sup>3</sup> The Commission released the Public Notice with procedures for applying for the Window on January 6, 2020. *See* Wireless Telecommunications Bureau Announces Procedures for 2.5 GHz Rural Tribal Priority Window, *Public Notice*, WT Docket no. 18-120 (rel. Jan 6, 2020) (“*Window Procedures PN*”).

Natives on tribal lands harder than any other community in America,<sup>4</sup> a situation further aggravated by the lack of reliable broadband on tribal lands. Unless the Commission extends the Tribal Window, hundreds of eligible tribal nations will miss this unique opportunity to provide 5G service to their people.

The Commission has received multiple informal requests for a 180-day extension of the Window.<sup>5</sup> NCAI, *et al.* now file this formal request so that the Commission may see in greater detail why grant of the extension is necessary to serve the vital purpose of promoting broadband deployment on rural tribal lands. NCAI, *et al.* note that on April 3, the Media Bureau extended implementation of Section 1004 of the Television Viewer Protection Act for six months, finding that the COVID-19 pandemic and the “disruptive effects of the national emergency on the daily activities” and the need of those subject to Section 1004 to “focus their resources on the national emergency” constituted “good cause” under the Administrative Procedure Act (APA) to grant the six-month extension without notice and comment.<sup>6</sup> The same logic applies to this request. The COVID-19 pandemic created disparities that led to American Indians and Alaska Natives’ (AI/AN) vulnerability to COVID-19 and resulted in Native communities having the highest per-capita COVID-19 infection rate in the U.S.<sup>7</sup> If the present emergency constitutes “good cause” to extend implementation of consumer protections for Fortune 100 companies such as Comcast and

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<sup>4</sup> See, e.g., Liz Mineo, *For Native Americans, Covid-19 is ‘the Worst of Both Worlds at the Same Time’*, The Harvard Gazette (May 8, 2020), <https://news.harvard.edu/gazette/story/2020/05/the-impact-of-covid-19-on-native-american-communities/>.

<sup>5</sup> See, e.g., Jamie Lennon, WT Docket 18-120 (July 7, 2020) (comment requesting the F.C.C. extend the 2.5 GHz Rural Tribal Priority Window), <https://www.fcc.gov/ecfs/filing/10707176818149>; Lisa Padol, WT Docket 18-120 (July 9, 2020) (comment requesting the F.C.C. extend the 2.5 GHz Rural Tribal Priority Window), <https://www.fcc.gov/ecfs/filing/10710218724493>.

<sup>6</sup> Public Notice, *In re Implementation of Section 1004 of the Television Viewer Protection Act* MB Docket No. 20-61 ¶4 (Media Br. rel. April 3, 2020) (“*TVPA Extension Order*”).

<sup>7</sup> Coronavirus Resource Center, *COVID-19 United States Cases by County*, Johns Hopkins University of Medicine, <https://coronavirus.jhu.edu/us-map>

AT&T, it certainly constitutes “good cause” for rural American Indian and Alaska Native tribal nations.

## **I. SUMMARY**

COVID-19 has forced tribal nations to close their governmental offices, shut down nearly all business on which they depend for revenue, and disrupted the ability of tribal governments to continue to provide even basic services to their residents. In many cases, critical tribal government leaders and personnel have become incapacitated or died due to infection.

These obstacles are made even more difficult to overcome by the widespread lack of reliable broadband on tribal lands, making it impossible to collect the necessary information, access resources such as the Commission shape files, or even file the Application and supporting documentation from the safety of their homes. Often, dedicated tribal government staff must put themselves at risk of infection by returning to their closed offices, or by driving hours to find an available source of broadband, so that they may consult with Commission staff or other federal agencies, take advantage of the resources created by tribal organizations to provide assistance, or coordinate with other tribal governments sharing the same tribal lands. COVID-19, combined with the widespread lack of reliable broadband the Commission designed the Tribal Window to address, has so disrupted the ability of tribal nations to dedicate resources to anything beyond basic services that hundreds of eligible tribal nations have only recently learned about the availability of the Tribal Window.

Clearly, neither the Commission nor the tribes could have foreseen anything remotely like this – let alone prepared for it. When the Commission opened the Tribal Window in January, there were virtually no known cases of COVID-19 in the United States. A mere two months later in March, tribal nations were under lockdown. The operations of government agencies assisting tribal nations – the Commission’s Wireless Bureau, the National Telecommunications

Information Administration (NTIA), and the Bureau of Indian Affairs (BIA) – were disrupted for several weeks as employees switched to working remotely and dealt with the immediate effects of the pandemic.<sup>8</sup> Despite initial hopes that the pandemic was beginning to ebb and restrictions would significantly ease, the virus has continued to surge. This increased infection rate (and the increased risk of infection and disruption of daily life that comes with it) has centered in the states that are the homes of the largest numbers of eligible tribes. States experiencing record-breaking new cases are home to 318 of the 626 eligible tribal lands.<sup>9</sup> The effects of this global emergency and its acute effects on Indian Country are consistent with the criteria under the Commission’s rules and precedent for grant of an extension of time.<sup>10</sup>

In Part I, the motion reviews a brief history of the Commission’s historic decision to open the Tribal Window and why it is so critically important to tribal nations to maximize their ability to participate. The Motion then explains why even before COVID-19 – and despite the Commission’s efforts to simplify the application process and provide staff resources – even the six months provided for the Tribal Window would be a tight schedule for outreach and filing complete applications. The very lack of reliable broadband the Tribal Window is designed to address is a constant hindrance to outreach, coordination and participation. This is especially true for a community where the vast majority of tribal nations have little experience with the FCC,

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<sup>8</sup> See F.C.C., *FCC Announces Updated Restrictions on Visitors to Its Facilities*, (March 12, 2020) (public notice), <https://docs.fcc.gov/public/attachments/DOC-363007A1.pdf>.

<sup>9</sup> MuralNet, *Rural Tribal Windows* (last visited July 16, 2020), <http://muralnet.org/rtw/>. (The number of eligible tribal lands exceeds the number of eligible tribes because some tribes are associated with multiple eligible lands. The presence of Coronavirus spikes, however, makes it difficult for tribal members from outside these states to visit the 316 tribal lands impacted and collect necessary data, such as physical surveys where necessary.

<sup>10</sup> See *Restoring Internet Freedom; Bridging the Digital Divide for Low Income Consumers; and Lifeline and Linkup Reform and Modernization*, Order Granting Request for Extension of Time (Rel. March 25, 2020) (finding disruption caused by COVID “good cause” to extend comment and reply comment deadlines).

and where appropriate due diligence as required by the Commission<sup>11</sup> and adherence to tribal law and procedures for undertaking such a project take significant investment of time and resources. The Motion then recounts the additional unexpected difficulties for tribal nations to complete applications, such as the fact that the maps provided by the FCC with the required shape files in many cases do not match the maps of tribal lands used by BIA. These and other issues require modification of the shape files, which requires access to the right equipment and technical expertise. Submitting a modified shape file requires applicants to file an application for waiver, with its own detailed requirements. A significant mistake on any one of these steps will result in the Application being disqualified, and the Commission has stressed it will not permit any major modifications to correct deficiencies or errors.

The Motion then recounts in greater detail the disruption caused by the COVID-19 pandemic and its particularly severe impact on tribal lands. It is difficult to grasp just how much more disruptive and severe the impacts of COVID-19 on tribal communities have been when compared to those impacts in places like Washington, D.C. The Motion describes the steps that intertribal organizations such as NCAI, and expert organizations such as AMERIND and MuralNet, have taken to overcome these obstacles. The fact that 71 applicants have filed during the Tribal Window despite the obstacles and risk of infection is a testament to the efforts and dedication of tribal stakeholders and federal agency staff that have supported them.<sup>12</sup> As the Commission should freely acknowledge, tribal nations and their allies have done everything in their power to meet the Commission's current August 3 deadline. It would be heartbreaking if, despite these heroic efforts, hundreds of tribal nations were unable to utilize this unique

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<sup>11</sup> Public Notice, "Wireless Telecommunications Bureau Announces Procedures for 2.5 GHz Rural Tribal Priority Window," WT Docket No. 18-120, 35 FCC Rcd 308 (rel. Jan. 6, 2020) ("*Tribal Window PN*").

<sup>12</sup> MuralNet, *supra* note 8.



opportunity to acquire 5G licenses and empower themselves to provide affordable and reliable broadband access on their tribal lands.

Part III addresses the Commission’s authority to grant the stay and how grant of the stay would permit hundreds of eligible tribal nations to participate. It would also provide the Commission with time to resolve NCAI’s pending Petition for Reconsideration, asking the Commission to extend eligibility to additional tribal lands than those authorized under the rules adopted for the Window.<sup>13</sup> Numerous letters of support from Republican and Democratic members of Congress,<sup>14</sup> as well as letters of support for an extension from industry stakeholders<sup>15</sup> and public interest organizations,<sup>16</sup> demonstrate the public interest in granting this

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<sup>13</sup> Petition for Reconsideration by The National Congress of American Indians, *In re Amendment of Parts 1, 21, 73 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access and Other Advanced Services in the 2150-2162 and 250-2690; Transforming the 2.5 GHz Band*, WT Docket No. 18-120 (filed Nov. 25, 2019) (“NCAI Recon Pet”).

<sup>14</sup> See, e.g., Press Release, Senator Kamala D. Harris, *Harris, Colleagues Urge FCC To Ensure Rural Tribal Communities Have Equal Internet Access* (May 20, 2020), <https://www.harris.senate.gov/news/press-releases/harris-colleagues-urge-fcc-to-ensure-rural-tribal-communities-have-equal-internet-access>; Press Release, Martin Heinrich, Senator for New Mexico, *Heinrich Urges FCC To Ensure Rural Tribal Communities Have Equal Internet Access* (May 20, 2020), <https://www.heinrich.senate.gov/press-releases/heinrich-urges-fcc-to-ensure-rural-tribal-communities-have-equal-internet-access-sen-heinrich-leads-senate-democrats-in-calling-on-fcc-chairman-pai-to-extend-period-for-tribal-governments-to-complete-applications-for-spectrum-for-wireless-broadband-and-increased-mobile-coverage-in-indian-country-in-light-of-covid-19>; Letter of Rep. Deb Haaland (D-NM) and Rep. Tom Cole (R-OK), Co-Chairs, Congressional Native American Caucus, to Chairman Ajit Pai (April 9, 2020).

<sup>15</sup> See Letter of Jeffery A. Campbell, Senior Vice President, Government Affairs and Public Policy, Cisco Systems, Inc. to Marlene Dortch, Secretary, Federal Communications Commission, Docket No. 18-120 (July 2, 2020), <https://ecfsapi.fcc.gov/file/10702322806006/Docket%2018-120%20Cisco%20Extension%20Request.pdf>; Letter of Gregory W. Guice, McGuire Woods, LLC., Counsel to Gila River Telecommunications, to Marlene Dortch, Secretary, Federal Communications Commission, Docket No. 18-120 (May 6, 2020).

<sup>16</sup> E.g., Colorado Broadband Office, *Re: Rural Digital Opportunity Fund*, WC Docket No. 19-126

*Transforming the 2.5 GHz Band - Rural Tribal Window* WT Docket No. 18-120 (April 24, 2020) (letter to FCC),

Motion. Additionally, grant of the Motion would not in any way delay the following 2.5 GHz Auction. Not only is the Citizens Broadband Radio Service (CBRS) Auction about to begin, but the C-Band Auction is scheduled to start December 8. Based on past Commission auctions, it seems likely that the C-Band Auction will not end until the beginning of February at the earliest. Accordingly, the Commission may not expect to schedule the 2.5 GHz Auction any sooner than the spring of 2021. Extending the Tribal Window until February 3 would not affect this schedule.

Finally, granting the extension will not harm applicants that file by August 3. As an initial matter, an informal survey of the applications filed by June 30 with the Commission by MuralNet found that 20% of the applications contained errors that required correction before the Window closes August 3. The extension of time will allow time for these and other applicants rushing to meet the existing deadline to review their applications and correct any errors.

Additionally, the Commission can address any concerns that applicants currently “shovel ready” would suffer from the delay in two ways. First, the Commission can grant existing networks on tribal lands special temporary authority (STAs) to operate on the frequencies while their applications are pending. The Commission has already granted multiple requests for STAs for operation during COVID-19,<sup>17</sup> so such relief has well-established precedent. The Commission could announce it is extending the Window but that it will process applications on a

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[https://ecfsapi.fcc.gov/file/104240432630195/Ex%20Parte%20Tribal%20Window%20%26%20904%20Auction%20Extension%20Request%20\(1\).pdf](https://ecfsapi.fcc.gov/file/104240432630195/Ex%20Parte%20Tribal%20Window%20%26%20904%20Auction%20Extension%20Request%20(1).pdf); Native Public Media & MuralNet, *Re: WC Docket. No. 18-120, Transforming the 2.5 GHz Band -- Rural Tribal Priority Window* (March 24, 2020) (letter to FCC),

<https://ecfsapi.fcc.gov/file/1032556425140/Chairman%20Ajit%20Pai.%202.5%20.pdf>; Schools, Health & Libraries Broadband Coalition (March 17, 2020) (letter to FCC),

<https://ecfsapi.fcc.gov/file/1031709908887/SHLB%20Covid-19%20FCC%20Letter%20-%20Final.pdf>.

<sup>17</sup> See discussion Part II, *infra*.

rolling basis after August 3. This will avoid any possibility of the extension creating a conflict between applicants that filed before August 3 and subsequent applicants.

In short, there is every reason to grant this Motion, and no reason to deny it. The Commission adopted the Tribal Priority Window to provide an opportunity for tribal governments to address some of the worst and most persistent broadband connectivity problems in America. The Commission should not allow the ravages of COVID-19 to undermine this opportunity.

## II. ARGUMENT

As the Commission has long recognized, federal agencies, including the Commission, fall under the general “Trust Obligation” that characterizes the relationship between the federal government and federally recognized American Indian and Alaska Native tribes, as well as Native Hawaiian Homelands.<sup>18</sup> As the Commission has also recognized, deployment of broadband on tribal lands falls well below that of the national average, with only 46.6% of housing units on rural tribal lands having access to broadband as defined by the Commission.<sup>19</sup> The Tribal Window was created in response to this shockingly low state of broadband penetration.<sup>20</sup> But for the Tribal Window to serve its purpose, the Commission must facilitate the ability of tribal nations to take full advantage of the Window. COVID-19 has aggravated the

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<sup>18</sup> See *Establishing a Government-to-Government Relationship with Indian Tribes, Policy Statement*, 16 FCC Rcd 4078 (2000).

<sup>19</sup> Federal Communications Commission, *Report on Broadband Deployment in Indian Country, Pursuant to the Repack Airwaves Yielding Better Access for Users of Modern Services Act of 2018*, submitted to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Energy and Commerce (May 2019), at 3. (“*FCC Indian Country Broadband Report*”).

<sup>20</sup> See *In re Transforming the 2.5 GHz Band*, Report and Order, WT Docket No. 18-120, 34 FCC Rcd 5446 (rel. July 11, 2019) (“*2.5 GHz Order*”); *In re Transforming the 2.5 GHz Band*, Notice of Proposed Rulemaking, WT Docket No. 18-120, 33 FCC Rcd 4867 (rel. May 10, 2018) (“*2.5 GHz NPRM*”).

existing difficulties for tribal nations. Of the approximately 515 entities eligible for the Tribal Window,<sup>21</sup> it is likely that fewer than 20% will be able to complete an application by the August 3 deadline.

**A. THE IMPACT OF COVID-19 HAS MADE AN ALREADY DIFFICULT TASK IMPOSSIBLE FOR HUNDREDS OF ELIGIBLE TRIBES.**

Generally, Commission filing windows are addressed to communities well versed in Commission practice. Here, however, the Tribal Window addresses a broad and disparate community where the vast majority of eligible parties have no direct experience with the FCC. They must therefore develop this expertise entirely from scratch. This is not, to be clear, for lack of tribal interest or effort. Historically, tribal nations have faced considerable barriers to entry in their efforts to access spectrum<sup>22</sup> or to deploy networks on tribal lands (either by themselves or in partnership with others).

The Commission has made it clear that any error in an application requiring a major amendment -- such as insufficient documentation to support any element of the application -- will result in the dismissal of the application with no ability to cure the deficiency.<sup>23</sup> This makes the process of preparing applications a high-stakes venture that requires tribal nations to collect

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<sup>21</sup> *2.5 GHz Rural Tribal Maps*, FCC.gov (listing Tribes), <https://www.fcc.gov/25-ghz-rural-tribal-maps>.

<sup>22</sup> Statement of Policy, FCC, *In the Matter of Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes* 16 FCC Rcd 4078, 4078 (June 8, 2000) (“FCC Statement of Indian Policy”); GAO, *Tribal Internet Access: Increased Federal Coordination and Performance Measurement Needed*, GAO-16-504T, 4 (April 27, 2016), <https://www.gao.gov/assets/680/676830.pdf> (“2016 GAO Report”).

<sup>23</sup> Public Notice, FCC, *Wireless Telecommunications Bureau Announces Procedures for 2.5 GHz Rural Tribal Priority Window*, ¶9 (Jan. 6, 2020), <https://ecfsapi.fcc.gov/file/01062185814033/DA-20-18A1.pdf> [hereinafter *Application Procedures Notice*].

as much documentation as possible and labor over the applications with painstaking care -- all of which takes time and resources.

**1. Notifying All Eligible Tribal Nations in Time to Complete the Application Was Already Difficult Despite the 6-Month Window.**

Tribal governments generally have the same or greater burdens as state and local governments for providing essential services to their communities -- but have fewer resources or sources of revenue upon which to draw.<sup>24</sup> As a consequence, even before COVID-19, few tribal governments could afford to dedicate resources exclusively to broadband, let alone FCC proceedings. Many tribal nations have therefore relied on intertribal organizations such as NCAI to represent them before the FCC. As a consequence, most eligible tribal nations required direct outreach from NCAI and other intertribal organizations, as well as from FCC staff, NTIA, and BIA staff, to even learn about the Tribal Window. Once tribal nations learned about the possibility, it required additional workshops and outreach to educate key tribal government staff on FCC requirements and for each tribal nation to consider internally whether they wish to utilize the Tribal Window, either by building and operating their own network or by working in partnership with others.

All of these activities take time, and the same organizations and agency staff involved with outreach are *also* the ones providing technical support for applicants. Outreach alone to hundreds of potential Tribal applicants -- even at the best of times -- takes time to develop. Multiple sessions by region for manageable numbers of tribal representatives take work to schedule and coordinate. Following each successful outreach effort, the same personnel must

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<sup>24</sup> See U.S. Civil Rights Commission, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* (July 2003) (“USCRC 2003”).

assist tribal nations in assessing their ability to take advantage of the Window, and then many assist in the collection of necessary documentation to support their applications.

Again, *none* of the infrastructure to accomplish this mammoth effort existed prior to the Commission announcement that it would open the Tribal Window. The stakeholders needed to develop their own outreach and support programs from scratch, for a project that -- while welcome -- is unique in the tribal context and requires extensive outreach, education, and assistance. Even without the additional challenges imposed by COVID-19, the Commission's decision to have the Tribal Window open for six months recognized the tremendous effort that would be required to reach out to tribal nations and support their applications in the first place, making an extension a logical step due to the pandemic.

- a) Despite Widespread Interest in the Window, the Vast Majority of Tribal Nations Have Little Experience with the FCC or With Operating Networks.

As noted above, tribal nations have had little opportunity to access spectrum on their land, or to deploy their own networks (either in partnership with others or independently). As the Government Accountability Office (GAO) noted in its 2019 Report on broadband deployment, tribal nations face enormous barriers to entry in the form of lack of access to capital and because of the rural nature of most tribal lands.<sup>25</sup> As the Commission is well aware, sparsely populated terrain with significant natural features that make coverage more expensive contribute to the existing digital divide even for non-tribal rural communities. But as the GAO found, tribal nations suffer additional disadvantages in their efforts to compete for federal subsidies.<sup>26</sup>

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<sup>25</sup> GAO, Tribal Broadband: FCC Should Take Efforts to Promote Tribal Access to Spectrum, GAO-19-668T, 1 (Sept. 18, 2019), <https://www.gao.gov/assets/710/701483.pdf> ("2019 GAO Report"); See also 2016 GAO Report, *supra* note 20 at 4.

<sup>26</sup> 2016 GAO Report, *supra* note 20; 2019 GAO Report, *supra* note 22.

Although tribal nations are eligible for funding from general federal broadband programs, they have received less than 3% of available funds.<sup>27</sup> Problems have included a lack of federal carve outs for tribal nations, forcing tribal nations to compete against communities with traditional carriers;<sup>28</sup> a lack of data coordination between federal broadband subsidy programs; and overestimates of broadband accessibility in the annual broadband deployment report, foreclosing areas with no broadband access from applying to relevant programs.<sup>29</sup> Recently, Congress, the Commission and other federal agencies have made efforts to address these problems. But the result of this systemic bias in subsidy programs against applicants for subsidies to serve tribal lands has left tribal nations without necessary infrastructure or experience prior to the Tribal Window.

This is, of course, an important reason why the Commission created the Rural Tribal Priority Window -- to provide tribal nations with access to spectrum on tribal lands and facilitate the ability of tribal nations to deploy broadband networks. But it also means -- as the Wireless Bureau stressed in the *Tribal Window PN* and in the Small Entities Compliance Guide for the 2.5 GHz Window -- that tribal nations must seriously consider whether they have the resources and ability to take advantage of the Window.<sup>30</sup> This assessment process can only begin for tribal nations after learning of the Tribal Window and collecting sufficient information on the mechanics and cost of network deployment. Given the deadlines imposed by the Commission,

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<sup>27</sup> See Congressional Research Service, *Tribal Broadband: Status of Deployment and Federal Broadband Funding Programs*, (January 9, 2019) (“CRS 2019”).

<sup>28</sup> See *id.*; GAO, *Tribal Broadband: Few Partnerships Exist, and the Rural Utility Service Needs to Identify and Address Any Funding Barriers Tribes Face*, (Sept. 2018) (“2018 GAO Report”).

<sup>29</sup> See CRS 2019; 2016 GAO Report.

<sup>30</sup> *Tribal Window PN* ¶¶4-5; FCC, *Small Entities Compliance Guide, Transforming the 2.5 GHz Band*, FCC 19-62, WT Docket No. 18-120 (rel. May 13, 2020) (“Small Entities Compliance Guide”).

this assessment must take place simultaneously with the process of preparing documentation for applications -- and of course must pull resources away from other immediate community needs.

Again, even before COVID-19 hit, the need for most tribal nations to undergo the self-assessment recommended by the Wireless Bureau as a prelude to applying would absorb considerable time and effort needed for other critical tasks, making completion of the application before August 3 difficult.

- b) Tribal Lands May Have Multiple Tribal Nations Eligible for a Given License, Requiring Coordination and Possibly Modification of the Shape File.

To assist tribal nations with their applications, and to assist the Commission in processing the applications, the Wireless Bureau prepared shape file maps of the eligible tribal lands and the coverage areas for the associated licenses. These licenses cover designated tribal lands, and an applicant must apply to serve the entire license area or submit a modified map and accompanying request for waiver.<sup>31</sup> In addition to technical difficulties described below, many areas treated by the FCC as a single unit of tribal land are home to multiple tribal nations. Each of these tribal nations has its own recognized tribal government, and is separately eligible for each individual license assigned to the entire tribal land.

Therefore, tribal nations in these areas face a choice. They may coordinate together on a single application, or they can each file a competing application and rely on the Commission's procedures for resolving conflicting applications. Alternatively, as a compromise, multiple tribal nations sharing the same tribal land may file separate applications covering separate portions of

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<sup>31</sup> *Tribal Window PN ¶¶7-10, 14-15, 18-19.* The license coverage areas are unique to the Tribal Priority Window.



the tribal land -- a choice which requires the applicants to file modified shape files and separate waiver requests.

To negotiate any one of these options takes time -- especially as it is in the best interest of everyone to avoid conflicting applications. Tribal governments, like all governments, have necessary procedures for coordination with other governments. Additionally, all of the difficulties discussed above apply to all tribal nations in the coordination and negotiation process. The already difficult task of submitting an application is now doubled or tripled depending on the number of tribal nations that must receive notice, take necessary steps to coordinate with each other, and pursue the appropriate application process depending on the results of these negotiations.

**2. Despite Efforts to Simplify the Application Process, Assembling the Necessary Supporting Documentation Takes Time.**

In recognition of these difficulties, the Commission and the Wireless Bureau have taken steps to simplify the application process. But even with these steps, additional steps need to be taken. Again, in light of the Bureau's repeated warnings that an error on one matter may result in dismissal of the *entire application* with no opportunity to redress the error, the stakes on these problems are extremely high.

a) **Commission Shape Files Do Not Match the BIA Maps of Tribal Lands, Or Require Changes for Other Reasons, and the Filing of a Waiver Request.**

By far the most difficult problem involves alteration of the shape files, which has proven necessary for a large number of applicants. As an initial matter, applicants find that the Commission shape files do not match the official maps of designated tribal lands produced by BIA. This can cause tribal land to be left off the license area. But also, it can extend the proposed license area beyond land that the tribal applicant can prove is part of its tribal land, or beyond

where the applicant can provide proof of presence. Despite the fact that the maps were generated by the Wireless Bureau, applicants must still provide documentation to support the claim for the entire license area<sup>32</sup> (unmodified map only *prima facie* evidence and must be accompanied by exhibits). So whether the Commission-provided map is over-inclusive or under-inclusive, it will require modification and a request for waiver supported by sufficient evidence.

Even where a map reflects the accurate boundaries of tribal lands, applicants may need to alter the maps and provide suitable documentation for a request for waiver. For example, if the tribal lands include an urban area at any point, the tribal applicant will need to modify the map to exclude any area that the applicant cannot prove is “rural” for purposes of the Window. As noted above, tribal lands for which the Commission provides a single map may contain multiple tribal nations. These tribal nations may need to form a consortium to meet the Commission’s requirements for showing a presence in the license area, or they may need to divide the land into new maps.

Modifying the shape file takes a particular set of tools and skills not routinely available to tribal governments. It also requires reliable broadband to access these files and successfully modify them. As noted above, the resources available to tribal nations for technical support are already heavily strained. This adds one more significant delay in the process, on one more piece of the application that the Commission requires be completed *flawlessly*.

- b) Assembling the Required Documentation Takes Considerable Time and Resources, and a Mistake May Cause the Application to be Dismissed.

In addition to requiring modifications of the shape files and supporting documentation for waiver requests, the Commission application requires documentation for four criteria: 1) status

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<sup>32</sup> *Id.* at ¶20.

as a qualified federally recognized Indian tribe or entity owned and controlled by a federally recognized Indian tribe; 2) that the land covered by the license request is tribal land; 3) that the land covered is rural -- as that term is defined by the Commission here; and, 4) that the tribal nation applying maintains a presence on the tribal lands described in the application.

Documenting each of these criteria can require considerable time and effort, coordination with non-tribal members, and access to records not under tribal control. Once again, the Commission has made it clear that an error or insufficient showing for any of the criteria will result in dismissal of the application.

Additionally, the Tribal Window procedures require applicants to conduct their own searches of the Commission's databases to determine the availability of licensed channels to request. The Commission's Universal Licensing Service (ULS) database is difficult to use and navigate, causing delays and uncertainties for tribal applicants. Indeed, Public Knowledge has frequently cited reorganizing ULS to make identifying spectrum holders, their associated licenses, and the area of coverage easier in response to Commission surveys on how to improve its transparency. The Educational Broadband Radio Service (EBRS) license holdings are particularly difficult to research in light of the multiple layers of rights, including overlay rights, and the difficulty in aligning the geographic area of tribal lands with the coverage areas of various EBRS licenses.

In short, even before COVID-19 struck, tribal nations confronted numerous difficulties and delays in completing their applications. Simply learning about the Tribal Window and understanding how to apply required outreach on an unprecedented scale to hundreds of tribal governments, each with its own procedures for approving a decision to apply -- and each with its own resources, expertise and limitations. Despite the assistance of FCC Staff, NTIA staff, BIA staff, and organizations such as NCAI and AMERIND, facilitating participation by the maximum

number of eligible tribal nations constituted a project of mammoth undertaking -- beyond any outreach and support project in communications technology ever engaged in by any of the stakeholders providing outreach or technical assistance.

Then COVID-19 struck, shutting down existing tribal infrastructure and disrupting the outreach and application process just as it was getting underway.

### **3. The Impacts of COVID-19 Make This Process Even More Difficult and Time Consuming.**

The statistics on the human impact of COVID-19 on tribal nations are shocking and severe in the findings they reveal. As of July 20, 2020, the Indian Health Service (IHS) reported nearly 27,233 positive cases within the IHS, Tribal, and urban Indian health care system (I/T/U).<sup>33</sup> According to the Centers for Disease Control and Prevention (CDC), 831 American Indians and Alaska Natives have died from COVID-19, the majority of whom are over the age of 55.<sup>34</sup> Today, despite being only 0.3% of the weighted distribution of the U.S. population, American Indian and Alaska Native COVID-19 deaths represent 0.6% of all U.S. deaths related to the COVID-19 virus. This disparity is even greater in some parts of Indian Country. For example, in New Mexico, American Indians and Alaska Natives are approximately 11% of the weighted population, yet represent at least 54.3% of the state's COVID-19 deaths. In Arizona, the weighted distribution of the American Indian and Alaska Native population is 2%; however, the distribution of COVID-19 deaths is at least 22%.<sup>35</sup>

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<sup>33</sup> Coronavirus Cases by IHS Area, Indian Health Services, (2020), <https://www.ihs.gov/coronavirus/>

<sup>34</sup> Deaths involving coronavirus disease 2019 (COVID-19) by race and Hispanic origin group and age, by state. CDC-National Center for Health Statistics, (July 1, 2020), <https://data.cdc.gov/NCHS/Deaths-involving-coronavirus-disease-2019-COVID-19/ks3g-spdg>

<sup>35</sup> Research Policy Update, COVID-19 Data – Situation Summary, NCAI Policy Research Center, (2020), [http://www.ncai.org/policy-research-center/research-data/prc-publications/NCAI\\_COVID19\\_Data\\_Situation\\_Summary\\_FINAL\\_7\\_1\\_2020.pdf](http://www.ncai.org/policy-research-center/research-data/prc-publications/NCAI_COVID19_Data_Situation_Summary_FINAL_7_1_2020.pdf)

These grim statistics documenting the disparate health impact of COVID-19 on tribal nations as compared to their surrounding populations do not begin to capture the disruptive impact of COVID-19 on every aspect of tribal life. Tribal nations have generally been under stay-at-home orders since late February or early March. As governments with citizenries under their jurisdiction, federally recognized Indian tribes within the United States routinely provide the whole range of governmental services to their citizens, including, but not limited to, health and wellness programming; police and public safety; courts; water and sewer infrastructure; fire protection; schools; sanitation and trash collection; road maintenance; the creation and enforcement of building codes; zoning and land-use planning; the regulation of air and water quality; and wildlife management. But even before the pandemic struck, tribal nations struggled to generate governmental revenues to provide these services<sup>36</sup> because states and localities already tax economic activity on tribal lands, all but ensuring an additional tribal tax would cause double taxation and “discourage economic growth.” *Bay Mills*, 572 U.S. at 811 (Sotomayor, J., concurring); *see id.* at 807 (“Tribes face a number of barriers to raising revenue in traditional ways”). Despite this, tribal governments are responsible for funding the same essential government services that non-tribal United States citizens enjoy from the federal government, their respective state government, and local governments.

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<sup>36</sup> *See, e.g.*, Montana Budget & Policy Center, *Policy Basics: Taxes in Indian Country, Part 2*, at 4 (Nov. 2017); *Dep’t of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 78 (1994) (approving state authority to tax cigarettes sold on the Seneca reservation); *Okla. State Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 507 (1991) (authorizing state tax on sales of goods to nonmembers of Indian Tribes on land held in trust for the Tribe); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151-63 (1980) (approving state cigarette and sales taxes on certain on-reservation purchases made by nonmembers of Indian Tribes); *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 477 (2d Cir. 2013) (authorizing town’s imposition of personal-property tax on gaming devices in tribal casino).

Additionally, as the 2003 report of the U.S. Commission on Civil Rights, *Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*, documented, the federal government has historically failed “to carry out its promises and trust obligations. . . . These failures included longstanding and continuing disregard for Tribes’ infrastructure, self-governance, housing, education, health and economic development.”<sup>37</sup> Updating that report in December 2018, the Commission concluded:

Federal funding for Native American programs across the government remains grossly inadequate to meet the most basic needs the federal government is obligated to provide. Native American program budgets generally remain a barely perceptible and decreasing percentage of agency budgets. Since 2003, funding for Native American programs has mostly remained flat, and in the few cases where there have been increases, they have barely kept up with inflation or have actually resulted in decreased spending power.<sup>38</sup>

For these reasons, all federally recognized Indian tribes rely heavily on the earnings of their tribal government-owned enterprises to fund the services to meet their citizens’ needs. Thus, as of 2019, *before the current crisis*, Indian tribes’ gaming enterprises alone provided more than \$12,590,000,000 to support tribal government programs.<sup>39</sup> However, “[n]early half of federally recognized Indian tribes in the United States do not operate gaming facilities at all,” *Bay Mills*, 572 U.S. at 809 (citing A. Meister, *Casino City's Indian Gaming Industry Report 28* (2009–2010 ed.) (noting that “only . . . 42%, of . . . federally recognized Native American tribes in the U.S. operate gaming”) and of that percentage, many are small and in remote areas.

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<sup>37</sup> USCRC 2003 *supra* n.23.

<sup>38</sup> U.S. Civil Rights Commission, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans*, December 2018 at 4, 6 (citing U.S. Civil Rights Commission, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*, July 2003).

<sup>39</sup> Dupris Consulting Group, “Economic Impact Summary: The Nationwide Impacts of Indian Gaming,” National Indian Gaming Association, 2019.

Thus, this annual \$12,590,000,000 figure to support tribal governmental programs only tells half the story, as it does not account for those governmental needs of federally recognized Indian tribes supported through revenues generated by non-gaming enterprises.

COVID-19 has shuttered virtually all tribal enterprises, gaming and non-gaming. As tribal governments scrambled to meet this catastrophic shortfall and provide basic services, many were unable to even begin the outreach and research necessary to successfully apply for a license. For example, the 21 federally recognized Indian tribes who are members of the Inter Tribal Association of Arizona with lands in Arizona, as well as California, New Mexico, Nevada and Utah, have exercised governmental authority to protect tribal citizens from the impacts of COVID-19 by promptly and voluntarily issuing emergency orders on their reservations. These orders have radically limited or shut down their tourism, gaming, and other business enterprises, the principal source of governmental revenues for these tribal nations. This loss of revenue cripples the ability of tribal nations to provide ongoing governmental services to their community members, including but not limited to: public safety and policing; health care; child care; elder assistance; food assistance; garbage and sanitation services; and many other services.<sup>40</sup> In addition, these 21 tribal nations have done their best to mitigate the economic hardships they and their residents are experiencing, by (wherever possible) providing paid leave and ongoing medical benefits to furloughed employees and overtime pay to essential employees and emergency workers for as long as possible.<sup>41</sup>

This is the situation for tribal nations across Indian Country, with many in even more dire conditions. American Indian and Alaska Native communities experience higher rates of poverty

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<sup>40</sup> See Brief of *Amici Curiae NCAI, et al.* filed in *Confederated Tribes of Chehalis Reservation v. Mnuchin*, D.D.C. Docket No. 1:20-cv-01002 (filed April 23, 2020) at 11-13.

<sup>41</sup> *id.*

than their non-tribal counterparts; more than 25% live in poverty with overcrowded housing conditions (16 times worse than the national average) and high rates of diabetes, cancer, heart disease and asthma.<sup>42</sup> Daily life for a majority of American Indians on reservations means “living without adequate access to clean water, plumbing, electricity, internet, cellular service, roads, public transportation, housing, hospitals, and schools.” Due to the geography of some reservations, residents on tribal lands must travel great distances for work and basic necessities such as food and clothing. For example, a majority of American Indians who live on the Pine Ridge Reservation in South Dakota commute more than 50 miles to work or the nearest grocery store.<sup>43</sup> On the Navajo Reservation, which is home to 300,000 people, and where 1 in 5 residents has diabetes, the average resident has to drive three hours to buy food at the grocery store.<sup>44</sup>

A survey conducted by NCAI, the largest, oldest, and most representative organization comprised of American Indian and Alaska Native tribal governments and their citizens, identified numerous health, education and welfare challenges due to the pandemic. *See* Declaration of Yvette Roubideaux, attached, at ¶¶ 10-39. As tribal economies continue to collapse and government services and enterprises shut down in response to COVID-19, the financial needs of the tribal nations increase and these critical health and safety challenges go unmet. *Id.* at ¶¶ 15-16, 28-29, 31.

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<sup>42</sup>U.S. Civil Rights Commission, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans*, December 2018 at 156 – 157; Dana Hedgpeth, Darryl Fears and Gregory Scruggs, *Indian Country, where residents suffer disproportionately from disease, is bracing for coronavirus*, Washington Post (April 4, 2020) Available at <https://www.washingtonpost.com/climate-environment/2020/04/04/native-american-coronavirus/>

<sup>43</sup> *See, e.g.*, Priya King, *How Native Americans Are Fighting a Food Crisis*, New York Times (April 13, 2020).

<sup>44</sup> *See* Matilda Kreider, *13 grocery stores: The Navajo Nation is a food desert*, George Washington University (Dec. 10, 2019). Available at: <https://www.planetforward.org/idea/13-grocery-stores-the-navajo-nation-is-a-food-desert>.



It is not surprising that, in the face of such dire circumstances, many tribal nations have been unable to dedicate resources to the Tribal Window despite the value that tribal nations place on this opportunity. As the Roubideaux Declaration illustrates, many of these COVID-19 related crises are further aggravated by the lack of broadband access for residents of tribal lands. For example, many tribal government offices are closed, making it difficult to reach members of tribal governments to conduct outreach. Multiple tribal nations identified an inability to provide distance learning for children during school shutdowns. One Alaska Native tribe was reduced to preparing physical packets for parents and requiring parents to drive to school to physically collect the packets and return the completed packets to the school -- increasing the risk of infection for both teachers and parents. Tribal nations cited the poor telecommunications infrastructure as impeding the ability of tribal governments to conduct any business, including crisis response. Tribal nations observed that this was a consequence of infection among tribal leaders, the inability to communicate effectively with closed tribal offices, and no reliable source of broadband access. As one respondent explained, the tribal government is just trying to keep everything going while “working with a skeleton crew.” *Id.*

The havoc caused to tribal governments from the pandemic -- wholly unique and impossible to anticipate -- would be more than enough to justify an extension of the Tribal Window.<sup>45</sup> But impediments to meeting the August 3 deadline do not stop here. The plans and resources of the FCC and of others dedicated to reaching out to tribal nations and supporting their application were disrupted for weeks while employees switched to teleworking remotely, and addressed the more immediate short-term fallout from the pandemic. COVID-19 eliminated the ability to conduct face-to-face outreach. FCC direct outreach to tribal nations, a *sine qua non*

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<sup>45</sup> See *TVPA Extension Order supra* n. 6 ¶¶4-5.

of notifying tribal nations and encouraging them to apply, was forced to become exclusively virtual. Given the widespread lack of available broadband to residents on tribal lands, especially with resources such as tribal offices and tribal libraries closed, this virtual outreach has been significantly less effective than the previously planned in-person workshops.

Again, to be clear, this is not the fault of Commission staff. This was absolutely the right decision. But it underscores how deep the disruption of the pandemic has been on tribal nations trying to file in the Window. *Every single activity related to filing* is made more difficult because of the impacts of COVID-19, in ways no one could possibly have imagined and prepared for. Would-be applicants could not possibly have prepared for, or in any way mitigated or controlled, the disruption in the ability of FCC, NTIA and BIA staff to conduct outreach and support applications.

In short, COVID-19 has fundamentally undermined the ability of tribal governments and tribal organizations to manage the basic responsibilities of government. Tribal nations already on the financial edge now face massive budget crises from the closing of their businesses, with nearly all resources and attention now going to basic questions of survival. Hampering all these activities is the disproportionate lack of broadband access -- the very problem the Tribal Window is meant to address. It would be a cruel irony for the Commission to refuse to extend the Window and deny hundreds of tribal nations this unique opportunity precisely because COVID-19 and lack of broadband have made it impossible for them to meet the August 3 deadline.

**4. The 180 Days is Necessary to Provide Tribal Nations with a Reasonable Opportunity to Participate in the Window.**

NCAI, *et al.* recognize that 180 days is an extraordinary request for relief. But the extraordinary and utterly unpredictable nature of these circumstances *warrants* such

extraordinary relief.<sup>46</sup> Tribal nations are still struggling with the impacts of the pandemic. Even those tribal nations that have managed to recover sufficiently to attempt to meet the August 3 deadline face the obstacles that already existed prior to COVID-19, layered on top of the new demands on tribal governments, and the difficulty of working without the resources in tribal offices that remain closed. Tribal nations have essentially lost the bulk of the Tribal Window due to the impacts of COVID-19 on would-be applicants and on the Commission and other providers of needed technical support. Those available to assist tribal nations in applying now face an enormous crush of applications that further burdens the ability of tribal nations to respond with a complete (and accurate) application by August 3.

While any extension is, of course, helpful, providing a full 180 days will allow tribal nations and their allies to compensate for the lost time *and* the continuing uphill struggle against the factors outlined above. Tribal nations still face the problems associated with residential lockdowns, the loss of their primary revenue generating businesses and the shutdowns of government services as they struggle to cope with the ongoing pandemic. While tribal nations have risen to the challenge, critical personnel are still required to spend the bulk of their time focused on the daily struggles of providing food, clean water and other basic services to their communities. Extending the deadline until February 3 will ensure that all tribal nations have a fair chance to participate successfully in this one-time opportunity to regain sovereignty over their own “public airwaves” and provide desperately needed broadband services through their own networks.

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<sup>46</sup> *Id.* (finding that unique, disruptive impacts of COVID-19 and need to focus on addressing other aspects of the pandemic constitute good cause to extend implementation of TVPA full 180-days authorized by Congress.)

**B. THERE IS AMPLE FCC PRECEDENT TO SUPPORT EXTENDING THE WINDOW DUE TO THE DISRUPTION CAUSED BY COVID-19.**

The FCC has already acknowledged that the COVID-19 pandemic has imposed unprecedented hardships warranting extensions, special exceptions, and temporary authorizations within the purview of the FCC and its proceedings. The unprecedented hardship caused by this pandemic is just as much an issue now as it was at the start of the pandemic. It has had particular impact on the 2.5 GHz Rural Tribal Priority Window, warranting an application extension.

Throughout the pandemic, the FCC took measures to offset the impact of the crisis on many of its ongoing proceedings and the communication network in America, including: (1) on March 13, extending the E-rate filing window by an additional 35 days;<sup>47</sup> (2) on March 15, granting T-Mobile Special Temporary Authority (STA) to the 600 MHz band;<sup>48</sup> (3) on March 17, extending the post-auction channel adjustment process for television stations;<sup>49</sup> (4) on March 18, granting Verizon's request for STA to use additional spectrum to meet increased demand for broadband as COVID-19 stay-at-home orders swept the nation;<sup>50</sup> and (5) on April 3, extending implementation of the consumer protection requirements of the Television Consumer Protection Act by six months to December 3, 2020 due to the COVID-19 pandemic.<sup>51</sup>

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<sup>47</sup> Public Notice, Wireline Competition Bureau Directs USAC to Extend E-Rate Application Filing Window for Year 2020 Due to Potential Coronavirus Disruptions,” CC Docket No. 02-6 (Rel. March 13, 2020). <https://docs.fcc.gov/public/attachments/DA-20-273A1.pdf>

<sup>48</sup> Press Release, “FCC Provides T-Mobile Temporary Access to Additional Spectrum to Help Keep Americans Connected During Coronavirus Pandemic,” (March 15, 2020). <https://docs.fcc.gov/public/attachments/DOC-363051A1.pdf>

<sup>49</sup> Public Notice, “Guidance to Stations in Phase 9 of the Post-Incentive Auction Transition as a Result of the Novel Coronavirus (COVID-19) Pandemic,” Docket Nos. MB 16-306; GN 12-268 (Rel. March 17, 2020). <https://docs.fcc.gov/public/attachments/DA-20-282A1.pdf>

<sup>50</sup> Press Release, FCC Grants Verizon Temporary Spectrum Access to Keep Americans Connected During COVID-19 Pandemic (March 18, 2020). <https://docs.fcc.gov/public/attachments/DOC-363145A1.pdf>

<sup>51</sup> *TVPA Extension Order supra* n.6.

Additionally, the FCC has recognized the particular hardship faced by tribal nations due to the COVID-19 pandemic. This is demonstrated through the many STAs the Commission has granted, allowing tribal nations access to the 2.5 GHz band during the pandemic. To date, the FCC has granted STAs to the A:shiwi College and Career Readiness Center for the Zuni Tribe in New Mexico,<sup>52</sup> the Navajo Nation for wireless service over its reservation,<sup>53</sup> and the Makah Tribe in Washington State.<sup>54</sup>

The FCC should similarly exercise its authority here. As discussed below, granting the extension will enormously benefit tribal nations severely impacted by the pandemic -- the same people the Tribal Window was designed to help. It will not cause harm to anyone. The Commission has shown it can act with alacrity and compassion in the face of the pandemic. It has every reason to do so here, and no reason not to.

**C. EXTENDING THE PRIORITY WINDOW WILL PROMOTE THE PUBLIC INTEREST BY ALLOWING GREATER PARTICIPATION.**

Our communications network is only as strong as its weakest link. The FCC is entrusted with ensuring that our entire nation is connected through a robust communications network including rural, low-income, and high-cost areas. As part of its public mandate, the FCC has acknowledged that promoting tribal connectivity is important and necessary given the unique challenges faced by tribal nations.<sup>55</sup> In its effort to promote broadband access for tribal nations, the FCC created the 2.5 GHz Rural Tribal Priority Window. Despite significant interest amongst

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<sup>52</sup> FCC, *FCC Grants Temporary Spectrum Access to Support Connectivity on Tribal Reservation During Covid-19 Pandemic* (Mar. 30, 2020) (press release).

<sup>53</sup> FCC, *FCC Grants the Navajo Nation Temporary Spectrum Access to Meet Increased Wireless Broadband Needs During Covid-19 Pandemic* (Apr. 17, 2020) (press release).

<sup>54</sup> FCC, *FCC Grants Makah Tribe Temporary Spectrum Access to 2.5 GHz Band to Meet Increased Wireless Broadband Needs During Covid-19 Pandemic* (May 29, 2020) (press release), <https://docs.fcc.gov/public/attachments/DOC-364635A1.pdf>.

<sup>55</sup> *2.5 GHz Band R&O* at ¶47.

tribal nations to apply, the COVID-19 pandemic has made it difficult to complete applications and extending the Tribal Window would promote the public interest by giving those interested applicants the time they need to complete their applications.

**1. For More Than Two Decades, the FCC Has Recognized That Tribal Nations Face Unique Challenges and That Promoting Tribal Connectivity Is in the Public Interest.**

The FCC has consistently interpreted the 1996 Telecommunications Act (1996 Act) to include a responsibility to promote tribal connectivity. The 1996 Act mandates that “consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high[-] cost areas, should have access to telecommunications and information services . . . .”<sup>56</sup> Despite this mandate, underserved communities still abound within America -- particularly on tribal lands that often have no access to broadband.

Tribal nations face a unique set of challenges when it comes to broadband connectivity. As the FCC learned in its 1999 field hearings in New Mexico and Arizona, tribal nations face many issues that limit their ability to effectively access broadband, including already low-quality telephone service, high costs to deliver services to remote areas with low population density, and complex governments and sovereignty issues.<sup>57</sup> More than two-decades later, these challenges remain the same.

After the 1999 hearings, the FCC adopted a Statement of Policy recognizing the FCC's “general trust relationship with, and responsibility to, federally-recognized Indian Tribes.”<sup>58</sup> This

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<sup>56</sup> 47 USC § 254(b)(3). The FCC has also found statutory grounds to provide telecommunication services to Indian reservations in Sections 214(e)(3) & (6) and Section 254(1) of the 1996 Act. 16 FCC Rcd 4078, n. 4.

<sup>57</sup> 16 FCC Rcd 4078, 4079.

<sup>58</sup> *Id.* at 4081.

Statement of Policy contains nine goals and principles, the first of these is “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.”<sup>59</sup> Granting spectrum licenses to tribal nations is a critical part of ensuring that residents on tribal lands have access to communications services.

This is the very reason that the FCC created the 2.5 GHz Rural Tribal Priority Window. The window gives tribal nations “an opportunity to obtain unassigned EBS spectrum to address the communications needs of their communities and of residents on rural Tribal lands, including the deployment of advanced wireless services to unserved or underserved areas.”<sup>60</sup> The entire purpose of this Tribal Window is to promote the public interest by increasing broadband access for tribal nations. This falls squarely within the FCC's long-established public mission of ensuring a robust national communications network, a mission that also justifies extending the window now.

**2. Extending the Tribal Window Will Likely Yield Greater Participation, Which Promotes the Public Interest by Expanding Access to Tribal Nations.**

Since the FCC announced the 2.5 GHz Rural Tribal Priority Window, eligible tribal applicants have demonstrated significant interest in applying. MuralNet, a non-profit that provides resources to help tribal nations build their own communications networks, states that it has hosted 28 workshops to help tribal nations with their 2.5 GHz applications, reaching approximately 237 unique tribal lands. Additionally, NCAI states that it held two breakout sessions and multiple recurring Technology and Telecommunications Subcommittee and Task

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<sup>59</sup> *Id.*

<sup>60</sup> *2.5 GHz Band R&O* at ¶47.

Force meetings on this opportunity. NCAI has also produced two videos providing education on the 2.5 GHz proceeding or promoting upcoming NCAI breakout sessions with information on the 2.5 GHz proceeding that have two-three times more views than their contemporary counterparts produced by the organization for the same events.<sup>61</sup>

Despite this outreach and ongoing interest, many tribal nations are only just now learning about the 2.5 GHz opportunity. As COVID-19 swept the nation, in-person workshops were cancelled or converted to virtual events. However, as the FCC has acknowledged, many tribal nations do not have adequate communication services, and some have no broadband access at all -- making it virtually impossible for them to attend online workshops. Although the FCC has identified 639 eligible areas,<sup>62</sup> only 71 tribal lands have completed applications and MuralNet expects that just 111 more are expected.<sup>63</sup> This means that approximately 488 eligible tribal lands are unlikely to meet the current application deadline. Extending the Tribal Window would give interested tribal nations the necessary time they need to complete their applications.

This is particularly important, as the FCC created the 2.5 GHz Priority Window specifically to expand tribal broadband access.<sup>64</sup> Extending the deadline would do exactly that -- by providing tribal nations with adequate opportunity to complete applications. Moreover, choosing not to extend the deadline would essentially punish tribal nations for the exact hardship the Tribal Window is aimed at remedying -- a lack of broadband access. The COVID-19 pandemic has made outreach challenging due to the lack of virtual means available to

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<sup>61</sup> <https://www.youtube.com/watch?v=n5CNlBpZBmM>;  
<https://www.facebook.com/ncai1944/videos/interested-in-learning-more-about-the-fccs-25-ghz-broadband-rural-tribal-window-/244707259852480/>

<sup>62</sup> <https://www.fcc.gov/25-ghz-rural-tribal-maps>

<sup>63</sup> <https://www.fcc.gov/25-ghz-rural-tribal-window-submitted-applications>;

<http://muralnet.org/rtw/>

<sup>64</sup> *2.5 GHz Band R&O.*



communicate with tribal nations. In light of the Commission's numerous findings that the pandemic creates good cause for an extension of deadlines, it would be arbitrary for the Commission to refuse to extend the August 3 deadline in light of circumstances and the FCC's trust obligation. The effects of COVID-19 are demonstrating the essential nature of broadband access in America. Extending this Tribal Window would increase access to some of the most underserved communities in our nation by giving tribal nations the time they need to complete applications for spectrum in the 2.5 GHz band, a necessary step to securing broadband access for their communities.

**D. GRANT OF THE MOTION WILL NOT DELAY THE 2.5 GHZ AUCTION OR HARM EXISTING APPLICANTS.**

As part of any request for a stay, the Commission must consider the possible harms to other parties. Fortunately, an examination of the circumstances here shows that granting this Motion will harm no one. Granting the Motion will not delay the as-yet-unscheduled 2.5 GHz Commercial Auction, nor harm those tribal applicants that have managed to file by the deadline. Delay will benefit those applicants who have filed defective applications by giving them time to correct any deficiencies or errors. Furthermore, the vast majority of applicants do not have the capacity to begin deployment at this time while coping with the pandemic, so a delay in processing will not delay tribal deployment by those who have managed to overcome the obstacles described above to file by August 3. Nevertheless, to the extent the Commission is concerned that a delay in closing the Tribal Window may have adverse effects on those applicants who have managed to file and are ready to deploy, the Commission can grant these applicants STAs.

1. **The 2.5 GHz Auction Cannot Take Place before the end of Q2 2021 at the Earliest.**

The Commission has two major mid-band auctions scheduled for the remainder of this year. The CBRS Auction, Auction No. 105, is scheduled to begin July 23.<sup>65</sup> The C-Band Auction, Auction No. 107, is tentatively scheduled to begin on December 8, 2020.<sup>66</sup> This scheduling almost certainly precludes the possibility of scheduling the 2.5 GHz Auction before May or June of 2021 at the earliest.

Section 309(j)(3)(E)(ii) of the Communications Act, 47 U.S.C. § 309(j)(3)(E)(ii), requires the Commission to allow suitable time for parties to assess market conditions and other factors relevant to their participation in the auction and ability to secure capital. As a consequence, the Commission is careful not to schedule auctions for similar types of licenses too close to one another. Requiring parties to move too quickly from one auction to another raises concerns with regard to “capital depletion,” and that potential bidders will not have adequate time to assess the new, post-auction competitive landscape. The C-Band Auction is scheduled to begin December 8. Based on experience with prior, similar Commission auctions, Auction 107 is likely to take until mid-to-late February to end (especially in light of the down time around Christmas and New Year’s). In other words, it seems unlikely that the C-Band Auction will even end until after the requested date of extension for the Tribal Window on February 3. After Auction 107 closes, the Commission will most likely need to wait another several months before scheduling the 2.5 GHz Auction to allow potential participants to consider their spectrum needs and arrange lines of credit.

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<sup>65</sup> See Public Notice, “Auction of Priority Access Licenses for the 3550-3650 MHz Band Rescheduled to July 23, 2020,” 35 FCC Rcd 2891 (rel. March 25, 2020). Of relevance here, the FCC delayed the auction “to protect the health and safety of Commission staff . . . and so that parties may have additional time to prepare to participate in the auction.” ¶1.

<sup>66</sup> See Press Release, FCC Announces Tentative Agenda for August Meeting,” (July 16, 2020) (listing Public Notice of C-Band Auction Procedures scheduling Auction).  
<https://docs.fcc.gov/public/attachments/DOC-365576A1.pdf>

Since the 2.5 GHz Commercial Auction is unlikely to begin until months after February 3, granting the request will not delay the commercial auction. Accordingly, there is no concern that granting the Motion for Stay will delay deployment of 2.5 GHz spectrum elsewhere. To the contrary, granting the extension will facilitate 5G deployment to tribal lands without creating delays for others.

2. **Grant of the Motion Will Not Harm Existing Applicants, and Will Allow the FCC to Finish Consideration of NCAI’s Pending Petition for Reconsideration on Eligibility.**

NCAI has canvassed its members and found broad support for granting the Motion for Stay even among those tribal nations that have already filed applications. While NCAI cannot claim to have spoken with every applicant, NCAI is the oldest, largest and most representative American Indian and Alaska Native organization serving the broad interest of tribal governments and communities. NCAI, *et al.* also notes that no one has filed to oppose the informal requests for extension filed by multiple parties. Indeed, the record shows support for the extension request from a wide swath of tribal organizations, public interest groups, Members of Congress, and even industry support.<sup>67</sup>

Additionally, granting the extension will allow the Commission to finish consideration of NCAI’s timely filed Petition for Reconsideration. In its Petition, NCAI asked the Commission to reconsider limiting the Tribal Window to rural federally recognized Indian tribes. As NCAI observed, tribal lands in urban and exurban areas not considered “rural” under the FCC’s definition also have a lower rate of broadband availability than similarly situated residents of non-tribal lands.

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<sup>67</sup> See notes 13-15 *supra*.

Should the Commission grant the NCAI Petition (in whole or in part), it will enable a number of currently ineligible tribal nations to apply. Although the Tribal Window closes in two weeks, the Commission has not yet resolved the Petition. Granting the Motion for Stay will give the Commission time to resolve the Petition, allowing any newly eligible tribal nations to participate.

**3. The Commission Can Issue STAs to Allow Tribal Nations Ready to Deploy, Or Process Applications on a Rolling Basis After August 3.**

Although many applicants are not yet ready to utilize 2.5 GHz spectrum to deploy broadband, those tribal nations who are ready need not wait until the Rural Tribal Priority Window closes. In order to “ensure connectivity to Tribal consumers during this time of increased demand,” the FCC is currently allowing tribal nations to use unassigned spectrum in the 2.5 GHz band.<sup>68</sup> That will allow these tribal nations to connect their residents, irrespective of how long the Tribal Window stays open.

Tribal nations are already using Special Temporary Authority (STA) to deploy broadband. The Makah Tribe is using an STA to build its own private LTE network. The FCC press release on the grant of the STA to the Makah Tribe noted that three other tribal nations have applied for STA, and “all three have been quickly reviewed and granted.”<sup>69</sup> Thus, it is not necessary to close the Tribal Window on August 3 in order to prevent tribal nations who are ready to access the 2.5 GHz band from doing so. The tribal nations that wish to use this spectrum can already do so using STA.

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<sup>68</sup> See notes 53 & 54 *supra* (STAs to Pueblo and Navajo to use 2.5 GHz spectrum to serve tribal land).

<sup>69</sup> FCC, FCC Grants Makah Tribe Temporary Spectrum Access to 2.5 GHz Band to Meet Increased Wireless Broadband Needs During COVID-19 Pandemic, Press Release (May 29, 2020). <https://docs.fcc.gov/public/attachments/DOC-364635A1.pdf>

To the extent the Commission is concerned that extending the Tribal Window will multiply the possibility of mutually exclusive applications, the Commission can resolve this problem by processing applications filed after August 3 on a rolling basis. All applications filed by August 3 would continue to be regarded as being filed simultaneously. However, subsequent applications would be resolved on a rolling basis to avoid conflicts. To be clear, nothing *requires* the Commission to do this. Further, there is broad support for granting the extension even among tribal nations that have filed applications. But the Commission has authority to do this should it wish to do so, and NCAI, *et al.* would not object to such an approach.

As the Commission recently found when it granted a blanket extension of six months to all multichannel video programming distributor (MVPDs) to implement the consumer protection requirements of the Television Viewer Protection Act, the Commission can act pursuant to the “good cause” provision of the Administrative Procedures Act (APA) without notice and comment.<sup>70</sup> As the Media Bureau explained: “In view of the evolving and unpredictable nature of the pandemic” and “the disruptive effect of the national emergency on the daily activities of entities subject to Section 642,” the decision to grant a six-month extension satisfied the provision allowing agencies to waive notice and comment “where it for good cause” finds it will serve the public interest to do so.<sup>71</sup> Tribal nations deserve the same consideration from the Wireless Bureau as that shown by the Media Bureau to MVPDs and providers of fixed-broadband access service.

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<sup>70</sup> See 5 U.S.C. §553(b)(3)(B).

<sup>71</sup> *TVPA Extension Order* at ¶4.

### III. CONCLUSION

The Rural Tribal Priority Window is the single most important initiative the Commission has ever taken to fulfill its trust obligations and enable American Indians to take control of their digital future, on equal terms with every other community in America. The unforeseen devastation from the COVID-19 pandemic threatens to deny this opportunity to hundreds of eligible tribal nations. Virtually no one could have foreseen the coming of the pandemic, or somehow planned for such a catastrophic contingency. COVID-19 has already inflicted a terrible toll on tribal nations across Indian Country. To allow COVID-19 to deny hundreds of tribal nations a genuine opportunity to access spectrum on their tribal lands and deploy their own 5G networks would be inequitable, unjust, and cruel.

The Commission has it within its power to extend the deadline so that tribal nations may overcome the damage done by COVID-19 and apply for 2.5 GHz licenses to serve their communities. The Commission has already exercised this power to assist the cable industry, granting an extension of six months for MVPDs to implement Section 1004 of the Television Viewer Protection Act. Tribal nations deserve the same treatment. The Commission's long-acknowledged obligations under the federal trust relationship with American Indian and Alaska Native tribes likewise requires the Commission to grant the extension. Doing so harms no one, and would benefit the hundreds of thousands of American Indians and Alaska Natives on rural tribal lands who lack broadband access.

WHEREFORE, for the above stated reasons, the Commission should grant this Motion and extend the deadline for filing applications in the Rural Tribal Priority Window until February 3, 2021.

Respectfully submitted,

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