

Before the
**DEPARTMENT OF COMMERCE
NATIONAL TELECOMMUNICATIONS AND
INFORMATION ADMINISTRATION**
Washington, DC

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Docket No. 0907141137-91375-05

BROADBAND INITIATIVES PROGRAM
AND BROADBAND TECHNOLOGY
OPPORTUNITIES PROGRAM

**COMMENTS OF NATIVE PUBLIC MEDIA, SCTCA
AND
NATIONAL CONGRESS OF AMERICAN INDIANS TO
SECOND REQUEST FOR INFORMATION (RFI)**

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November 30, 2009

EXECUTIVE SUMMARY

NPM, NCAI and SCTCA (“the Joint Tribal Commenters”) hereby file these comments in response to the Second RFI issued by RUS and NTIA.

The BIP/BTOP program presents a unique opportunity to bring broadband service to where it is most needed in America. That was the intent of Congress when it enacted ARRA. Unfortunately, by adopted strict quantitative scoring measurements, the areas in some of the most critical need for broadband, Indian Country, will likely be left out. In these Comments, the Joint Tribal Commenters draw on their experience with the first round of BIP/BTOP, as well as the input from Tribal leaders, and a new study of broadband demand and deployment recently published by Native Public Media.

NCAI at its 66th Annual Meeting adopted Resolution PSP-09-026 , where it called on RUS and NTIA to adopt structural changes in the program. The Joint Tribal Commenters likewise call on RUS and NTIA to:

- Establish a Tribal Priority, consistent with the federal government’s trust responsibility, the applicable Constitutional rational-basis justification, and the classification of federally recognized Tribes as political entities, for the funding of Tribal Entities providing broadband services on their own Tribal lands;
- Eliminate the barriers to entry created by BIP/BTOP NOFA requirements which deduct points for not being established Title II borrowers, for having smaller and remote populations bases, and for the inability to access capital or pay greater amounts of matching funds, as Tribal Entities often have budgets limited by spending restrictions;
- Consolidate the BIP and BTOP applications into a single application with optional sections for each program as necessary, including options not to apply for a loan nor to

file loan support documentation, and, while permitting the loan application to be deemed electronically complete for the purposes of submission;

- Require that Tribal approval is required for service to Tribal lands, and that the States will not be authorized to recommend or disapprove BIP/BTOP applications on Tribal land, as States do not promote, support, or regulate Tribal lands;
- Redefine “remote,” based not on proximity by an arbitrary number of miles to urban population, but by services available and restrictions that arise from unique geo-political situations vis-à-vis the States, and related barrier challenges faced by Tribal Entities, so that points are not automatically deducted;
- Not penalize a Tribal applicant based on lack of choice of service provider, by recognizing that Tribal applicants are sovereign entities that provide services where no one else will become a provider of services to their communities and institutions;
- Implement the Significantly Underserved Trust Areas (SUTA) provisions of the 2008 Farm Bill through the ARRA funding provisions based on coordination and consultations with Tribal Entities to address, within the existing ARRA timeframes, the inherent barriers to entry faced by Tribes in the NOFA application process.

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toward the BIP/BTOP program. The meeting brought together tribal leaders, telecom experts and NTIA and RUS representatives in a panel and multiple break-out sessions. These sessions culminated in the passage by the National Congress of two NCAI resolutions discussed below and appended hereto as Attachment 3.

In addition, NPM, in conjunction with the New America Foundation and with the support of the Benton Foundation, the Corporation for Public Broadcasting (CPB), and the Ford Foundation, has published the first quantitative and qualitative study of broadband deployment on Tribal Lands, entitled “New Media, Technology and Internet Use in Indian Country” (“*NPM New Media Study*”). The *NPM New Media Study* is a seminal work, and presents several policy recommendations applicable to the BIP/BTOP program. With this background, The Joint Tribal Commenters are pleased to file these Comments on the state of broadband deployment in Indian Country. The Comments urge NTIA and RUS to make modifications to the BIP/BTOP program that will better effectuate the purpose of the American Recovery and Reinvestment Act of 2009 (“ARRA”), consistent with the special government-to-government relationship between the Federal government and the 564 Federally recognized Tribes.

I. Background On The Commenting Parties

Native Public Media (“NPM”) represents the interests of some thirty-four public radio stations and the permittees of an additional thirty-five new stations serving Tribes throughout the United States. NPM recognizes, however, that profound changes are taking place in the way Americans communicate and use media. NPM is therefore focused not only on the needs of Native American radio stations, but also on helping Native America gain access to new digital and wireless platforms. Improving the communications infrastructure on Tribal lands is critical to the self-government, economic development, and nation-building objectives of American Indian Tribes. It is also critical to a diversified civil society and to our collective democracy.

Advocating on behalf of its member Tribes from across the entire United States in consensus based decision making, NCAI is a forum for federal-tribal policy on all of the major issues confronting Native peoples today, including the myriad challenges of communications access and deployment. NCAI continues to coordinate with the Federal Communications Commission (“Commission” or “FCC”) on a number of Tribal outreach and education efforts. NPM and NCAI have co-hosted several of the Commission’s Indian Telecommunications Initiatives or “ITI” regional workshops and roundtables. NCAI annually co-hosts with the Commission the annual high level consultation “FCC-NCAI Dialogue on Increasing Tribal Telecommunications,” between Commission officials and members of the NCAI Telecommunications Subcommittee.

Since the creation of NCAI’s Telecommunications Subcommittee in 2001, NCAI has adopted many resolutions, representing formal national Tribal policy positions and prerogatives, to support the deployment of telecommunications, broadcast and broadband services throughout Indian Country. NPM is a frequent and active participant in the NCAI Telecommunications Subcommittee.

The Southern California Tribal Chairmen's Association (SCTCA) is a multi-service non-profit corporation established in 1972 for a consortium of 19 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 enrolled Members in the San Diego County urban areas. A board of directors comprised of tribal chairpersons from each of its member Tribes governs SCTCA. SCTCA coordinates and administers numerous grant programs for its members and the southern California Indian community, including: Tribal Temporary Assistance to Needy Families (TANF), Law

Enforcement, Food Commodities, Information Technology Services, Rincon Community Day Care, Adult Vocational Training, Career Development Center, Low Income Home Energy Assistance Program (LIHEAP), the Library Program, Child Care Development Services, Tribal Digital Village (TDV) and Resource Prevention Program. TDV is a broadband wireless network serving 16 different reservations and 66 tribal municipalities and currently 56 tribal homes. The network has over 250 point-to-point and point-to-multipoint links and utilizes renewable solar energy to power 90 percent of its backbone and relay towers. It was designed to support the tribal communities of SCTCA, because there were no other options for connectivity to broadband Internet services.

II. The NCAI Resolutions Concerning the BIP/BTOP Program Provides a Roadmap for Needed Changes to the Program

At its Annual Conference in October, 2009, NCAI dedicated a significant part of its agenda to the BIP/BTOP program through panels, breakout sessions, and Telecom Subcommittee meetings. Over several days the NCAI Annual Conference sessions brought together elected and appointed Tribal leaders and representatives from across the nation to discuss the BIP/BTOP programs. Dozens of Tribal leaders engaged in the meetings to provide the agencies with input on how the programs may be improved to find success on Tribal lands. The first of these meetings was to hear presentations by senior officials from the Department of Commerce/NTIA, Department of Agriculture/RUS and the FCC in a panel session highlighting the BIP/BTOP programs and the National Broadband Plan. The NCAI Telecom Subcommittee held a Listening Session immediately following the panel designed for Tribal leaders to inform the federal officials of Tribal concerns related to the BIP/BTOP programs. These sessions, as well as meetings of the Telecom Subcommittee focusing on the promulgation of related resolutions, distilled information from Tribal leaders, Native communications and IT and

professionals, and Tribal Applicants in the first round of the BIP/BTOP program. Their experience with the BIP/BTOP program, as well as historical understanding of the needs of Tribes and years spent trying to bring telecommunications infrastructure to some of the least served populations in this country are reflected in Resolution PSP-09-026 (“Effective Inclusion of Tribes in the ARRA Broadband Program”), with the following recommendations that RUS and NTIA:

- Hold appropriate consultations sessions with Tribal Leaders aimed at the successful implementation of the BIP and BTOP programs on Tribal lands nationwide;
- Establish a Tribal Priority, consistent with the federal government’s trust responsibility, the applicable Constitutional rational-basis justification, and the classification of federally recognized Tribes as political entities, for the funding of Tribal Entities providing broadband services on their own Tribal lands;
- In establishing a Tribal Priority for broadband, take proactive steps to recognize the unique knowledge, abilities, and inherent rights of Tribal entities, as well as the need to reverse the market conditions that place Tribes in the position of being a carrier of last resort to create conditions that foster Tribes the “carrier of first choice”;
- Eliminate the barriers to entry created by BIP/BTOP NOFA requirements which deduct points for not being established Title II borrowers, for having smaller and remote populations bases, and for the inability to access capital or pay greater amounts of matching funds, as Tribal Entities often have budgets limited by spending restrictions;
- Consolidate the BIP and BTOP applications into a single application with optional sections for each program as necessary, including options not to apply for a loan nor to

file loan support documentation, and, while permitting the loan application to be deemed electronically complete for the purposes of submission;

- Require that Tribal approval is required for service to Tribal Lands, and that the States will not be authorized to recommend or disapprove BIP/BTOP applications on Tribal Land, as States do not promote, support, or regulate Tribal Lands;
- Redefine “remote” based not on proximity by an arbitrary number of miles to urban population, but by services available and restrictions that arise from unique geo-political situations vis-à-vis the States, and related barrier challenges faced by Tribal Entities, so that points are not automatically deducted;
- Not penalize a Tribal Applicant based on lack of choice of service provider, by recognizing that Tribal Applicants are sovereign entities that provide services where no one else will become a provider of services to their communities and institutions;
- Implement the Significantly Underserved Trust Areas (SUTA) provisions of the 2008 Farm Bill through the ARRA funding provisions based on coordination and consultations with Tribal Entities to address, within the existing ARRA timeframes, the inherent barriers to entry faced by Tribes in the NOFA application process;
- Require that broadband mapping and planning requirements performed under the ARRA on the Tribal lands be approved and certified by the Tribal Entities which exercise sovereign rights as governmental entities over the Tribal Lands, to ensure both the accuracy of the information and appropriate intergovernmental coordination;
- Establish methods of directly funding Tribal Entities for broadband mapping and planning requirements, including but not limited to contracting, subcontracting, granting, and other methods of funding; and

- Create regional tribal liaison positions to facilitate and assist NTIA and RUS in their ongoing intergovernmental coordination with Tribal Entities.

The remainder of these comments will provide the context against which the above recommendations were adopted, including the experiences of Native applicants to the first round of funding as well as the findings of the first empirical study of broadband demand and deployment in Indian Country.

III. The Existing BIP/BTOP Program Does Not Adequately Account for the Unique Trust Relationship between Tribes and the Federal Government

The United States shares a unique government-to-government and trust relationship with Federally-recognized American Indian Tribes and Alaska Native Villages, to ensure they receive parity of communications services with other American communities. “It is well established that the Tribes are inherently sovereign Nations, with the obligations to ‘maintain peace and good order, improve their condition, establish school systems, and aid their people in their efforts to acquire the arts of civilized life,’ within their jurisdiction.”¹

In a Memorandum signed November 5, 2009, President Obama called on all Federal agencies to report back to the White House on their efforts to establish clear plans to consult with Indian Tribes as part of developing Federal policies.² As the Memorandum notes:

History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.

¹ S.Rep. No. 698, 45th Cong., 3d Sess. 1-2 (1879) (quoted in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140, 102 S.Ct. 894, 903, 71 L.Ed.2d 21 (1981)).

² <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>.

The President ordered all executive departments and agencies to report within 90 days of their plans to better implement Executive Order 13175 (2000), which calls for better consultation and coordination with Indian Tribal Governments. The Joint Tribal Commenters applaud President Obama's Tribal initiative and its relevance to BIP/BTOP. Among the continuing failures in bringing broadband to Tribal Lands is the fact that Indian Tribes must interface with multiple U.S. Federal agencies for assistance, financial, and technical support in bringing broadband to Indian Country. Only when individual Native Americans have access to information, contacts, and support, can the necessary broadband deployment happen in Indian Country. The U.S. Federal government as a whole must take the lead in coordinating among the various agencies with responsibilities vis-à-vis Tribes, and establishing lines of communication with those Tribes so that broadband access is available to every person in the United States.

A. Tribal Entities Need a Better “Seat at the Table” in this Process Commensurate with Their Roles as Governments and Key Anchor Institutions

Unfortunately, the first round of BIP/BTOP funding fell far short of recognizing the unique trust relationship between the Federal government and Tribal governments in a number of ways, as outlined in these Comments. First, and foremost, the current BIP/BTOP implementation plan places significant power in the hands of the States, while failing to recognize the sovereignty of Tribes. As a result, applicants seeking to serve Tribal Lands were not required to interface with Tribes, but instead were encouraged to interface with States to lobby for priority of their projects in lands over which the States have extremely limited jurisdiction. In many instances Tribes did not know who was applying to serve their own Tribal Lands or what services were proposed. The only means of reviewing proposals to serve Tribal Lands was to review each of the over two thousand applications filed in the first round.

As an initial matter, therefore, The Joint Tribal Commenters request that RUS and NTIA fully consult with Tribes concerning any application that proposes to provide service to Tribal lands. Page 4 of the *Second RFI* posits the following set of questions in this regard:

Transparency and Confidentiality. Consistent with the Administration's policy and the Recovery Act's objective to ensure greater transparency in government operations, RUS and NTIA are considering whether they should permit greater access, consistent with applicable Federal laws and regulations, to certain applicant information to other applicants, policymakers, and the public, including state and tribal governments. Should the public be given greater access to application data submitted to BIP and BTOP? Which data should be made publicly available and which data should be considered confidential or proprietary? For example, RUS and NTIA tentatively conclude that the application's executive summary should be made publicly available for the second round of funding.

When it comes to Tribal Lands, The Joint Tribal Commenters submit that the affected Tribes should have complete access to all aspects of any application proposing the use of federal funding to serve their lands. As sovereign entities with the right and responsibility to provide for their peoples, Tribes should have full access to the information contained therein and the ability to participate in the selection of any application that proposes service to Tribal Lands. This would include a requirement that applicants receive Tribal rights of way (or at least begin the process and provide in the application a plan for receiving Tribal Land rights of way) before Federal funds under BIP/BTOP could flow to the applicant. These steps, along with the recommendations above, are necessary for RUS and NTIA to comply with Executive Order 13175 (2000), as currently implemented by the Obama Administration.

B. The Definition of "Remote Area" Must Be Redefined To Account for the Unique Nature of Tribal and Near Tribal Lands

As more fully documented by the experience of Southern California Tribal Chairman's Association ("SCTCA") below, one of the major impediments for Tribal Applicants and

applicants desiring to bring broadband service to Tribal Lands under the BIP/BTOP program is the definition of “remote area.” The *Second RFI* recognizes this problem as follows:

The NOFA defines “remote area” as an unserved, rural area 50 miles from the limits of a non-rural area. The rural remote concept aims to address the prohibitive costs associated with broadband deployment in communities that are small in size and substantially distant from urban areas and their resources. The definition adopted in the NOFA was intended to ensure that the most isolated, highest-cost to serve, unserved communities could receive the benefit of up to 100 percent grant financing. The geographic factor upon which an area was determined to be eligible was its distance from a non-rural area; in this case, 50 miles. RUS heard from many interested parties, including members of Congress, on this definition. Many believed it was overly restrictive, thereby eliminating too many areas that were not 50 miles or more from a non-rural area but were nonetheless a fair distance away and unserved. Comment is requested on the definition of remote area, as well as whether this concept should be a factor in determining award decisions. Should factors other than distance be considered, such as income levels, geographic barriers, and population densities?

Second RFI, pp. 6-7. When it comes to Tribal Lands, the problem is even more fundamental.

Because Tribal Lands constitute separate sovereign nations within the confines of the United States, within which both Federal and Tribal government program services are delivered to Tribal members, any geographic mileage measure used to define “remote area” is inappropriate, both from a Tribal comity standpoint, and as a practical matter. One only has to look at the Indian Nations that abut larger communities. Literally on one side of a highway there is ample commerce with full access to fundamental utilities and telecommunications infrastructure.

Across the highway, on Tribal Lands, however, none of that exists. Historically, those services end at the beginning of Indian Country. Often as federal enclaves, both former and current, these Tribal lands have experienced periods of infrastructure development different than the country as a whole, and the results of unique geo-political histories in each instance that cannot be measured accurately in simple terms of distance and population. Yet under the current definition of “remote areas,” significant Tribal Lands, and indeed potentially entire Tribes, do not qualify as “remote.”

The Joint Tribal Commenters therefore urge RUS and NTIA to amend the definition of “remote area” to include all Tribal Lands. Only in doing so will the Federal government achieve the goal set forth in the *Second RFI* to “ensure that Tribal entities, or entities proposing to serve Tribal Lands, have sufficient resources to provide these historically unserved and underserved areas with access to broadband service.”³

IV. The NPM New Media Study Highlights the Need for Structural Changes in the BIP/BTOP Program

Attached hereto, as Attachment 4, is a copy of the just-released *NPM New Media Study*. It is the first attempt in history to study the demand for broadband service in Indian Country, and to examine models for broadband deployment on Tribal Lands. The Joint Tribal Commenters urge RUS and NTIA to review it carefully, because its findings and policy recommendations have a critical bearing on whether the BIP/BTOP programs can effectively bring broadband to Native Americans, or whether these programs will be yet another government program designed by non-Native Americans that throws millions of dollars to solve the wrong problems with the wrong, but very expensive solutions.

A. Summary of the NPM New Media Study As It Relates to the BIP/BTOP Program

The fundamental findings of the *NPM New Media Study* are summarized below:

- Contrary to many stereotypes, Native Americans want access to broadband technology, and will go to great and creative lengths to get broadband. Like water, they will find it and find creative and economical ways to use it;
- Broadband usage by Native Americans with access actually outstrips national averages for usage by non-Natives;
- Broadband deployment on Tribal lands is “community” centric;

³ *Second RFI*, p. 6.

- Broadband is most effectively deployed first to major economic anchors in the community that include the Tribal government headquarters, Indian Health Service, Bureau of Indian Affairs, local educational institutions, and computer centers;
- Residential broadband deployment is added once the economic and service core of the community is established; and once the Tribe decides on a plan that is affordable and sustainable to its residents; and
- Therefore, any federal program that gives substantial scoring credit to proposals emphasizing delivering “last mile” to residential users will fail to meet the community-centric needs on Tribal Lands.

B. The NPM New Media Study Represents the First “Good Look” at Broadband Demand and Deployment in Indian Country

The *NPM New Media Study* is a two-part report, which includes a survey of Native American technology use normed against other national surveys, and case studies of six successful projects exhibiting Digital Excellence in Native America. Part One includes an assessment of existing Internet capacity in Indian Country and was initiated under the direction of NPM in collaboration with the New America Foundation. The 54-question survey was administered via Survey Monkey on the internet, beginning in October 2008 and continuing through September 2009. NPM staff also surveyed random conference attendees at the National Congress of American Indians Annual Conference and at the National Indian Gaming Conference, both held in Phoenix, Arizona in 2009.

The Survey asked respondents basic demographic information and questions about multimedia and internet technology use in order to understand Tribal broadband usage. Subsequent questions ranged from use of the Internet for driving directions to political research to blogging. The survey also gathered information regarding access to and cost of services including telephone, computer and cell phone. Additionally, respondents were asked about other internet technology and media use, including the posting of music, videos, digital photos, and text messaging. This data was compared (“normed”) with samples from the Pew 2008 Spring

Tracking Survey, the Pew Internet and American Life Project's Annual Gadgets Survey, Pew Internet and American Life Project's December 2006 Tracking Survey, and the Pew Internet and American Life Projects Consumer Choice Survey.

The Survey captured respondents from over 120 Tribes living in 28 states. In total, 196 surveys were completed, 182 of these 196 surveys (93%) were fully completed. The survey encapsulated perspectives from young adult to elderly (born in years 1934 to 1989) with the median birth year being 1963. Respondents spanned a variety of educational backgrounds: Nine percent (9%) of survey respondents had a high school degree or less; 41 percent had technical/vocational or some college education; 23 percent had completed college; and 27 percent had an advanced degree or post-graduate training. 69 percent of respondents were employed full-time with an additional 7 percent employed part-time, 6 percent were self-employed, 4 percent were retired and 4 percent were students. The respondent sample was middle income, with a median yearly household income of \$40,000-50,000; however, one in three respondents had a total family income of less than \$40,000 per year, and one in five respondents had a total family income of less than \$30,000 per year. Overall, participants in the *NPM New Media Study* were extremely tech savvy, utilizing digital multimedia and communications technologies at rates that are much higher than national norms.

Part Two of the *NPM New Media Study* consists of six case studies at exemplar sites that have demonstrated successful use of broadband and recommends replicable models for other Native communities. The case studies comparatively map out existing resources, technology use and infrastructure, Tribal involvement in development of technology resources, funding resources, Internet access, and community involvement. Successful projects were characterized

by the following specific factors: commitment from Tribal Council, strong leadership, planning, investment in human capital and community technology centers. Each is discussed below.

Commitment from Tribal Council. A key commonality between the successful case study projects was that each evolved organically from the ground up and with necessary input from their respective Tribal Councils. All of the project leaders expressed the need for commitment and endorsement from the Tribal Council, yet each for their own reasons sought limited or no involvement from the Tribe in the implementation and the day-to-day operations of a project. However, Tribal Council approval is important to this process because it is an endorsement from the Tribe that the projects were important and worthy of their consideration for approval. Further, without approval from the Tribal Council or local governing bodies, it is difficult if not impossible for projects that require massive towers and prominent hardware to secure the clearances and necessary right-of-way approvals.

Strong Leadership. Driven by project leaders with an understanding of community needs, the projects reviewed in this Study were able to make a substantial progress towards digitizing Native America. The project leader usually understood the community and its needs, the local challenges and players, the technology and infrastructure, and was capable implementing the vision. In many of the cases, the leader had the technical expertise to make the project feasible. Where indigenous technical expertise was lacking, communities hired consultants with technical expertise to work with community members. Often these experts, whether consultants or original visionaries, later migrated into positions within the Tribal IT structure.

Planning. Although many of the projects developed organically little time for due diligence or phased development, the current project leaders interviewed strongly recommended

substantial early planning for new projects. Even so, each of these projects greatly benefited from a sudden opportunity to which a quick response was required. In some cases, this response meant aggressively seeking funding opportunities, working to quickly provide needed services, or to connect their communities in exciting ways for special events. However, the need for specific planning based on community need, expertise and funding opportunities is integral to the process of developing a successful network.

Investment in Human Capital. In all of the communities studied, community members are implementing the networks. The communities are investing in human capital, by investing in their own people. This is nation building at its finest. By investing in their community, especially the youth, communities keep their money local, train members for jobs, and build physical and human infrastructure, a vibrant Native community and Tribal capacity. This point goes hand-in-hand with the development of community technology centers. Tribes understand that building the technology highway is not enough; digital literacy training results in a trained workforce, leading to substantial community buy-in, support and the use of technology.

Community Technology Centers. In many of the communities, the establishment of a community technology center has been essential to bridging the digital divide by promoting community engagement and building local capacity. The community technology centers serve as the hub of project leadership, technical expertise, as well as a planning and meeting place for Tribal citizens. The case studies demonstrate that the community centers provide gateways to the rest of the world for community members. Everyone in the community uses the technology centers, young and old alike, providing ideal locales to teach digital literacy skills. Arguably, community technology centers are the most important component of implementing Internet access and driving use and adoption in Indian Country.

These case studies are a compelling picture of the potential for Native American broadband deployment and adoption of technology. Successful networks are emblematic of a long history of Native self-sufficiency and pioneering creative solutions to fulfill the needs of their communities. Faced with limited resources and means, motivated individuals have provided their communities with new ways to connect and communicate with each other. These networks have decreased Tribal costs, and brought access in areas where community needs were largely ignored by non-Tribal service providers.

The case studies undermine any ill-conceived assumption that Native communities are uninterested in technology and the Internet. The findings demonstrate that Native America wants access to the communication tools of the 21st Century and will take advantage of available technology in their community. This study is foundational and contains the first valid and credible data on Internet use among Native Americans. Overall, participants were extremely tech savvy, utilizing digital multimedia and communications technologies at rates that are much higher than national norms. Survey responses indicate that residents on Tribal land are being charged more for their Internet Services than the national average.

Findings should not be misconstrued to mean that broadband access is widely available on Indian lands, but rather that the selected participants have managed to find ways to access broadband resources and that there is a great demand for these resources among these segments of the Native American community. Select Tribal communities have successfully deployed Internet in areas unserved by non-Tribal providers; providing a model for adoption and deployment. Community centric approaches are the most successful in Indian Country

Among the key policy recommendations in the *NPM New Media Study* are that the Federal government needs to:

- Implement a new and robust strategic initiative targeting Tribal communications development.
- Create a Tribal Broadband Plan within the National Broadband Plan.
- Create new means of effectuating consultation and coordination with Tribal governments.
- Undertake Universal Service Fund Reform to recognize the unique characteristic of both Tribal Lands and Tribal cultures.
- Increase access to spectrum and remove barriers to use of spectrum by Tribal Entities.
- Undertake greater federal funding and education, and the creation of a new federal program mechanism to support further connectivity and adoption within Native Nations
- Support future additional research and analysis.
- Make changes to meet immediate needs in the broadband funding application processes under BIP/BTOP.

V. Native Applicant Experience in the First Round of the BIP/BTOP Programs Demonstrate the Need for Change in the Programs

The Joint Tribal Commenters have heard from many Tribal Applicants in the first round of the BIP/BTOP programs. One of the deployments studied in the *NPM New Media Study*, SCTDV, a project of the Southern California Tribal Chairman’s Association (SCTCA) was such an applicant. The comments from Matthew R. Rantanen, the Director of Technology of SCTCA, excerpted below, exemplify the experience of Native Americans in the first round. To understand the issues encountered by SCTCA, some understanding of its roots and development is necessary.

The SCTCA is a consortium of 19 federally recognized tribes. This nonprofit service organization, established in 1972, is made up of a board of directors comprised of the tribal chairs of the member tribes: Barona, Cahuilla, Campo, Chemehuevi, Ewiiapaayp, Inaja, Jamul, La Jolla, La Posta, Los Coyotes, Manzanita, Mesa Grande, Pala, Pauma, Rincon, San Pasqual, Santa Ysabel, Sycuan, and Viejas tribes. The SCTCA is the administrative group that coordinates

numerous grant programs for the member tribes. The organization increases the tribes' strength in working with the federal government and local communities.

Demographics vary by tribe as do the local economies, but the San Diego region reservations have an approximate population of 7,675 living in geographically separated and often isolated areas ranging from the U.S.-Mexico Border to southern Riverside country, an area of about 150 miles. The tribes are connected through the Tribal Digital Village. The Tribal Digital Village has been operational since 2001, when it was awarded a three-year grant from Hewlett-Packard valued at \$5 million for connectivity and \$4 million in HP equipment. The grant initially provided for construction resource centers and some broadband connections between the reservations, along with the donation of HP products, services, and support. Initially, the Rincon and La Jolla reservations were connected. Soon after that, the Northern half of the communities were connected. The rest of the reservations were brought online by 2004. Since 2004, they have brought the backbone up to a professional level and secured E-Rate funding to cover yearly connectivity. Currently, 86 buildings, 16 libraries, five Head Start programs and two schools on 16 reservations are connected, as well as fire stations, tribal administration buildings, tribal police, the EPA, and all resource programs. Additionally, there are 22 homes connected and there is a build-out plan in place to connect an additional 2700 tribal homes and the surrounding community. The Digital Tribal Village has 250 plus miles of point-to-point and point-to-multipoint links, with 18 backbone nodes and relay sites. The network operates on 2.4, 5.3, and 5.8 gigahertz and they have one FCC licensed link to relieve usage on the areas unlicensed spectrum. They are pulling away from the 2.4 gigahertz spectrum and moving more towards the 5.3 and 5.8 gigahertz spectrum to open up more possibilities.

The BIP/BTOP program provided SCTCA with a wonderful opportunity to expand the Tribal Digital Village. SCTCA personnel, guided by Mr. Rantanen, prepared and submitted an application. The application is pending and SCTCA remains hopeful that it will receive funding. Nonetheless, their experience, win or lose, is emblematic of the issues faced by Native American applicants, many of whom feel that the “deck was stacked against them” in the process. Following its submission, Mr. Rantanen went through the self-scoring exercise provided by RUS and came away with the following impressions (paraphrased and edited here from Mr. Rantanen’s notes):

A) The criteria used to select awardees in the NOFA for first round effectively excluded Tribal Applicants. These same criteria will exclude Tribes during the second round unless significant changes are made. The first round NOFA puts all but .01% of Tribal Applicants at a **40 point** disadvantage before the first blank of the application form was completed. The following is a breakdown of the obstacles within the first NOFA for Tribes.

1) The first obstacle for Tribes applying for ARRA Broadband Stimulus funding is the fact that all rural applications were required to apply for the BIP program administered by RUS. There was no way to apply directly to BTOP, even if the application for last mile connections is better supported through BTOP. The NOFA stated that if a rural application is not funded by the BIP and the applicant has indicated that they wish the application be reviewed by BTOP/NTIA as well, an applicant may submit a joint application for the BIP/BTOP for review. It remains unclear whether an application that is passed from BIP to BTOP will get fair consideration

due to the fact that BTOP applications were fully reviewed and ripe for grant when the BIP “rejects” come through the door. It is difficult to focus on a BIP application, knowing that it will be declined. Tribes lose as many as 9 points for this category if they are applying for a grant.

2) The first NOFA required applicants to submit the equivalent of one and three quarters applications, increasing the burdens substantially for applicants often with limited resources. Nearly twice the amount of work was required just to get handed off to the BTOP program at NTIA.

3) The first NOFA requested the applicant to fulfill all of the criteria for a BIP application even if it wished to be reviewed for a BTOP application. If one item was missing from the BIP/RUS side, the application could not even be submitted to BTOP/NTIA.

4) An applicant in the first NOFA had to submit budget information that is required of BIP applicants whether or not they are requesting a loan or loan/grant. Applicants that did not wish to apply for the loan or loan/grant were still required to submit irrelevant but sensitive information, and that section had to be complete to be accepted. An applicant for a grant should not be required to submit information for a loan.

5) Only one point out of 10 is awarded if an applicant is looking for a grant, not a loan or loan/grant combination. Nine points are lost when a Tribe seeks grant funding and not a loan. Tribes for the most part do not have a surplus of cash. The unavailability of matching funds for applications of this magnitude severely limits the ability of the Tribe to

establish a sustainable model. Tribes are thus at a disadvantage, since “RUS will favor applications that propose a higher percentage of loan funds.”

B) BIP/RUS has an admitted problem with their definition of “rural” and “remote.” Tribes are at a severe disadvantage in this category, especially those Tribes that reside in counties like San Diego, where no part of the county is further than 50 miles from an urban/urbanized area. In the case of the 17 Tribes in San Diego County which are in close proximity to urbanized areas, there is absolutely no Tribal history of commercial telecommunications carriers building out infrastructure on these Tribal lands, and they have no access to broadband Internet. Several reservations do not even have access to Plain Old Telephone Service (POTS). Some have no electricity and several have no access to running water. Although in some cases the nearest grocery is 28 miles away, cut off from resources and often without transportation, none of the Tribes participating in the SCTCA are classified as "remote".

C) Lack of prior status as a telco and Title II class borrower severely hinders Native applicants. This status is required to get 5 of the 100 possible points in the self-scoring evaluation. Exactly 8 of 564 Federally recognized Tribes qualify for this status, or 1.4 percent. Conversely, almost 99 percent of all Tribes lose 5 points from the outset. To achieve this status, you must first be a telco, and have previously borrowed from RUS for telco funding, and successfully repaid, or have your loan in good standing.

D) Lack of residential population density harms Native applicants. Because SCTCA could not serve more than 10,000 customers, it lost four out of five points under this criteria. Even if they could serve every potential customer within its visual footprint, SCTCA could only serve 5800 homes (which would include 3100 non-Tribal homes).

E) No credit was given to serving multiple and diverse communities. The flip side to the credit for serving larger population blocks is the lack of credit for connecting disparate and diverse communities. SCTCA serves 17 entire communities and their surrounding non-Tribal neighbors, all in critical need of broadband. Yet because of lack of overall population density SCTCA achieved only one of five points under this self-scoring criteria.

F) Allowing the States to recommend and prioritize applicants severely harms Native applicants. Tribes (especially smaller ones) do not have relationships on this level with their State governments, nor should they be expected to. States may not support Tribal efforts because Tribes directly compete with other entities within the State. Moreover, States neither have jurisdiction over, or experience dealing with, Tribes when it comes to infrastructure such as telecommunications. In fact, States do not know what is best for Tribes. Tribes know what is best for Tribes. Tribes should determine priority of Tribal projects, not States.

G) Government Partnering is a problem for many Tribes. SCTCA potentially lost four out of five points under this criteria because of the difficulty in working with State governments which have limited jurisdiction over Tribes.

H) Network Openness issue. SCTCA potentially lost all five points under this criteria for two reasons. First, the Tribal Digital Village is Tribally owned and operated, and subject to the jurisdiction of multiple sovereign nations. Tribes need to ensure that the network meets the needs of their people, rather than advance U.S. Federal concepts of competition. Secondly, competition does not exist on Tribal Lands. There typically are no other carriers seeking access to the network, since they have no interest in providing telecommunications services to Tribal lands.

I) Inability to leverage outside resources hinders funding chances – a loss of 9 points on the self-scoring test. Tribes are cash poor, and funding from private funders on a tight timeline was basically impossible. If a Tribe seeks a 100% grant from RUS without outside funding, it loses 9 points.

J) Technical issues with the application. SCTCA ran into a number of technical glitches with the application process. Some of these are encountered by all applicants, but a few in particular were particularly insulting to Tribal Applicants, such as not allowing an apostrophe in the name of the applicant. Many Native nations have names that contain one or more non-ASCII characters. Not being able to use the actual name of a Tribe in an application is akin to announcing that any applicant with a “z” in its name could not apply. Only a last minute fix to the system allowed SCTCA’s application to be filed. One wonders how many Native applicants simply gave up because they could not get the online system to verify their applications until the last day.

VI. Only Through the Establishment of a “Tribal Priority” Can NTIA and RUS Ensure that ARRA Funds Bring Broadband Service to the Most Needed Populations in America

The first round of the BIP/BTOP program has failed to provide a fair opportunity for Tribes and entities seeking to deploy broadband to Tribal Lands. The deck has been stacked in favor of existing telecommunications providers that seek to extend existing service offerings to additional residences in less densely populated areas, but in areas where at least 10,000 residents could be served with a single system deployment. At Page 6 of the *Second RFI*, RUS and NTIA pose that question directly:

Targeted Populations. Should RUS and NTIA allocate a portion of the remaining funds to specific population groups? For example, should the agencies revise elements of the BIP and BTOP programs to ensure that tribal entities, or entities proposing to serve tribal lands, have sufficient resources to provide these historically unserved and underserved areas with access to broadband service? Similarly, should public housing authorities be specifically targeted for funding as entities serving low-income populations that have traditionally been unserved or underserved by broadband service? How can funds for Public Computer Centers and Sustainable Broadband Adoption projects be targeted to increase broadband access and use among vulnerable populations? Should NTIA shift more BTOP funds into public computer centers than is required by the Recovery Act? In what ways would this type of targeted allocation of funding resources best be accomplished under the statutory requirements of each program? Should libraries be targeted as sites for public computer access, and if so, how would BTOP funding interact with e-Rate funding provided through the Schools and Libraries program?

The Joint Tribal Commenters submit that only through the establishment of a Tribal Priority will the needs of Indian Country be served. As discussed below, the Tribal Priority must consist of two features: A) Leveling the playing field in the scoring so that Tribal Applicants have a chance to compete against other proposal across America; and B) Providing a priority between Tribal and non-Tribal Applicants both proposing to serve the same Tribal Lands.

A. The Tribal Priority Would Require the Federal Government to Score Tribal Applicants Based on a Recognition that Certain Scoring Criteria Cannot Be Met

As fully demonstrated by the experience of SCTCA above, even the best Tribal Applicants cannot compete toe-to-toe with established telecommunications carriers proposing to deliver residential broadband service to large numbers of people under the current scoring criteria. If the experience of the second round is similar to the first, the amount of money sought by round two applicants will far exceed the available funds. Tribal Applicants that start with a 25, 40, or 50 point deficit will have no chance at funds.

To level the playing field, RUS and NTIA should adopt a Tribal Priority whereby in evaluating and scoring Tribal Applicants, RUS and NTIA would take the unique situation facing Indian Country into account, and would allocate maximum scores within scoring criteria to reflect these unique circumstances. Specifically, adjustments in scoring should be made under the following criteria:

1) Allocate a full 10 points under the funding criteria for a Tribal Applicant proposing a 100% grant to recognize the fact that most Tribes cannot put together matching funds or acquire loans within the timeframe required under this program.

2) Allocate a full five points under the definition of “remote” to recognize the lack of telecommunication infrastructure on Tribal Lands equates to those lands being “remote.”

3) Allocate a full five points to Tribal Applicants who are not prior Title II class borrowers to level the playing field for Tribal Applicants against incumbent telecommunications providers.⁴

⁴ The existing eight Tribal telcos would continue to be eligible for the full five points under this category.

4) Allocate additional points, up to the full five points, to Tribal Applicants for population served where POTS penetration and/or broadband availability are at least ten percent (10%) below national norms. Tribal Applicants proposing service on Tribal Lands that historically have little or no telecommunications infrastructure would receive the full five points, regardless of how many residential users they propose to serve.

5) Allocate the full five points to Tribal Applicants under the government partnering issue to acknowledge that the applicant itself is part of a Tribal government or is Tribally sanctioned.

6) Allocate the full five points under the issue of network openness to recognize the sovereign right of Tribes to regulate networks on their Tribal Lands.

7) Allocate the full ten points under the category of Leveraging of Outside Resources to recognize that Tribal budget and funding cycles simply do not allow for the short-term diversion of capital into these types of projects. Tribal governments are unable to go into the capital markets to come up with matching resources in such a tight timeframe, and Tribal budgets themselves are subject to other Federal restrictions on spending that impinge the ability of Tribes to make other funding available.

With these adjustments to the evaluation and scoring of Tribal Applicants, Tribes will be able to compete for the nationwide “pot” of second round BIP/BTOP money. Anything short of this will result in truly meritorious applications losing out to other applicants who do not propose to provide critically needed broadband service to Indian Country.

B. The Tribal Priority Would Favor a Tribal Applicant over Another Applicant Proposing to Serve the Same Tribal Lands

The second component of the Tribal Priority must allow for Tribes to choose between applicants proposing to provide broadband service to their Lands. Tribes should be consulted

with, and their recommendation and prioritization given deference by RUS and NTIA. In most instances this would result in the Tribal Applicant being awarded funding over a non-Tribal Applicant, but as demonstrated below, giving such a priority to Tribal Applicants is consistent with sound policy and legal precedent.

C. A Tribal Priority Would Meet the Rational Basis Constitutional Standard in Promoting the Deployment of Broadband Services on Tribal Lands in the Face of Myriad Needs and the Extreme Lack of Services

As sovereign entities, federally recognized Tribal Entities share a unique government-to-government relationship with the United States Federal government as recognized in the Constitution, numerous federal laws, policies, and Supreme Court cases. Federally recognized American Indian and Alaska Native Tribal Entities, their citizens and their instrumentalities, such as Tribally-owned or controlled businesses, are politically classified rather than racially classified. As such, the rational basis review, rather than strict scrutiny, applies to citizens of federally recognized Tribal Entities.⁵ The government-to-government trust relationship between

⁵ See *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (“[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the B.I.A in a unique fashion”). The Supreme Court in *Mancari* went on to note: “The preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes. This operates to exclude many individuals who are racially to be classified as ‘Indians.’ In this sense, the preference is political rather than racial in nature.” *Id.*, n.24. While “Native Americans,” is a term commonly used, in speaking, to refer to persons who self-identify as being of racial descent as “Indians,” the term “Tribal Entities” is employed above for the purposes of this recommendation to mean federally recognized American Indian Tribes and Alaska Native Villages, their member citizens, and their economic instrumentalities, such as Tribally-owned or controlled businesses. See also *United States v. Antelope*, 430 U.S. 641, 645 (1977) (“[t]he decisions of [the Supreme] Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications”). See also *American Federation of Government Works, and AFL-CIO v. U.S.* (“*AFGE v. U.S.*”). 330 F.3d 513, 524 (D.C. Cir. 2003), *cert. denied* 540 U.S. 1088, 124 S.Ct. 957 (2003) (“regulation of commerce between the federal government and tribal entities, including tribally controlled corporations is “at the heart of the [U.S. Constitution’s Indian Commerce] Clause”). In *AFGE v. U.S.*, the D.C. Circuit specifically rejected the plaintiff’s

Tribal Entities and the Federal government is the reason for the existence of several federal agencies, institutions, and programs aimed at Native Americans, including the Bureau of Indian Affairs, the Indian Health Service, the Administration for Native Americans, and the special efforts of the Federal Communications Commission with its focus on Tribal initiatives since 1999, both regulatory and outreach based, to remove barriers to entry in the communications industries for Tribal Entities. Notably, the Commission recognized in 2000 its own government-to-government relationship and its own responsibilities to reduce regulatory burdens on Tribal Entities.⁶

The Joint Tribal Commenters strongly recommend that the agencies take this step to address the significant problems created by the application process heretofore. The NTIA and RUS should seize upon this opportunity to work directly with Tribal Entities, and create a Tribal

claim that the preference should be reviewed under a strict scrutiny standard, stating “In *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998), we summed up the state of the law this way: ‘ordinary rational basis scrutiny applies to Indian classifications just as it does to other non-suspect classifications under equal protection analysis.’ *Id.* at 1340.” *Id.* The United States Department of Justice has maintained this position consistently since the issuance of *Adarand*, and in 1995 issued a Memorandum of Legal Guidance stating that “*Adarand* does not require strict scrutiny review for programs benefiting Native Americans as members of federally recognized Indian tribes. In *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court applied rational basis review to a hiring preference in the Bureau of Indian Affairs for members of federally recognized Indian tribes. The Court reasoned that a tribal classification is ‘political rather than racial in nature,’ because it is ‘granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities.’ *Id.* at 554. See *id.* at 553 n.24.” *Legal Guidance on the Implications of the Supreme Court’s Decision in Adarand Constructors, Inc. v. Pena*, Memorandum to General Counsels, Walter Dellinger, Assistant Attorney General, U. S. Department of Justice, Office of Legal Counsel, June 28, 1995, <http://www.fedcivilrights.org/www.fedcivilrights.org/DOJAdarand.pdf>, at p. 8. (last visited November 30, 2009).

⁶ See Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes, 16 FCC Rcd 4078, 4082 ¶III ¶4 (2000) (“The Commission will endeavor to streamline its administrative process and procedures to remove undue burdens that its decisions and actions place on Indian Tribes. As administrative and organizational impediments that limit the FCC’s ability to work with Indian Tribes, consistent with this Policy Statement, are identified, the Commission will seek to remove those impediments to the extent authorized by law.”)

Priority mechanism within the BIP/BTOP programs to deploy broadband effectively and efficiently on Tribal Lands. By streamlining the administrative procedures to remove undue burdens of the process, the creation of the Tribal Priority within the BIP/BTOP programs for Tribal Entities that apply to deploy broadband services on Tribal lands would necessitate a rational basis justification. This should be found plainly in meeting the myriad needs for broadband services on Tribal lands that are exacerbated by the extreme lack of present deployment. The creation of a Tribal Priority would be a significant step in the correct direction to address the Digital Divide's infamous and persistent presence in Indian Country.

In an ongoing proceeding at the FCC, the Commission is proposing to grant a Tribal Priority under Section 307(b) of the Communications Act.⁷ Therein the FCC concluded, "It is well established that Tribes are inherently sovereign Nations, with the obligation to maintain peace and good order, improve their condition, establish school systems, and aid their people in their efforts to acquire the arts of civilized life within their jurisdictions. . . The Commission therefore believes that is is in keeping with its policy toward and relationship with Tribes, as well as the public interest, to aid Tribes and tribal consortia in their efforts to provide educational and other programming to their members residing on tribal lands, as well as to assist them in acquiring and operating commercial stations for purposes of business and commercial development.

VII. Conclusion

Based on the foregoing, the Joint Tribal Commenters hereby request that RUS and NTIA adopt the proposals set forth herein, including a Tribal Priority for Tribal Applicants, in order to

⁷ See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures (NPRM)*, 74 Fed. Reg. 22498 (May 13, 2009).

assure that ARRA funds are available to Tribes to meet the critical broadband needs on Tribal Lands.

Respectfully submitted,

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Dated: November 30, 2009