

# United States Senate

WASHINGTON, DC 20510

November 19, 2019

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

Dear Chairman Pai,

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

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

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

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

<sup>2</sup> FCC 00-207 (June 8, 2000).

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

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

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

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

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

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

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

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

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

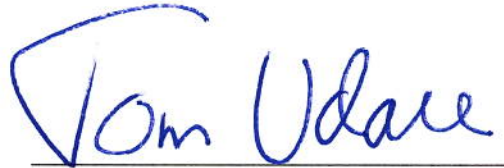
3. Information identifying which EBS channel groups are available for all Tribes;
4. A list of government-to-government consultations with Tribes on the Tribal priority window;
5. Acknowledgement that each Tribe that is eligible for EBS spectrum have been notified of their eligibility in writing.

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

Sincerely,



BRIAN SCHATZ  
United States Senator



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



LISA MURKOWSKI  
United States Senator