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Before the

UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

at its

SEPTEMBER 18, 2019, OVERSIGHT HEARING

on

**GAO REPORT ON TRIBAL ACCESS TO SPECTRUM: PROMOTING COMMUNICATIONS
SERVICES IN INDIAN COUNTRY**

Good afternoon Chairman Hoeven, Vice-Chairman Udall, and Members of the Senate Committee on Indian Affairs. Thank you for allowing me to submit the following statement on behalf of Native Public Media, an organization I am proud to serve as its President and CEO, in today's oversight hearing on the GAO Report on Tribal Access to Spectrum: Promoting Communications Services in Indian Country. We are honored and privileged by the opportunity to address you on this urgent and vital topic. First, a word about who we are. Established in 2004, Native Public Media (NPM) is a non-profit organization dedicated to serving Tribal communities seeking to develop communications networks. NPM's mission is to promote healthy, engaged, and independent Native communities by expanding communications capacity on Tribal lands and by empowering a strong, proud Native voice in the media. By applying the spirit, law, and exercise of Tribal sovereignty to the development and implementation of media and communications, NPM provides leadership, designs programming, and engages on a proactive level in securing and maintaining Tribal radio, television, and communications systems for Indian Country. NPM currently serves as a coordinating entity for 57 Tribal radio stations, and 4 Tribal television stations, and for one Tribal Educational Broadband Service licensee, providing centralized resources and strategic services to assist in developing communications systems in Indian Country that is, in part, dependent on spectrum resources. We respectfully request this Committee and its Honorable members, to consider the following:

I. FCC HAS LONG RECOGNIZED THAT TRIBAL LANDS ARE GROSSLY UNDERSERVED IN BROADBAND ACCESS AND THAT RELIANCE ON MARKET FORCES IS INEFFECTIVE TO INCREASE ACCESS

The Federal Communications Commission (FCC) is charged by Congress in the Communications Act with allocating and administering electromagnetic spectrum in the public interest, convenience, and necessity.¹ Congress also specifically charged the FCC to accelerate the availability of

¹ Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934), as amended by Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 53, 153 (1996) (codified as amended at 47 U.S.C. § 151, et seq.).

affordable high speed broadband internet service to all Americans, including those living on rural and Tribal lands, and since 2010 that mandate has been enshrined in formal FCC policy.² Within its broad mandate, the FCC recognizes a special responsibility to Tribal communities to implement policies and regulations promoting their self-sufficiency and economic development,³ and that access to quality broadband service is critical to achieve those goals.⁴

The FCC concedes that Tribal lands have been and are grossly underserved. According to the Commission's *2018 Broadband Deployment Report*, an estimated 35 percent of residents of Tribal lands lacked access to broadband speeds at 25 Mbps download and 3 Mbps upload (25 Mbps/3 Mbps), which is the U.S. standard.⁵ Comparatively, the majority of the U.S. population has access to high-speed broadband at or above the standard with just 8 percent without a broadband connection. Since the early 2000's, Tribes have lagged behind the rest of the U.S. in access to telecommunications services, both telephone and Internet. The digital divide on Tribal lands is but the latest example of that historic disparity.

It has long been recognized that reliance on private sector market forces alone will not bring the benefits of affordable high-quality broadband service to Tribal lands. Low population density, isolation, poor roads and transportation infrastructure, lack of first responder services and conventional physical addresses, and the difficult terrain of Tribal lands contribute to unattractive private sector market conditions for utilities or commercial broadband service providers to build and operate systems there.⁶ Ironically, each and every one of these same conditions also supports and makes the need for fast reliable broadband service critical for the well-being, safety, self-sufficiency and happiness of people

² 47 U.S.C. § 1302(b); FCC, *Connecting America: The National Broadband Plan* (Washington, D.C.: 2010).

³ *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078 (2000).

⁴ FCC, *Connecting America: The National Broadband Plan* (2010).

⁵ FCC, *2018 Broadband Deployment Report*, FCC No. 18-10 (Feb. 2, 2018).

⁶ GAO, *Telecommunications: Additional Coordination and Performance Measurement Needed for High-Speed Internet Access Programs on Tribal Lands*, GAO-16-222 (Jan. 29, 2016).

living on Tribal lands in this day and age, in which the Internet is the dominant and transformational engine of communication and commerce. Compounding the failure of private market forces, most Tribes, especially in rural areas, lack sufficient resources to fund development and deployment on their own. The reality of most tribes is that no broadband infrastructure will get built in Indian country without some form of federal assistance to support it.

But at the end of the day, bridging the Tribal digital divide is not just about infrastructure. It is about bringing the same affordable high speed broadband resources most Americans enjoy to people living on Tribal lands. It's about the child that is required to complete homework using the internet, about the individual who wants to apply for a loan online, about the student who wants to access library resources around the globe, or an app developer who wants to create a way to sustain tribal language use among his peers. This is a story about 573 diverse nations, rich in culture, history, and experience to dream and innovate answers to challenges of broadband disparities on their own terms, and to participate fully in self-determined internet governance that addresses how technology can benefit and sustain strong, healthy, and robust tribal communities in new and innovative ways. This is not only a quality of life issue, but an issue that gives life to the spirit of the law that mandates a right of all Americans to connect and to communicate. Real lives are at stake.

II. SEPTEMBER 2018 GAO REPORTS: REGULATORY BARRIERS RESTRICT TRIBES' ACCESS TO FEDERAL BROADBAND DEVELOPMENT FUNDING; AND FCC UNDERREPORTING, MARKET FAILURE AND LACK OF MEANINGFUL ENGAGEMENT AMONG FCC, TRIBES AND SERVICE PROVIDERS CONTRIBUTE TO THOSE BARRIERS AND FAILURES

In September 2018, the GAO issued a report finding what Tribes already know from bitter experience -- few have been successful in obtaining federal funding under the FCC's Universal Service Fund and the Rural Utilities Service broadband development grant programs, which purport to be designed to improve access in underserved areas where deployment costs are high.⁷ The GAO also

⁷ GAO, *Tribal Broadband: Few Partnerships Exist and the Rural Utilities Service Needs to Identify and Address Any Funding Barriers Tribes Face*, GAO-18-682, Sept., 2018 ("2018 GAO, Few Partnerships").

found limited opportunities for Tribes to partner with various non-Tribal entities, including federal grant and subsidy recipients, to improve broadband access on Tribal lands, and that such partnerships (where they exist) enjoyed uneven success. These findings are accurate in NPM's experience.

The GAO also found that significant regulatory barriers inhibit Tribes' ability to take advantage of federal broadband development funding to provide broadband systems and service in their own communities, without depending on others. These barriers include federal statutory and FCC regulatory requirements that Tribal applicants must qualify as "eligible telecommunications carriers" (ETCs) to obtain FCC USF Connect America Funding (CAF). A criteria designed for massive telephone companies that dominated the telecommunications industry decades ago, is exacerbated by the FCC's glacial pace in ruling on the ETC eligibility of the few Tribes who have applied for that designation.⁸

Further, the FCC's grants of billions of dollars in CAF funding did not stimulate non-Tribal ETCs to improve broadband access on Tribal lands. As the GAO found, non-tribal ETCs given CAF funding to improve broadband access in underserved areas simply do not deploy service in the Tribal parts of those areas. In our view, this is the result of the FCC's failed quasi-market-based approach to administering USF grants and subsidies. Further, the complexity and up-front expense of navigating the RUS grant application process and difficulty meeting eligibility requirements deters many Tribes from obtaining funding from that source. Specifically, as the GAO found, the RUS grant process requires: preparing complex existing and planned network design documents; demonstrating financial sustainability (essentially, a return on investment) within 5 years, a very unrealistic expectation for the Tribal areas in question; and matching funding from non-federal sources, which cannot be in the form of in-kind contributions of equipment or services. As a practical matter, these requirements make RUS funding unattainable for many Tribes.

⁸ For example, the Leech Lake Band of Ojibwe applied to FCC for ETC status in 2013, and incurred massive costs to stand up a broadband service through its own tribally-charted telecommunications company, on the assumption that CAF funding would be available to offset those costs. Five years later, the band was still awaiting FCC action, and is in danger of having to shut down the service. *2018 GAO, Few Partnerships*, at 19.

In its other September 2018 report, the GAO found that the FCC continues to overstate the actual level of broadband access on Tribal lands, in reliance on incomplete and inaccurate penetration data.⁹ The primary method the FCC uses to collect availability data across the U.S. is through its Form 477. ETC funding recipients are required to submit data annually to the FCC on Census blocks to which they provide service. However, the GAO found ETC-reported Form 477 data “[d]oes not accurately or completely capture broadband access on tribal lands because it (1) captures nationwide broadband *availability* data— areas where providers may have broadband infrastructure—but does so in a way that leads to overstatements of availability, and (2) does not capture information on factors that the FCC and tribal stakeholders have stated can affect broadband *access* on tribal lands, such as affordability, service quality, and denials of service.” In reporting Form 477 data, a carrier reporting coverage in a Census block may base that report on only a single household in that block actually receiving such service.

These overstatements of service availability could lead to Census blocks on Tribal lands being deemed ineligible for federal broadband infrastructure funds. They also contribute to the FCC’s apparent false sense that its policies and regulations to improve Tribal broadband access are effective. For instance, the GAO found that some of the Tribes interviewed specifically stated that they were unable to obtain federal funds to deploy broadband infrastructure due to their reservation lands being listed as ‘served’ by other broadband providers. The GAO also found that there was no formal process at the FCC for Tribes to challenge broadband availability data on Tribal lands. Additionally, when Tribes attempt to dispute reported data, they are often unsuccessful. This systemic “bad data” problem exacerbates other problems that all converge to obstruct real progress toward closing the Tribal digital divide.

Better and more meaningful Tribal engagement, consultation, and accurate information-sharing between and among FCC service providers and Tribes might improve broadband access data, but

⁹ GAO, *Tribal Broadband: FCC’s Data Overstate Access, and Tribes Face Barriers Accessing Funding*, GAO-19-134T (Sept. 2018).

existing FCC regulations and policies do little to encourage either. In fairness, some providers have actively engaged with Tribes to develop needs assessments and deployment, feasibility, and sustainability planning for infrastructure deployment, and there have been some success stories. However, many Tribes experience a general lack of engagement from non-Tribal service providers and report that they simply receive a template letter once a year as a way for the provider to ‘check the box’ on reporting they’ve engaged with Tribal governments in their service area. Moreover, information provided by providers to Tribes is often heavily redacted or withheld unless the Tribe signs a restrictive non-disclosure agreement. There are no FCC rules that regulate or prohibit this practice. Lack of access to detailed and accurate information about broadband availability inhibits the practical ability of Tribes to challenge before the FCC data reported by the providers, upon which the Tribes eligibility for federal grant funding may depend. Under existing rules and policies, service providers have no reason or incentive to report richer, accurate Tribal area broadband access data than the inaccurate and incomplete data the FCC collects, and every reason not to.

The two September 2018 GAO reports culminated in an Oversight Hearing before this Committee in October 2018. Those studies and testimony from Tribal stakeholders before this Committee last Fall chronicle the barriers discussed in our testimony today, and the utter failure of market forces and the FCC to meaningfully address those barriers documented by GAO and multiple witnesses. We refer the Committee to that record. Very little has changed for the better since then.

III. NOVEMBER 2018 GAO REPORT: TRIBES LACK THE ABILITY TO OBTAIN LICENSED WIRELESS SPECTRUM IN COMPETITIVE AUCTIONS; MARKET FAILURE AND FCC’S POLICIES INHIBIT EXPANSION OF BROADBAND SERVICES ON TRIBAL LAND BY NON-TRIBAL LICENSEES

Since the Committee’s last oversight hearing, GAO released in November 2018 yet another report, this one highlighting issues with Tribal access to wireless spectrum.¹⁰ We agree that the difficulty

¹⁰ GAO, *Tribal Broadband: FCC Should Undertake Efforts to Better Promote Tribal Access to Spectrum*, GAO-19-75 (November 2018) (“2018 GAO- Tribal Access to Spectrum”).

Tribes face in obtaining licensed wireless spectrum suitable for affordable broadband service is a major barrier to progress in improving Tribal broadband access. The November 2018 GAO Report identified the FCC's current auction-based method of assigning and licensing wireless spectrum to the highest bidder, and Tribes' lack of access to capital, as factors that converge to deny Tribes' the ability to establish their own primary broadband services and infrastructure as licensees.¹¹

In the face of those obstacles, some Tribes try to muddle through by cobbling together systems relying on unlicensed wireless spectrum never intended and technically unsuitable for broadband use. Unlicensed spectrum generally does not support reliably the bandwidth and low latency needed to stream and exchange the volume of data and content typically used in the modern Internet environment. Moreover, use of unlicensed spectrum can be a crowded field, and subject to interference from other users, with no legal or practical recourse. As the GAO correctly concluded, unlicensed spectrum is no substitute for interference-protected, exclusively licensed wireless spectrum in building and deploying sustainable networks providing universal broadband service.

But, as GAO also notes, although the Commission has proposed adopting a Tribal priority for licensed broadband spectrum in Indian country to promote primary interference-protected licensure to Tribal entities,¹² it has largely failed to follow through in most frequency bands used for wireless broadband, and, where it has done so, it has imposed unrealistically short deadlines on Tribal priority

¹¹ The experience of the most isolated tribe in America and the traditional guardians of the Grand Canyon, the Havasupai, is instructive. For that Tribe, the primary bottleneck in deploying wireless broadband was not infrastructure cost. Rather, regulatory obstructions caused by FCC policy were the primary source of delay and costs. It took lawyers, and four months to get special temporary authority, and then, over another year for the FCC to grant a waiver of its long-standing "freeze" on applications for assignment of unlicensed 2.5 GHz spectrum (which was specifically set aside for educational not-profit and tribal use), and a permanent license. Now, the Havasupai report that their desire to expand and upgrade the power on its modest wireless network to bring service to the entire village, and the bandwidth needed to offer 911 service, tele-learning, and telemedicine, may be frustrated because a non-Tribal provider in 2015 proposed service in the area through the FCC's "prior coordination notification" process, which may give the provider's later-filed application for 6 GHz spectrum priority over the Tribe's partner's earlier-filed application. The Tribe apparently must now fight yet another battle with the FCC. NPM urges the Committee to consider and place in the record the following article and the July 16, 2019, House testimony of Ms. Mariel Triggs:

<https://www.npr.org/2019/09/16/759908026/most-isolated-tribe-in-continental-u-s-gets-broadband>

https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/2_Testimony_Triggs%20%28update%29_0.pdf

¹² In the Matter of Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands, Notice of Proposed Rulemaking 26 FCC Rcd 2623 (2011).

applicants.¹³ The GAO also identified secondary market failures that make Tribes' reliance on engagement and arrangements with other wireless spectrum licensees and service providers, such as service contracts or leases, an unreliable pathway to meaningful rapid progress in bridging the Tribal digital divide. These failures are promoted by the FCC's failure to collect and mandate sharing with Tribes accurate and complete data as to the true state of broadband access on Tribal lands and possible availability of unused spectrum over such lands that would put Tribal entities in a far better and fairer bargaining position with providers than they are now.

IV. *NATIONAL LIFELINE ASSOC. v. FCC: FCC'S POLICIES ARE SOMETIMES WORSE THAN INEFFECTIVE*

We, Tribes and Tribal citizens alike, have reached the point where a *laissez-faire* approach to enforcing meaningful engagement and information-sharing by broadband service providers is just not good enough. That approach has done little to incentivize or require non-Tribal wireless licensees and USF funding recipients to deploy quality broadband service in underserved Tribal areas. We are also past the point where we can tolerate indifference to the known problem of inadequate Tribal broadband access as not being "bad enough" to galvanize real action. Further, the FCC can no longer take actions that defy the "facts on the ground," and make the problems worse.

For example, in 2017 the FCC altered its "Tribal Lifeline program regulations to limit the availability of subsidies only to services provided by telecommunications carriers that utilize their own fixed or mobile wireless facilities, excluding carriers that resell the service of others, and to limit the

¹³ 2018 GAO --*Tribal Access to Spectrum*, at 20-22. One exception is that in the 2.5 GHz rulemaking, the FCC adopted in July 2019 a Tribal priority filing window for currently unlicensed 2.5 GHz spectrum on rural tribal lands in which the applicant tribe has a substantial local presence. FCC, Report & Order, *Transforming the 2.5 GHz Band*, FCC No. 19-62, ¶¶ 47-65 (July 11, 2019). That order also eliminated restrictions limiting licensees of that spectrum only to educational and tribal entities, and the "educational use" restrictions that formerly applied, effectively "commercializing" the band. The Commission will soon hold an "overlay" auction where currently unlicensed EBS spectrum not assigned via a Tribal priority application will be auctioned to the highest bidder on a county-by-county basis. *Id.* ¶¶ 75-99. As a practical matter, underserved Tribes will not be able to take advantage of the 2.5 GHz filing priority. NPM believes that the short Tribal priority "outreach" and filing "windows" prescribed by the FCC, and its inexplicable decision to require Tribal priority licensees to build out systems twice as fast as non-Tribal auction-winner licensees, will limit Tribes' practical abilities to solve complex technical challenges, obtain necessary grant and other funding, form partnerships, and devise and implement solutions in sufficient time to leverage the 2.5 GHz Tribal priority. See also note 11 and references.

subsidies only to persons residing on “rural” Tribal lands. These restrictions had the perverse effect of discouraging, not promoting, greater broadband service availability in Tribal communities.

Earlier this year, the U.S. Court of Appeals for the District of Columbia struck down these rules, holding that they were arbitrary and capricious, in that the FCC failed to offer any reasoned explanation for the policy change supported by evidence in the rulemaking record.¹⁴ The Court explained that the FCC decision simply ignored evidence of real-world market conditions facing Tribal broadband users:

The Commission’s decision evinces no consideration of the exodus of facilities-based providers from the Tribal Lifeline program. Neither does it point to evidence that banning resellers from the Tribal Lifeline program would promote network buildout. Nor does it analyze the impact of the facilities requirement on Tribal residents who currently rely on wireless resellers. Further, the Commission ignored that its decision is a fundamental change that adversely affects the access and affordability of service for residents of Tribal lands. Similarly, in adopting the Tribal Rural Limitation, the Commission’s decision evinces no consideration of the impact on service access and affordability. Its decision does not examine wireless deployment data related to services to which most Tribal Lifeline recipients subscribe.¹⁵

V. THE WAY FORWARD – THE COMING 5G REVOLUTON AND URGENT NEED FOR LEGISLATION

Currently, as a primary focus, the FCC is plunging headlong in a race to free up and auction to the highest bidders, spectrum suitable for next-generation 5G mobile telecommunications services.¹⁶ 5G promises bandwidth and latency rates far superior to existing technologies, and widespread deployment of mobile 5G service in Tribal lands and communities would certainly help close the digital divide. But unless the barriers and obstacles already recognized by this Committee, GAO, and the FCC itself are addressed, Tribal communities are unlikely to enjoy the benefits of this promising technology, and the gap in availability and quality of service will only grow ever wider. If the FCC’s pattern of foot-dragging and neglect continues, it is almost certain that Tribal communities will simply be left behind in the rapidly-approaching 5G revolution. The FCC has displayed scant regard for the interests of Tribes

¹⁴ *National Lifeline Association v. FCC*, No. 18-1026 (D.C. Cir. Feb. 1, 2019)
[https://www.cadc.uscourts.gov/internet/opinions.nsf/8E6B91FC5437D2D9852583940053BC87/\\$file/18-1026.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/8E6B91FC5437D2D9852583940053BC87/$file/18-1026.pdf)

¹⁵ *Id.*, at 3.

¹⁶ <https://www.fcc.gov/5G>.

and Native peoples in its rush to deploy 5G thus far, and there is little reason to think this will change absent Congressional action.¹⁷

For these reasons, NPM strongly supports the efforts of Senator Udall and other members of this Committee to introduce and press for adoption of legislation to remove the barriers caused by broadband service market failure and the FCC's inadequate efforts to mandate and promote meaningful solutions. Such legislation should reflect and implement GAO's recommendations in its 2018 reports. It should:

- Mandate a dedicated Tribal Broadband Fund within the USF, eliminate the ETC eligibility requirement for Tribal applications and require the FCC to create a streamlined application process;
- Mandate dedicated Tribal Broadband funding within the RUS, and require USDA to eliminate or reduce for Tribal entities burdensome and impractical application and eligibility requirements for RUS funding;
- Require the FCC to improve data collection on Tribal lands, develop a formal process for Tribal challenges to and review of carrier reported data, and review and improve its Tribal Government Engagement policies to remove existing barriers and disincentives to meaningful engagement and information-sharing;
- Require the FCC to implement Tribal priority application filing windows for Tribal lands in all wireless spectrum license auctions, with realistic application and build-out deadlines;
- Mandate a National Broadband Advisory Council designed to set an agenda that ensures effective communication and coordination among Federal agencies and to promote Tribal participation in federal decisions and policies regarding broadband deployment and adoption across Indian Country, including (without limitation) in connection with:
 - Proceedings related to the FCC National Broadband Plan and the nation's digital divide;
 - Identifying relevant federal funding information and mechanisms in order to maximize Tribal opportunities for broadband deployment and adoption;
 - Taking actions necessary to fully implement Tribal recommendations in the FCC National Broadband Plan and those stemming from relevant GAO Reports;

¹⁷ On August 9, 2019, in *United Keetoowha Bands of Cherokee Indians in Oklahoma v. FCC*, No. 18-1129 (D.C. Cir. Aug. 9, 2019) the U.S. Court of Appeals overturned a 2018 FCC order designed to accelerate wireless 5G broadband deployments by eliminating National Historic Preservation Act and National Environmental Policy Act review of proposed wireless broadband construction projects' impacts on sites of environmental, religious and cultural importance to federally-recognized Indian tribes. The Court found that FCC acted arbitrarily and capriciously in failing to justify its conclusion that small cell deployments pose little to no cognizable religious, cultural, or environmental risk. <https://www.narf.org/nill/documents/20190809fcc-decision.pdf>.

- Identifying opportunities for Federal agencies, Tribes, broadband service providers (tribal/non-tribal) to share resources related to affordable broadband deployment and adoption; and
- Strengthening, supporting and liaising with the continued outreach and work of the FCC Office of Native Affairs and Policy and the FCC’s Native Nations Communications Task Force.¹⁸

¹⁸ NPM does not believe that the proposed National Broadband Advisory Council would duplicate or be redundant of the work of the FCC’s OPNA or Native Nations Communications Task Force. The scope of the new advisory body is different — focused on multiple federal agencies and collaboration with Tribes to find solutions; with an invitation to service providers to join the circle. Indian Country is diverse and advisory bodies must embrace that this is not a one size fits all approach to addressing the digital divide. This is also an issue about affordability, not just infrastructure. The conversation needs to bring into the circle all stakeholders, public and private, that have the power to help close the digital divide in a substantive and meaningful way.