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January 11, 2019

**Submitted Electronically**

The Broadcasting and Telecommunications Legislative Review Panel  
c/o Innovation, Science and Economic Development Canada  
235 Queen Street, 1st Floor  
Ottawa, Ontario K1A 0H5

**RE: Call for Comments - Broadcasting and Telecommunications Legislative Review**

Dear Members of the Review Panel:

The First Nations Technical Services Advisory Group Inc. (TSAG) files the attached Comments regarding the Broadcasting and Telecommunications Legislative Review.

TSAG provides technical services and training for First Nations in Alberta, including for information technology services. TSAG is mandated by the Chiefs of Alberta and takes direction from a Chiefs Steering Committee and Board of Directors, which include representatives from Treaty 6, Treaty 7, and Treaty 8. TSAG is a member of the First Mile Connectivity Consortium (FMCC), a national non-profit organization providing research and expert advice on policy and regulatory activities related to telecommunications and digital networks in remote and rural First Nation communities. For more information, please see: [www.firstmile.ca](http://www.firstmile.ca)

Please note that while these comments are submitted by TSAG, they are also endorsed by the following organizations:

- Western James Bay Telecommunications Network: <http://wjbtcn.com/>
- Clear Sky Connections: <https://clearskyconnections.ca/home>

TSAG thanks the Legislative Review Panel for this opportunity to submit comments and recognize the Panel's efforts to include a range of stakeholders in its work. We note the importance of an inclusive consultation process that engages Indigenous citizens in ways that ensure any revisions or additions to Canada's *Telecommunications, Broadcasting and Radiocommunications Acts* reflect their needs and desires. We welcome further opportunities to contribute to this important review.

Sincerely,



Rob McMahon, PhD  
(Filed on behalf of TSAG)

# **Submission to the “Broadcasting and Telecommunications Legislative Review Panel”**

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## **Comments by the First Nations Technical Services Advisory Group Inc. (TSAG)**

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## Executive Summary and List of Recommendations

E1. The First Nations Technical Services Advisory Group Inc. (TSAG) provides technical services and training for First Nations in Alberta, including for information technology services. TSAG is mandated by the Chiefs of Alberta and takes direction from a Chiefs Steering Committee and Board of Directors, which include representatives from Treaty 6, Treaty 7, and Treaty 8.

E2. TSAG is a member of the First Mile Connectivity Consortium (FMCC), a national non-profit organization providing research and expert advice on policy and regulatory activities related to telecommunications and digital networks in remote and rural First Nation communities.<sup>1</sup>

E3. Please note that while these comments are submitted by TSAG, they are also endorsed by the following organizations:

- Western James Bay Telecommunications Network: <http://wjbtc.com/>
- Clear Sky Connections: <https://clearskyconnections.ca/home>

E4. This document presents the following recommendations for the Legislative Review Panel:

E5. The goals of the *Broadcasting Act* should specifically include reference to and support for Indigenous content, and the concept of “broadcasting” should be expanded to include all electronic means of distributing and sharing content. The *Broadcasting Act*’s support for Indigenous initiatives current includes the statement “as resources become available”, which must be updated to reflect a more substantive commitment.

E6. A single *Communications Act* that includes all converging media as well as provides for future innovations in technologies and services may best serve the needs of all communications stakeholders, including Indigenous providers and communities.

E7. The following *Telecommunications Policy Objectives* should be retained in the *Telecommunications Act* or in any converged legislation:

“...7 (b) to render reliable and affordable telecommunications services of high quality accessible to Canadians **in both urban and rural areas in all regions of Canada;**

(h) to respond to the **economic and social requirements of users** of telecommunications services” (emphasis added).

E8. Specific language concerning Indigenous land and treaty rights and procedures to be used in obtaining access to land, “passive infrastructure” such as rights of way, poles, and ducts, as well as other communications equipment, should be included in the legislation. This language should apply to all applicants for licenses to provide services on Indigenous lands.

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<sup>1</sup> See: [www.firstmile.ca](http://www.firstmile.ca) for more information.

E9. Language requiring special consideration for Indigenous projects and providers should be included in the legislation. Public authorities include Tribal and other Indigenous governments, and specific language referring to them should be included in the legislation.

E10. Legislation should state that the Commission does not have the right to order construction of transmission lines on Tribal or other Indigenous lands without the formal consent of the relevant Indigenous government.

E11. The *Expropriation Act* (Section 4) includes exceptions for Indigenous lands. These exceptions should also apply to all Tribal and other Indigenous lands, and that the process outlined in the *Act* should apply to any proposed expropriation of Indigenous land for telecommunications purposes.

E12. Concerning communications equipment, the *Radiocommunication Act* requires specific conditions and procedures before any radio station on Gwich'in land may be possessed by the Government. These conditions and procedures should be included in the legislation to apply to communications equipment or facilities on all Indigenous lands.

E13. Legislation should require a review of Basic Service and Universal Access at least every five (5) years.

E14. We propose a unified approach to federal funding of communications facilities and services for Indigenous communities. Ideally, legislation should require that funds contributed by the various agencies be managed with common criteria and guidelines. At minimum, legislation should require an Indigenous communications funding oversight council that includes representatives of both the funding agencies and Indigenous stakeholders.

E15. Communications legislation should state requirements for monitoring and publication of availability and quality of service (QOS) indicators of communications services, including rural, remote and Indigenous regions, with specific targets and parameters.

E16. Legislation should require mapping of telecommunications facilities in Indigenous regions, and specify methodologies and parameters suitable for regions with low population densities.

E17. Communications legislation should specify that compliance and enforcement of obligations are required for all licensees and for funded projects. The language should include how oversight will be provided, and how compliance will be enforced.

E18. Legislative language should require consideration for the constraints faced by small and Indigenous providers in responding to requests for proposals and participating in regulatory proceedings.

E19. Legislation should specify that cost contributions required for funding may include exceptions for Indigenous applicants, including lower or waived financial contributions and in-kind contributions.

E20. Open access is an important concept that should be clearly defined in legislation.

E21. Legislation should include language to ensure a more inclusive approach to the distribution of spectrum licenses that reflects the diversity of providers. The Internet Society's 2017 *Policy*

*Brief – Spectrum Approaches for Community Networks* outlines guiding principles that support the effective use of spectrum:

- Utilizing unlicensed spectrum;
- Shared license spectrum/dynamic spectrum access; and
- Innovative licensing.

We endorse these principles and believe they should be incorporated in legislation.

E22. The Commission should designate one or more Commissioners with specific responsibility for Indigenous regions including not only the territories but also Indigenous lands within the provinces.

E23. Government should establish a permanent multi-stakeholder advisory council to oversee the implementation of policy and regulation, and this council should bring together government, industry, consumers and non-governmental organizations, including Indigenous organizations and their representatives, as well as members of the academic community.

E24. In general, principles of meaningful consultation and informed consent of Indigenous communities must apply to communications, including broadband. This language should be incorporated in communications legislation.

E25. Section 9(1) of the *Telecommunications Act* states that “The Commission may, by order, exempt any class of Canadian carriers from the application of this *Act*, subject to any conditions contained in the order, where the Commission, after holding a public hearing in relation to the exemption, is satisfied that the exemption is consistent with the Canadian telecommunications policy objectives”. This exemption clause should apply to carriers owned and/or operated by Indigenous entities.

## Background: TSAG

2. The First Nations Technical Services Advisory Group Inc. (TSAG) provides technical services and training for First Nations in Alberta such as asset management, water and wastewater management, environmental management, housing support services, fire safety, information technology services and youth initiatives. TSAG is mandated by the Chiefs of Alberta and takes direction from a Chiefs Steering Committee and Board of Directors, which include representatives from Treaty 6, Treaty 7, and Treaty 8. Our team of IT professionals provide quality technical service and training to connect First Nations to community, education, and health online services to promote strong, healthy communities.
3. TSAG is a member of the First Mile Connectivity Consortium (FMCC), a national non-profit organization providing research and expert advice on policy and regulatory activities related to telecommunications and digital networks in remote and rural First Nation communities.<sup>2</sup> TSAG has received infrastructure funding, including through ISED's 'Connect to Innovate' program. We also receive ongoing connectivity funds. We continue to face challenges in providing local last-mile access networks and affordability of wholesale bandwidth.
4. Please note that while these comments are submitted by TSAG, they are also endorsed by the following organizations:
  - Western James Bay Telecommunications Network: <http://wjbtc.com/>
  - Clear Sky Connections: <https://clearskyconnections.ca/home>

### Communications Services for Indigenous Communities

5. Telecommunications, broadband and other communications media such as broadcasting are essential services and should remain a fiduciary and financial responsibility of the Government of Canada to ensure that these services are available and affordable to *all* Canadians. Digital services are essential for the social, cultural, and economic development of rural and remote Indigenous communities and their residents.<sup>3</sup> However, there is a paradox in the development and delivery of communications services in these regions: rural/remote communities with the worst transportation links and highest needs (due to a lack of 'brick and mortar' services) often have the worst access, lowest quality of service, and most expensive communications services.<sup>4</sup> This condition is partly due to market failure, since not enough people live in these regions to generate the revenue and profits required by commercial communications companies.
6. Faced with this challenge, Indigenous service providers across Canada have innovated to develop and implement modern systems supporting digital infrastructure and services.<sup>5</sup> First Nation organizations and regional networks, including TSAG/Arrow, provide services to both institutions (e.g. health and education) and households. These organizations utilize a "whole community approach" that frames broadband as an ecosystem of: 1) residents and

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<sup>2</sup> See: [www.firstmile.ca](http://www.firstmile.ca) for more information.

<sup>3</sup> Research contracted by Industry Canada/ISED, see: <http://firstmile.ca/wp-content/uploads/2016-ISED-FMCC.pdf>

<sup>4</sup> See: <http://www.northernpublicaffairs.ca/index/volume-6-special-issue-2-connectivity-in-northern-indigenous-communities/a-whole-community-approach-for-sustainable-digital-infrastructure-in-remote-and-northern-first-nations/>

<sup>5</sup> For an overview of projects, see: <http://firstmile.ca/wp-content/uploads/Stories-from-the-First-Mile-2018.pdf>

households; 2) community institutions (“anchor tenants” including health centres, schools, businesses, etc.); and 3) regional transport infrastructure connecting multiple communities.

7. Opportunities for residents of rural, remote, Northern and Indigenous communities to substantively contribute to and benefit from policies and regulations require recognition of a range of development approaches. Residents of these communities should not be restricted to act only as consumers of infrastructure and services – they can also act as producers, owners, and operators. We stress that these populations have opportunities to utilize digital communications infrastructure and services not just as an enabler of economic development in other industries and services, but also as a locally-owned and managed resource in and of itself.
8. Recognition and support for these Indigenous service providers must be considered in the context of a variety of funding programs<sup>6</sup> and policy/regulatory activities, including the Legislative Review of the *Acts*, and in ISED/CRTC policies and regulations as well as government decisions.
9. We note that several other federal departments and agencies provide funding for Indigenous communications services, including INAC (Indigenous and Northern Affairs Canada) and FNIHB (First Nations and Inuit Health Branch), to be merged into ISC (Indigenous Services Canada). These agencies play important roles in funding Indigenous communications networks.
10. Indigenous Nations deliver public services to their citizens using digital infrastructure and services, and have developed regional networks, including TSAG, to manage that activity. It is essential that adequate on-going funding is provided for these regional networks.
11. We recognize the current environment of technical convergence, and potential impacts on any updates or reforms to the *Acts*. We refer to the FMCC’s contribution to *Broadcasting Notice of Consultation CRTC 2017-359: Call for comments on the Governor in Council’s request for a report on future programming distribution models* for a discussion of some of these issues.<sup>7</sup> Specifically, our submission highlighted the opportunities for:
  - creating and broadcasting content in First Nations supporting the production and distribution of Indigenous language products and resources;
  - transforming the dominant dependent, consumer broadcast distribution model to one of an Indigenous production broadcasting model, i.e. First Nations as producers of content in place of the consumers of products produced in far-away locations;
  - using the “Whole Community” approach to planning and developing appropriate and required digital products, content, and resources;
  - supporting the economic and social development of valuable long-term professional employment opportunities by constructing and sustaining local digital innovation centres addressing local priorities and desires.

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<sup>6</sup> A summary of Federal Funding for Indigenous Broadband in Canada (2016) is available here: <http://firstmile.ca/wp-content/uploads/FMCC-Guide-to-Federal-Funding-for-Indigenous-Broadband-in-Canada.pdf>

<sup>7</sup> See: <http://firstmile.ca/fmcc-files-comments-to-crtc-2017-359-on-future-programming-distribution-models/>

## Revision of the Acts: Concerns of Indigenous Peoples

12. Most of this current submission focuses on connectivity issues. However, one of our reasons for making these proposals to facilitate Indigenous ownership and operation of communications facilities and services is because of the importance of connectivity for producing and sharing Indigenous content. **We believe that the goals of the *Broadcasting Act* should specifically include reference to and support for Indigenous content, and that the concept of “broadcasting” should be expanded to include all electronic means of distributing and sharing content. Further, the *Broadcasting Act*’s support for Indigenous initiatives current includes the statement “as resources become available”, which must be updated to reflect a more substantive commitment.**
13. We have emphasized in our submissions to the CRTC, ISED, and other departments and agencies that affordable access to broadband is critical for Indigenous cultural and economic development and the delivery of social and other services to Indigenous communities. We recognize that content ranging from cultural programs to training to Indigenous e-commerce now relies on digital tools and platforms, and that means of distributing content are converging. Broadcasting, cable, satellite broadcasting, streaming, online videos are all examples of this convergence.
14. **We think that a single *Communications Act* that includes all of these converging media as well as provide for future innovations in technologies and services may best serve the needs of all communications stakeholders, including Indigenous providers and communities.**
15. We point to two sets of Principles developed by non-profit organizations and individuals, including the FMCC (included as an Appendix in this submission):
  - *Consensus set of principles guiding and sustaining diverse, non-profit, community broadcast programming and distribution models*
  - *Non-profits’ consensus broadband fund design principles*
16. We stress that the gains made by Indigenous peoples during past legislative reform, such as the language included in the *Broadcasting Act* (1991) and the *Radiocommunication Act* (as amended 1994) that references Aboriginal peoples and First Nations, must be retained.
17. **The following *Telecommunications Policy Objectives* should be retained in the *Telecommunications Act* or in any converged legislation:**
  - “...7 (b) to render reliable and affordable telecommunications services of high quality accessible to Canadians **in both urban and rural areas in all regions of Canada;**
  - (h) to respond to the **economic and social requirements of users** of telecommunications services” (emphasis added).
18. We emphasize the relevance of 7(b) for Indigenous people living in *all regions of Canada, including rural and remote areas*. We further note that 7(h) responding to the economic and social requirements of users of telecommunications includes *Indigenous users*.

19. Now is the time to build on and update these precedents. It has been 20 years since the release of the final report of the *Royal Commission on Aboriginal Peoples* (RCAP). Among other recommendations, the report focused on the need for policies to recognize Indigenous peoples as distinct peoples driving their own self-determined initiatives.<sup>8</sup> Two decades later, the continuing challenges faced by Indigenous communities in Canada were highlighted in the recent report by James Anaya, the United Nations Special Rapporteur on the Rights of Indigenous Peoples. His report documented ongoing challenges in particular to remote and rural communities: housing shortages, and the high cost of transportation, food, and maintenance and operation of community facilities and local connectivity infrastructure.<sup>9</sup>
20. Several recent actions taken by the Government of Canada point to a new approach to partnering with Indigenous peoples. In May 2016, the Government officially adopted the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).<sup>10</sup> This endorsement came from Canada as a full supporter of the declaration - without qualification. Minister Bennett stated that: “We intend nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution”.<sup>11</sup>
21. The basic service objective hearings held by the CRTC in 2015-2016 clearly illustrated the essential role that communications infrastructures and services play in supporting the principles of the UNDRIP. In today’s society, digital communications are a key requirement for access to public services and economic development - in particular in rural, remote, Northern and Indigenous communities. It is through the ownership and control of the development and ongoing operations of communications infrastructures and services that members of these Nations and communities, and the self-governing institutions they have set up, can shape these tools to support their own needs and requirements, rather than the needs and requirements envisioned by far-off government or corporate offices.
22. The Broadcasting and Telecommunications Legislative Review is intended to consider whether any changes are needed to the legislative framework for the digital age. By substantively recognizing the unique status of Indigenous nations and incorporating the inherent, group-differentiated rights and responsibilities that flow from that status, this review can establish an ‘enabling environment’ of policy and regulation that will help to decolonize communications policy and regulation, encourage development of appropriate, accessible, and affordable technologies and support Indigenous innovation for decades to come.<sup>12</sup> The CRTC has referred to broadband as a ‘transformative enabling technology’ that can support innovation, creativity and engagement.<sup>13</sup> We encourage the review committee to seize this opportunity to build a legislative framework that will sustain the efforts of Indigenous Nations and their citizens in all areas of Canada.

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<sup>8</sup> See: Highlights from the Report of the Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation*. Available at: <http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637>

<sup>9</sup> Anaya, J. (2014). *Report of the special rapporteur on the rights of Indigenous peoples, James Anaya, on the situation of Indigenous peoples in Canada. United Nations, Human Rights Council, 27th session, May*. New York: United Nations. Available at: <http://unsr.jamesanaya.org/country-reports/the-situation-of-indigenous-peoples-in-canada>

<sup>10</sup> See: [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) and

<http://www.cbc.ca/news/indigenous/canada-adopting-implementing-un-rights-declaration-1.3575272>

<sup>11</sup> See: <http://www.cbc.ca/news/aboriginal/canada-adopting-implementing-un-rights-declaration-1.3575272>

<sup>12</sup> For a discussion of an enabling environment for digital self-determination, see:

<http://www.waccglobal.org/articles/creating-an-enabling-environment-for-digital-self-determination>

<sup>13</sup> Office of the Auditor General of Canada: Report 1, *Connectivity in Rural and Remote Areas* (Fall 2018), p.3. Available at: [http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_201811\\_01\\_e\\_43199.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_201811_01_e_43199.html)

23. In this context, TSAG makes the following points with respect to the Questions raised in the Call for Comments from the Broadcasting and Telecommunications Legislative Review Panel.

### **Recognize Indigenous Lands and Jurisdiction, and Aboriginal and Treaty Rights**

**24. We submit that specific language concerning Indigenous land and treaty rights and procedures to be used in obtaining access to land, “passive infrastructure” such as rights of way, poles, and ducts, as well as other communications equipment, should be included in the legislation.**

**25. We support the CRTC’s statements in 2018-377 that it “expects applicants to identify any established or asserted Aboriginal or treaty rights that might be affected by the proposed project and to commit to undertaking any further consultations that may be necessary” (paras 219-224). This language should be included in communications legislation, and should apply to all applicants for licences to provide services on Indigenous lands.**

**26. We support the CRTC’s statements in 2018-377 that “The Commission may give special consideration to proposed projects that would serve Indigenous communities”. Language requiring special consideration for Indigenous projects and providers should be included in the legislation.**

### Recognize Indigenous Jurisdiction Over Land and Access to Passive Infrastructure in Indigenous Territories

27. The Legislative Review Committee’s Call for Comments notes the requirement for providers to “efficiently roll out new infrastructure”. It states that the legislative framework must be “able to ensure the provision of adequate spectrum for advanced services...and access to ‘passive infrastructure’ (i.e. poles, ducts and rights-of-way) required to accommodate the advanced and ubiquitous networks of tomorrow”.

28. First Nations hold jurisdiction over rights-of-way in their territories; they are not municipal governments. These assets are owned and governed by the Nation and therefore must be recognized as such.

29. Section 43/(3) of the *Telecommunications Act* states: “No Canadian carrier or distribution undertaking shall construct a transmission line on, over, under or along a highway or other public place without the consent of the municipality or other public authority having jurisdiction over the highway or other public place.”

**30. We note that public authorities include Tribal and other Indigenous governments, and that specific language referring to them should be included in the legislation.**

31. The *Act* further states in Section 43(4) that: “Where a Canadian carrier or distribution undertaking cannot, on terms acceptable to it, obtain the consent of the municipality or other public authority to construct a transmission line, the carrier or distribution undertaking may apply to the Commission for permission to construct it and the Commission may... grant the permission subject to any conditions that the Commission determines.”

32. We emphasize elsewhere the requirement for consultation with Indigenous governments. **The legislation should state that the Commission does not have the right to order construction of transmission lines on Tribal or other Indigenous lands without the formal consent of the relevant Indigenous government.**
33. The *Telecommunications and Broadcasting Acts* both refer to the right to expropriation. Section 46(1) of the *Telecommunications Act* states: “If, in the opinion of a Canadian carrier, the taking or acquisition by the carrier of any land, an interest or, in the Province of Quebec, a right in any land without the consent of the owner is required for the purpose of providing telecommunications services to the public, the carrier may, with the approval of the Commission, so advise the appropriate Minister in relation to Part I of the *Expropriation Act*.”
34. We note that the *Expropriation Act* (Section 4) includes exceptions for Indigenous lands covered by the *Yukon First Nations Land Claims Settlement Act*, *Naskapi and the Cree-Naskapi Commission Act*, *Cree Nation of Eeyou Istchee Governance Agreement Act*, *Sechelt Indian Band Self-Government Act*, and *Gwich'in Land Claim Settlement Act*. We believe that these exceptions should also apply to all Tribal and other Indigenous lands.
35. With reference to the Gwich'in, the *Expropriation Act* states in Section 4(6): “Where an interest in land ... is to be expropriated, notice of intention to obtain the consent of the Governor in Council shall be given to the Yukon first nation or Gwich'in Tribal Council, as the case may be, on completion of any public hearing and submission of a report to the Minister.”
36. **We believe that this process should apply to any proposed expropriation of Indigenous land for telecommunications purposes.**
37. Concerning communications equipment, we note that the *Radiocommunication Act* requires specific conditions and procedures before any radio station on Gwich'in land may be possessed by the Government:
- (5) If the Yukon First Nation concerned does not consent to it, no interest in settlement land ... may be taken possession of under this section without the consent of the Governor in Council.
  - (6) If the Gwich'in Tribal Council does not consent thereto, no interest in Tetlit Gwich'in Yukon land may be taken possession of under this section without the consent of the Governor in Council.
  - (7) Where an interest in land referred to in subsection (5) or (6) is to be taken possession of without the consent of the Yukon First Nation or Gwich'in Tribal Council, as the case may be,
    - (a) a public hearing in respect of the location and extent of the land to be taken possession of or occupied shall be held in accordance with the following procedure:
      - (i) notice of the time and place for the public hearing shall be given to the Yukon First Nation or Gwich'in Tribal Council and the public,

(ii) at the time and place fixed for the public hearing, an opportunity shall be provided for the Yukon First Nation or Gwich'in Tribal Council and the public to be heard,

(iii) costs incurred by any party in relation to the hearing are in the discretion of the person or body holding the hearing and may be awarded on or before the final disposition of the issue, and

(iv) a report on the hearing shall be prepared and submitted to the Minister; and

(b) notice of intention to obtain the consent of the Governor in Council shall be given to the Yukon First Nation or Gwich'in Tribal Council on completion of the public hearing and submission of a report thereon to the Minister.”<sup>14 15</sup>

**38. We believe that these conditions and procedures should be included in the legislation to apply to communications equipment or facilities on all Indigenous lands.**

**Universal Access and Deployment**

Regularly Review and Update the Basic Service Definition of Universal Service

39. We encourage universal access and deployment models based on encouraging abundance rather than scarcity of access to bandwidth and services. Communications technologies and services are evolving rapidly, so definitions of Universal Service are likely to require frequent revision. For example, the CRTC established a standard of 50 mbps download/10 mbps upload in its 2016 Basic Service Decision, a dramatic change from the previous Basic Service criteria.<sup>16</sup>

40. We see this standard as an important step, but recognize that the 50/10 standard itself will need to be updated within a few years. **Therefore, we propose that the legislation require a review of Basic Service and Universal Access at least every five (5) years.**

Recognize Existing Funding Programs for Indigenous Providers

41. We note that several other federal other departments and agencies provide funding for Indigenous communications services, including such INAC (Indigenous and Northern Affairs Canada) and FNIHB (First Nations and Inuit Health Branch), to be merged into ISC (Indigenous Services Canada). These agencies play important roles in funding Indigenous communications networks.

42. While helpful, these programs utilize varying criteria, deadlines, and types and levels of support. For example, operational costs (e.g. leasing bandwidth) are not currently included in ISED and CRTC infrastructure funding programs, except for satellite-served communities. For First Nations service providers, operational costs such as bandwidth are currently

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<sup>14</sup> See reference 5.

<sup>15</sup> *Radiocommunication Act*, s. 5 (as amended 1994); s. 6; s. 7.

<sup>16</sup> Telecom Regulatory Policy CRTC 2016-496, available at: <https://crtc.gc.ca/eng/archive/2016/2016-496.htm>

supported through annual project-based funding programs managed by other departments including INAC (New Paths in Education) and Health Canada (First Nations and Inuit Health Branch).

43. Further, these funding programs have historically faced challenges. For example, with regards to education funding, there have been a number of significant cuts to the First Nations SchoolNet budget since the early 2000s, and there have been no increases in funding since the 2011 transfer of FNS to INAC via the ‘New Paths in Education’ program. At present, the New Paths funding model is shifting to community-based funding, and organizations including TSAG will no longer qualify for direct funding – which may result in the fragmentation of digital networks that have been built and sustained in local communities for more than a decade.
44. As an essential service and cross-sector enabler, broadband should be funded directly. This essential service funding is tied to areas of First Nations jurisdiction such as health and education. **We propose a unified approach to federal funding of communications facilities and services for Indigenous communities. Ideally, legislation should require that funds contributed by the various agencies be managed with common criteria and guidelines. At minimum, legislation should require an Indigenous communications funding oversight council that would include representatives of both the funding agencies and Indigenous stakeholders.**

#### Mapping, Monitoring and Ensuring Compliance for Universal Access and Deployment

45. There is limited reliable, robust connectivity data currently available in many rural and remote regions of Canada. This lack of data hinders attempts to monitor whether progress is being made to deliver improved broadband to these areas. Some Indigenous organizations are collecting their own connectivity data. For example, TSAG is currently involved in a project that uses inexpensive (Raspberry Pi) devices to assess internet speeds of participating homes and businesses of Alberta First Nations. This project utilizes CIRA’s Internet Performance Test to test the speed and quality of internet connections.<sup>17</sup>
46. **Communications legislation should state requirements for monitoring and publication of availability and quality of service (QOS) indicators of communications services, including rural, remote and Indigenous regions, with specific targets and parameters.**
47. There are problems with existing mapping methodologies for communications facilities. For example, both ISED and the CRTC indicate they will use 25 Km<sup>2</sup> hexagons to determine areas eligible for infrastructure funding. The CRTC notes: “[A] hexagon will be identified on the Commission’s eligibility maps when at least one household is present within its bounds” (para 83). This hexagon monitoring approach is problematic for many First Nations (and other communities), since a single point of connection is interpreted as indicating the availability of services for a whole community. There are many examples of First Nations in Alberta with significant access inequalities inside a community, such as Maskwacis First Nation (e.g. *Broadband Bruce* documentary).<sup>18</sup>

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<sup>17</sup> For more information, see: <https://www.cybera.ca/news-and-events/news/testing-the-gaps-in-first-nations-internet-access/>

<sup>18</sup> *Broadband Bruce: Fighting Canada’s Digital Divide*, is available for viewing here: <https://www.youtube.com/watch?v=IJUZcMjTOVI&v1=en>

**48. Legislation should require mapping of telecommunications facilities in Indigenous regions, and specify methodologies and parameters that are suitable for regions with low population densities.**

49. Project monitoring and compliance are important to ensure that publicly funded projects meet stated requirements. Historically, some publicly funded broadband projects have failed in this respect. For example, problems with Alberta’s SuperNet have been well documented by the Auditor General of Alberta in November 2018.<sup>19</sup> A *CBC News* story about this audit notes that Service Alberta, the department responsible for managing the SuperNet contract, “lacked the systems to properly measure performance and enforce compliance of the contracts to build and run the system”.<sup>20</sup>

50. The CRTC notes that it will “adopt a multipronged approach to compliance and enforcement, which includes the imposition of obligations, reporting requirements, the distribution or withholding of funding, and the imposition of conditions on the offering and provision of broadband services” for its Broadband Fund (CRTC 2018-377, para 303). However, no details are provided.

**51. Communications legislation should specify that compliance and enforcement of obligations are required for all licensees and for funded projects. The language should include how oversight will be provided, and how compliance will be enforced.**

## **Competition, Innovation, and Affordability**

### Recognize the Important Role of Community Networks

52. Community networks provide an important solution to digital access divides.<sup>21</sup> As noted by the Internet Society in its 2017 *Policy Brief – Spectrum Approaches for Community Networks*:

“To truly connect everyone, everywhere, community networks must be recognized as a viable way for the unconnected to connect their communities. This is a paradigm shift where the focus is on allowing communities to actively connect themselves. **To achieve this paradigm shift, legislation should recognize that connectivity can happen from the ‘village’ or ‘community’ out – where the last mile is essentially a ‘first-mile’, where citizens build their own networks.** Community networks are complementary to traditional, commercial telecommunications networks.

Policy and regulatory factors to enable community networks to succeed include innovative licensing and funding opportunities that can include, but are not limited to, traditional universal service funds (USF), and access to spectrum” (p.2).<sup>22</sup>

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<sup>19</sup> The Auditor General of Alberta’s report is available here: <https://www.oag.ab.ca/reports/service-alberta-pa-nov-2018>

<sup>20</sup> See: <https://www.cbc.ca/news/canada/edmonton/alberta-auditor-general-supernet-1.4896294>

<sup>21</sup> For a good global overview of Community Networks, see: <https://www.giswatch.org/community-networks>

<sup>22</sup> Available at: <https://www.internetsociety.org/policybriefs/spectrum/> . The Internet Society also produced a useful overview of the 2018 Indigenous Connectivity Summit, which is available at: <https://www.internetsociety.org/resources/doc/2018/indigenous-connectivity-summit-community-report/>

## Encourage Competition through Supporting ‘Alternative’ Providers

53. We agree with recent ISED and CRTC decisions and policies that support small ISPs and community initiatives. Such opportunities must remain accessible for Indigenous providers. However, **legislative language should require consideration for the constraints faced by small and Indigenous providers in responding to requests for proposals and participating in regulatory proceedings.**

## Clarity Regarding Applicant Investment in Infrastructure – Indigenous Contributions

54. The CRTC fund notes that applicants must provide more than a ‘nominal’ investment in infrastructure, and there is no reference to possible in-kind contributions (paras 146-155; 234). In the past, ISED and other funders provided exceptions for First Nations projects. For example, ISED’s Connecting Canadians program’s contribution limit is higher for projects that would serve Indigenous communities. According to the program’s FAQ website: “The program provided up to 75 percent of eligible project costs, compared to 50 percent for the rural component of the program. **In addition, projects that serve Indigenous communities may receive up to 100 percent of eligible costs from federal sources if they are able to obtain complementary funding from other federal departments or agencies**” (emphasis added).<sup>23</sup>
55. **Legislation should specify that cost contributions required for funding may include exceptions for Indigenous applicants, including lower or waived financial contributions and in-kind contributions.**

## Open Access is an Important Part of Ensuring Competition, Innovation and Affordability.

56. **Open access is an important concept that should be clearly defined in legislation.** As presented in existing documents by ISED and the CRTC, the definition of this concept is unclear:
57. Open access (wholesale): “applicants will not be required to commit to any additional wholesale open access obligations other than existing regulatory obligations, such as wholesale high-speed access services, with respect to the [local] access portion of a proposed project” (Telecom Regulatory Policy CRTC 2018-377, para 193).
58. Open access (retail): “applicants should be required to commit to offering retail open access to transport infrastructure... [T]o be eligible for funding...an applicant that proposes a project to build or upgrade transport infrastructure must commit to providing retail open access to that infrastructure” (Telecom Regulatory Policy CRTC 2018-377, para 203).
59. An example of the challenging nature of some forms of open access came up during Northwestel’s request to the CRTC for forbearance from the regulation of the Wholesale Connect Service in communities served by the Mackenzie Valley Fibre Link. In its response to this request, FMCC noted its concerns that it could limit the accessibility and affordability of such wholesale bandwidth services for communities and community-based ISPs operating

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<sup>23</sup> See section titled, “How much funding does the program provide?” here: <https://www.ic.gc.ca/eic/site/028.nsf/eng/50010.html>

in the Mackenzie Valley over the long term.<sup>24</sup> In *Telecom Decision 2017-300*, the CRTC denied Northwestel's request.<sup>25</sup>

## Effective Spectrum Management and Regulation

### Spectrum Access and Licensing Rules Must Support Indigenous Providers

60. Effective spectrum management and regulation should support small and non-profit community operators and not only incumbents and other large providers.<sup>26</sup> The Fall 2018 report of the Auditor General of Canada highlighted significant shortcomings in the existing spectrum management regime. As noted in that report:

“[S]mall Internet providers did not have sufficient access to high-quality spectrum to support broadband deployment in rural and remote areas. The Department [ISED] auctioned spectrum licenses for geographic areas that were too large for smaller service providers to submit bids for. Also, the secondary market for unused spectrum did not function well, partly because licensees had little business incentive to make unused spectrum available for subordinate licensing” (p.4).<sup>27</sup>

61. *ISED Spectrum Outlook 2018-2022* notes that: “ISED will develop licensing policies giving consideration to encouraging service provision in rural areas to ensure that Canadians in all areas of the country benefit from the latest technologies including 5G” (p. 6).

62. Interested Indigenous organizations have utilized spectrum, where available, to provide mobile services to their populations. For example, see K-Net Mobile in Northwest Ontario.<sup>28</sup> However, existing spectrum licensing policies limit Indigenous activity in this area. Given these concerns, we suggest an examination of the classification of service tiers.

63. In a previous response to Industry Canada spectrum consultation (SLPB-004-14), the FMCC commented on service tiers and minimum bids. We expressed our concerns with the geographic and population metrics used to determine existing tiers and corresponding licenses, and also noted that the expense of some proposed minimum bids are a challenge for independent, non-profit cellular providers serving rural, remote and Northern communities. We raised concerns that these high costs restrict the ability of these organizations to expand or establish their operations.

64. Specifically, we provided an example from the areas covered in Tier 2-09. In its sparsely-populated northern section, most communities are fly-in First Nations that are serviced by one of our members, an Indigenous provider called K-Mobile. As is clear from Map 1, KMobile's service area focuses only on the northern regions of Tier 2-09. It does not include the more densely-populated and accessible southern regions of the Tier.

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<sup>24</sup> See: <http://firstmile.ca/wp-content/uploads/FMCC-CRTC-NWTeI-Forbearance-Letter-Mar9.pdf>

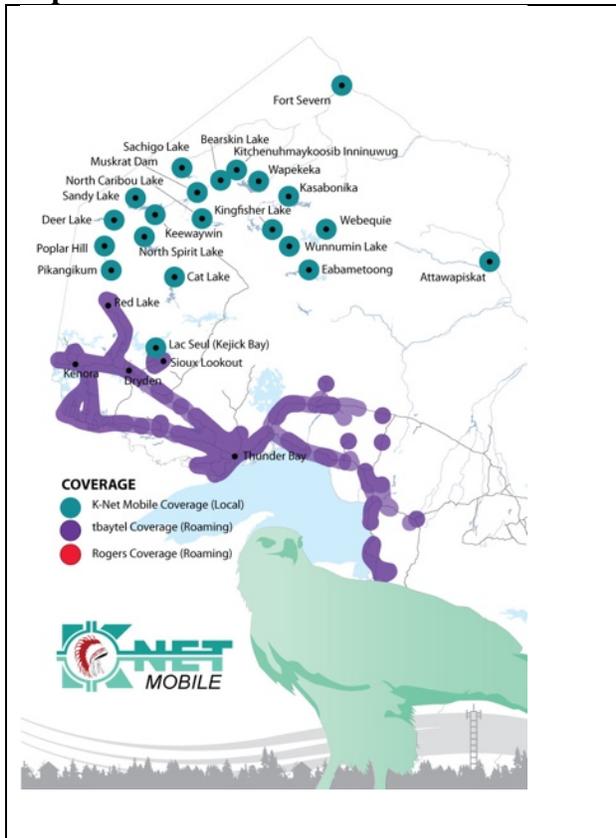
<sup>25</sup> See: <https://crtc.gc.ca/eng/archive/2017/2017-300.pdf>

<sup>26</sup> Organizations including the International Telecommunications Union (ITU) Development Bureau have recommended that administrations consider mechanisms to facilitate the development of broadband services in rural and remote areas by small and non-profit community operations. Recommendation ITU-D 19. WTDC 2017 report. [https://www.itu.int/en/ITU/Conferences/WTDC/WTDC17/Documents/WTDC17\\_final\\_report\\_en.pdf](https://www.itu.int/en/ITU/Conferences/WTDC/WTDC17/Documents/WTDC17_final_report_en.pdf)

<sup>27</sup> See: [http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_201811\\_01\\_e\\_43199.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_201811_01_e_43199.html)

<sup>28</sup> See: <http://mobile.knet.ca/>

## Map 1: K-Mobile Service Area: Remote Northern Ontario



Source: <http://mobile.knet.ca/coveragearea>

65. We present this example to highlight how the existing composition of service tiers and corresponding spectrum licenses can restrict the ongoing development of infrastructure and services in expensive-to-service regions. Alternatively constructed service tiers might reflect different regional characteristics/population sizes/opening bids in ways that can support community-based service providers like K-Mobile as “operating new entrants” serving very remote communities.

**66. Legislation should include language to ensure a more inclusive approach to the distribution of spectrum licenses that reflects the diversity of providers.**

### Spectrum Set-Asides for Indigenous Nations

67. Spectrum is a critical resource for delivering communication services to Indigenous communities. For some new services, spectrum should be set aside for the specific use of Indigenous Nations. As noted in a 2015 presentation by University of Ottawa Professor Larry Chartrand: “A strong case can be made that Aboriginal collective authorities and the communities they represent possess Aboriginal or Treaty rights to the ‘spectrum’ resource.”<sup>29</sup> Such a spectrum set-aside should be put in place when ISED is distributing new wireless bandwidth – especially in geographic zones of market failure where commercial telecommunications companies have proven unwilling to invest in developing the service.

<sup>29</sup> Available at: [https://www.academia.edu/12476151/Indigenous\\_Rights\\_to\\_the\\_Electromagnetic\\_Spectrum](https://www.academia.edu/12476151/Indigenous_Rights_to_the_Electromagnetic_Spectrum)

68. We note that spectrum set-asides for Indigenous Nations are already in place in New Zealand,<sup>30</sup> Mexico,<sup>31</sup> and the United States.<sup>32</sup>
69. The Internet Society's 2017 *Policy Brief – Spectrum Approaches for Community Networks* further outlines guiding principles that support the effective use of spectrum. These include:
- Utilizing unlicensed spectrum;
  - Shared license spectrum/dynamic spectrum access; and
  - Innovative licensing.<sup>33</sup>
- 70. We endorse these principles and believe they should be incorporated in telecommunications legislation.**

## **Governance and Effective Administration**

### Indigenous Representation

71. Currently, CRTC Commissioners represent political jurisdictions (with Yukon, the NWT and Nunavut assigned to provincial jurisdictions of BC, Alberta, and the Atlantic provinces respectively.) As would be expected, the Commissioners tend to prioritize the needs of their most populous areas, and many are not familiar with the specific needs of Indigenous communities.
72. While the *Acts* do not specify the number or criteria for CRTC Commissioners, **we believe that the Commission should designate one or more Commissioners with specific responsibility for Indigenous regions including not only the territories but also Indigenous lands within the provinces.**
73. The CRTC's provision of costs through the *Broadcasting Participation Fund*,<sup>34</sup> and awards of costs to support participation in Telecommunications Proceedings<sup>35</sup> for non-profit organizations that have an interest in the outcome of the proceedings and assisted the Commission in developing a better understanding of the matters that were considered (plus additional criteria) have enabled some Indigenous communications organizations to participate in CRTC proceedings. **This model should be applied to other regulatory proceedings and to policy inquiries.**

### Community Engagement, Consultation and Informed Consent

74. We agree with the House of Commons Standing Committee's Report on Broadband Connectivity in Rural Canada that community engagement is a key component of broadband development policy.<sup>36</sup> Community engagement must not be treated as an early-stage

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<sup>30</sup> See: <http://firstmile.ca/wp-content/uploads/2015/03/Update-Paper-Maori-and-Radio-Spectrum-2011rev1.pdf>

<sup>31</sup> See: <https://www.redesac.org.mx/tramiteconcesion>

<sup>32</sup> See: <https://crtc.gc.ca/eng/aertr/prx/2018szwarc.htm>

<sup>33</sup> See: [https://www.internetsociety.org/wp-content/uploads/2017/10/Spectrum-Approaches-for-Community-Networks\\_20171010.pdf](https://www.internetsociety.org/wp-content/uploads/2017/10/Spectrum-Approaches-for-Community-Networks_20171010.pdf). For more information on community networks and spectrum regulation, see: <https://www.giswatch.org/en/infrastructure/community-networks-and-telecommunications-regulation>

<sup>34</sup> See: <http://www.bpf-fpr.ca/en/home.html>

<sup>35</sup> See: <https://crtc.gc.ca/eng/archive/2010/2010-963.htm>

<sup>36</sup> See: <https://www.ourcommons.ca/Committees/en/INDU/StudyActivity?studyActivityId=9604427>

opportunity to comment on decisions, but rather an ongoing relationship between equal stakeholders. **To this end, our position is that government should establish a permanent multi-stakeholder advisory council to oversee the implementation of policy and regulation, and that this council should bring together government, industry, consumers and non-governmental organizations, including Indigenous organizations and their representatives, as well as members of the academic community.**

75. The Government of Canada uses the following definition of consultation, as outlined in “Guiding Principle No. 4” in *Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (March 2011):

“Consultation and accommodation will be carried out in a manner that seeks to balance Aboriginal interests with other societal interests, relationships and positive outcomes for all partners. A meaningful consultation process is one which is:

- carried out in a timely, efficient and responsive manner;
- transparent and predictable;
- accessible, reasonable, flexible and fair;
- founded in the principles of good faith, respect and reciprocal responsibility;
- respectful of the uniqueness of First Nation, Métis and Inuit communities; and,
- includes accommodation (e.g. changing of timelines, project parameters), where appropriate.”

**76. We believe that this language should also be included in communications legislation.**

77. The legislative review must also recognize the calls to action issued by the Truth and Reconciliation Commission of Canada (TRC). Concerning telecommunications, we highlight in particular 92, on “Business and Reconciliation”:

“92. We call upon the corporate sector in Canada to adopt the United Nations Declaration on the Rights of Indigenous Peoples as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources. This would include, but not be limited to, the following:

- i. Commit to **meaningful consultation**, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects.
- ii. Ensure that Aboriginal peoples have **equitable access to jobs, training, and education opportunities** in the corporate sector, and that Aboriginal communities **gain long-term sustainable benefits** from economic development projects (**emphasis added**).<sup>37</sup>

78. We support the CRTC’s statements in 2018-377 that community consultation is required for all proposals for rural broadband funding. However, we note the lack of clarification of evidence and enforcement of these requirements, and note inclusion of the term “attempted to

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<sup>37</sup> See: [http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls\\_to\\_Action\\_English2.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf), p.9.

consult”. Instead, evidence of substantive consultation is required, along with ongoing consent. Such approaches to consultation benefit both communities and service providers, through the exchange of information regarding development and ongoing sustainability of telecommunications infrastructure.

79. We also note a seemingly broad definition of parties to consultation, which includes: “individuals, elected officials, community associations, or other representative bodies.” Projects should be required to demonstrate will demonstrate that they have a mandate from Indigenous peoples.

**80. In general, principles of meaningful consultation and informed consent of Indigenous communities must apply to communications, including broadband. We believe that this language should be incorporated in communications legislation.**

#### Exemption

81. We note that Section 9(1) of the *Telecommunications Act* states that “The Commission may, by order, exempt any class of Canadian carriers from the application of this Act, subject to any conditions contained in the order, where the Commission, after holding a public hearing in relation to the exemption, is satisfied that the exemption is consistent with the Canadian telecommunications policy objectives”.

**82. We believe that this exemption clause should apply to carriers owned and/or operated by Indigenous entities.**

#### Ongoing Consultation Opportunities are Welcome

83. We thank the Legislative Review Panel for this opportunity to submit comments and recognize the Panel’s efforts to include a range of stakeholders in its work. We note the importance of an inclusive consultation process that engages Indigenous citizens in ways that ensure any revisions or additions to Canada’s *Telecommunications, Broadcasting and Radiocommunications Acts* reflect their needs and desires. We welcome further opportunities to contribute to this important review.

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