

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Tribal Mobility Fund Phase I Auction) AU Docket No. 13-53
Competitive Bidding Procedures)

To: Wireless Telecommunications and Wireline Competition Bureaus

**COMMENTS OF NATIVE PUBLIC MEDIA AND
NATIONAL CONGRESS OF AMERICAN INDIANS**

The National Congress of American Indians (“NCAI”) and Native Public Media (“NPM”) respectfully submit these comments in response to the Tribal Mobility Fund Phase I Auction 902.¹

NCAI is the largest and oldest representative organization of American Indians and Alaska Native tribal governments. Since 1944, NCAI has represented the interests of Tribal nations and their citizens to advance and promote the advancement of Tribal sovereignty and self-determination. NPM is a non-profit organization which encourages Native people across the United States to participate actively in all forms of media. NPM promotes healthy, engaged, and independent Native communities through media access, control, and ownership. Both NPM and NCAI have previously commented on the need for a Tribal Mobility Fund and on the appropriate design of the Phase I auction now scheduled to begin on October 24, 2013.

NPM and NCAI again applaud the Commission’s creation of a Tribal Mobility Fund. Auction 902 is an important milestone in the Commission’s efforts to provide broadband service

¹ See *Public Notice*, DA-13-323, March 29, 2013 (“*Public Notice*”).

to unserved areas of Tribal lands, to improve relationships between Tribal Nations and carriers that serve Tribal lands, and to encourage Tribal Nations and Tribally-controlled entities to develop communications infrastructure on Tribal lands. Auction 902 complements the other remarkable advances in communications policy that began with the 2000 Tribal Policy Statement, accelerated with the creation of the Office of Native Affairs and Policy (“ONAP”) in 2010, and that have culminated in the policy and training initiatives fostered by ONAP between 2010 and the present.²

Without in the least diminishing these accomplishments, it remains the case that strides in communications policy have outpaced practical realities. The comments that follow are directed less to the mechanics of Auction 902 than to the enormous work that must still be done before Indian Country will have the same kind and quality of broadband service as the rest of the country.

I. SPECTRUM

Tribal Mobility Fund Phase I will award up to \$50 million in support for qualified bidders who commit to serve unserved Tribal lands. This goal, although laudatory, does little to empower Tribes and Tribally controlled entities with the ability to serve their own lands. Auction 902 provides incentives to serve Tribal lands, but no new access to spectrum. Without such access, incentives to use spectrum will primarily benefit established carriers.³ The auction will thus tweak, rather than transform, the status quo.

² Federal Communications Commission Office of Native Affairs and Policy, 2012 Annual Report, DA 13-547, released March 25, 2013 (“*2012 Annual Report*”).

³ See *2012 Annual Report* at p. 4, which notes that “access to spectrum continues to be a critically important need of Indian Country,” and “a necessary predicate to being involved in the Mobility Fund reverse auctions.”

On March 3, 2011, the FCC released a notice of proposed rule making, *In the Matter of Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands*, which proposed extending the Tribal Priority for broadcast spectrum to include commercial wireless spectrum.⁴ NPM and NCAI filed comments in support of that proposal. The FCC has taken no action in the docket since the comment and reply comment periods closed in the summer of 2011. It is unclear how many Tribally-owned and operated carriers will be able to participate in Auction 902, given their lack of access to spectrum licenses.

Of the 52 participating bidders in the \$300 million Mobility Fund Phase 1 auction, Auction 901, only three were Tribally-owned and operated telecommunications providers; and of those three, only one was selected as a winning bidder.⁵ That winning bidder was Standing Rock Telecommunications, Inc. (SRTI), the first tribally-owned and operated wireless telecommunications service provider. SRTI holds a license to spectrum and has been designated as an ETC to provide service throughout the Standing Rock Sioux reservation.⁶

As the Mobility Fund auctions occur over the next decade, the lack of access to spectrum will become an even greater barrier to Tribal participation. Although the FCC has repeatedly announced its commitment to the government-to-government relationship with tribal nations through increasing access to communications services on tribal lands. That commitment has yet to result in action that removes these barriers to entry in the wireless market.

⁴ *In the Matter of Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum Over Tribal Lands*. Notice of Proposed Rulemaking. WT Docket No. 11-40 (“Docket 11-40”). Available at <http://apps.fcc.gov/ecfs/comment/view?id=6016822908>.

⁵ See http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-316600A1.pdf.

⁶ See *2012 Annual Report*.

This situation underscores the need for the FCC to move quickly in adopting proposals suggested in Docket 11-40, as NCAI and NPM have previously recommended.⁷ First, new spectrum to serve Tribal lands must go to qualified Tribal bidders if the cycle of “last to be served” is to be broken.

Second, a strict “build or divest,” or “use it or lose it,” policy should be adopted. Any non-Tribally owned licensee that wins in this Auction but fails to meet the build-out or service quality standards set forth in the *Transformational Order* should not only be required to repay the support received from the Tribal Mobility Fund, but should also forfeit the licenses to the frequencies used as the basis of the auction bid.⁸

Finally, as NCAI/NPM have pointed out in Docket 11-40 and elsewhere, it is unrealistic to expect Tribal bidders to acquire leases for spectrum in the secondary market. A review of the filings in Docket 11-40 reveal not a single reported incident of a successful negotiation between a Tribe and a non-Tribal FCC licensee. Requiring Tribes to have a spectrum license or spectrum lease as a condition of bidding in Auction 902 has a perverse effect on the spectrum market. The fact that Tribes are excluded from bidding absent a spectrum lease will drive up the price of spectrum leases. With the Auction’s relatively short timeline, carriers can simply warehouse spectrum and hope that Tribes will be desperate enough to overpay for leases in order to qualify to bid in an upcoming auction. Unless the secondary market process is coupled with a strict “build or divest” policy, secondary markets for spectrum in Indian Country will never become an effective mechanism for Tribal providers.

⁷ Reply Comments of NCAI/NPM in Docket 11-40.

⁸ NCAI/NPM Comments in Docket 11-40, pp. 7-9.

II. ACCESS TO CAPITAL

The Tribal Mobility Fund provides a much-needed incentive to provide communications services to unserved Tribal lands through a reverse auction process, which rewards the bidder seeking the lowest level of support. While such a process may efficiently conserve federal funds, it assumes that bidders have sufficient capital to build the systems they propose and that they need only a modest “incentive” to serve areas that may produce less than optimal returns on investment. The Tribal Mobility Fund thus does little to address the fundamental problem of providing access to capital. Such capital is needed to become a qualified bidder or to secure a successful bidder’s performance with an irrevocable letter of credit (“LOC”). The requirements of an LOC, essentially a performance bond, is particularly onerous for Tribal Nations whose principal assets – Tribal lands – are often held in trust, and thus incapable of being pledged as collateral.⁹ It is unfair to require a Tribe to meet the LOC requirement if it cannot acquire an LOC because of its relationship with the United States, which holds the needed assets in trust. Consequently, the requirements of an irrevocable LOC should be waived as to Tribally-owned or controlled entities.

III. QUALITY OF SERVICE

The Tribal Mobility Fund provides support to bidders who “commit to provide 3G or better mobile voice and broadband services on Tribal lands”¹⁰ This commitment must be embodied in certifications contained in the application for support.¹¹ Support payments are then delivered in three stages, based on grantee’s reports concerning the geographic area covered.

⁹ See *ex parte* comments of Gila River Indian Community and Mescalero Apache Telecom, Inc., filed April 26, 2013 (“GRI/MATI”).

¹⁰ *Public Notice*, ¶ 2.

¹¹ See 47 C.F.R. § 54.1005 and 47 C.F.R. § 54.1008.

The mechanism proposed thus rests solely on certifications and reports of the bidder. Without being overly cynical, it is safe to say that there has been a radical difference between what non-Tribally owned carriers have promised and what has actually been delivered to Indian Country. Performance has lagged promises by many dollars, and often by many years. NPM and NCAI therefore recommend that the Commission adopt a performance standard that requires bidders receiving support from the Tribal Mobility Fund to repay the Mobility Fund support if the bidder fails to deliver 3G or better service. Such a penalty applies now only if the recipient fails to provide the coverage proposed.¹² The same penalty should apply for failure to deliver a proposed quality of service.

IV. POPULATION

Auction 902 is designed to solicit bids based upon eligible areas for which support is sought.¹³ Potentially eligible areas are divided into 5,554 census blocks, averaging approximately 2.1 square miles. The *Public Notice* proposes that carriers bid on aggregated groups of census blocks, and that the support provided be based upon the population contained in the relevant census blocks.¹⁴

NPM and NCAI agree that population is a more reliable basis for support than road miles, the standard used in Auction 901. As NPM and NCAI have previously commented, a road-mile standard encourages carriers to serve vehicular traffic but fails to achieve the policy objective of serving Tribal lands. While service to roads is certainly valuable, it may bear only a tangential relationship to the fundamental goals of assuring that Tribal anchor institutions and the entirety of Tribal lands are well served.

¹² See 47 C.F.R. § 54.1006 (f).

¹³ See *Public Notice*, ¶ 12 *et. seq.*

The auction design for Auction 902, although improved, still fails to meet these objectives. Despite its goal of serving Tribal lands, Auction 902 provides an incentive only for serving the most populated areas of Tribal lands – in practice, those areas immediately adjacent to non-Tribal lands, *not* the remote areas of Tribal lands most in need of service. It provides no incentive to serve *all* of Tribal lands, including anchor institutions, although such service is essential to public health, safety and education. Except for the proposed “tribal engagement” provisions, which would apply *after* support has been awarded, the proposed design for Auction 902 provides no incentive to consult with Tribes in designing a system to serve Tribal lands.

To bring incentives into line with policy objectives, NPM and NCAI propose the following:

- Score all census blocks with a minimum population of one (1). Even if existing, and often unreliable, methods of determining population distribution on Tribal lands were more accurate, they should not be used as a *disincentive* to achieve the fundamental goal of providing service to Tribal *lands*. Scoring a census block as “0” will effectively exclude it from bidding under the system proposed.
- Award a bidding credit of five percent (5%) to any bidder that proposes to serve *all* eligible Tribal lands. The ability to aggregate census blocks should not undermine the objective of providing service to all Tribal lands, rather than the portion of Tribal lands regarded as the most economically desirable for the bidder. All unserved lands within the outer boundaries of Tribal lands should be considered eligible. The bidding credit proposed should be

¹⁴ See *Public Notice*, ¶ 30 *et seq.*

available both to Tribal and non-Tribal bidders, but should be in addition to any Tribal bidding credit for which a Tribal bidder would qualify.

- Require bidders, as an eligibility criterion, to certify that they are authorized by the relevant Tribe(s) to do business on the Tribal lands they propose to serve. Such a requirement would essentially require bidders to consult with Tribes *before* the auction. A failure to seek such a qualification to do business before the Auction would disqualify the bidder. A failure to obtain such a qualification after the Auction would be a performance default.

V. TRIBAL ENGAGEMENT

The *Public Notice* requires any winning bidder to notify the appropriate Tribal government within five days after being identified as a winning bidder.¹⁵ NPM and NCAI submit that such notification is *much* too late in the process. As part of the application to bid, applicants should have to certify that they have applied for registration to conduct business on the Tribal lands they intend to serve and that they have already contacted the relevant Tribal authority and begun the Tribal Engagement process. A Tribe should be able to object to any application for support if the application specifies an entity not qualified to conduct business on Tribal lands, or if the Tribe believes that the application would be inconsistent with the needs of the Tribe.¹⁶ Tribes must have a “seat at the table” early enough in the process to be able to

¹⁵ *Public Notice*, ¶ 16.

¹⁶ ONAP should be tasked with ensuring that any Tribe affected by an auction be contacted and given the opportunity to object to an application. Relying on the FCC’s Public Notice system is wholly inadequate given that the Tribal Mobility Fund Phase I option is a one-of-kind proceeding. Many Tribes simply do not yet understand their rights and responsibilities vis-à-vis telecommunications carriers. It is safe to say that few Tribes scour the FCC’s Daily Digest on a regular basis to determine whether any applications have been filed that might impact them.

communicate their needs to a carrier. Tribal Engagement after the fact is little more than “be grateful for what you get.”¹⁷

VI. CONCLUSION

NPM and NCAI applaud the FCC’s policy initiatives to improve communications services for Indian Country and the tireless efforts of its Office of Native Affairs and Policy. By providing financial incentives to serve currently unserved portions of Tribal lands, Auction 902 is likely to bring Indian Country closer to parity with the rest of the country.

There is a long way to go, however. The recommendations made in these comments are designed to assure that all Tribal lands, not simply the portions most economically desirable for carriers, are well served, that Tribal carriers have sufficient access to spectrum to be able to participate in the auctions, and that Tribal Nations can effectively exercise their sovereign responsibilities to improve the public health, safety and education of their people.

¹⁷ Anecdotal evidence indicates that the first year of the FCC’s Tribal Engagement process has been less than encouraging, with many carriers giving stock marketing presentations to Tribes and then ignoring any questions or comments raised by such Tribes. The Tribal Engagement provisions have not extinguished the attitude “we’re the carrier and we know what is best for you” among some carriers. That attitude stems from the view that “we paid for this spectrum, it’s ours, and we’ll do with it what we want.” This approach obviously rankles many in Indian Country, who still believe that their aboriginal lands, and everything on them, do not belong to the United States government, and that it is inconsistent with the trust relationship with Tribes to give away or sell access to their lands to the highest bidder.

NATIVE PUBLIC MEDIA

By: _____ /s/
Loris Ann Taylor
President & CEO
P.O. Box 3955
Flagstaff, AZ 86003

By: _____ /s/
John Crigler
James E. Dunstan
GARVEY SCHUBERT BARER
1000 Potomac St., N.W. Suite 500
Washington, DC 20007
Counsel to Native Public Media

Dated: May 10, 2013

Respectfully submitted,

**NATIONAL CONGRESS OF
AMERICAN INDIANS**

By: _____ /s/
Jacqueline Johnson Pata
Executive Director
1516 P Street, NW
Washington, DC 20005

Your submission has been accepted

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Contact Info

Name of Filer: Native Public Media and the National Congress of American Indians
Email Address: jcrigler@gsblaw.com
Attorney/Author Name: John Crigler
Lawfirm Name (required if represented by counsel): Garvey Schubert Barer

Address

Address For: Law Firm
Address Line 1: 1000 Potomac Street, N.W.
Address Line 2: Suite 500
City: Washington
State: DISTRICT OF COLUMBIA
Zip: 20007

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