RURAL WIRELESS ASSOCIATION

November 30, 2017

Via ECFS

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **NOTICE OF EX PARTE**
WT Docket No. 16-335

Dear Ms. Dortch:

On November 3, 2017 the Wireless Telecommunications Bureau ("WTB" or "Bureau") denied a request by AST Telecom, LLC d/b/a Bluesky ("Bluesky") for a waiver of rule sections 27.14(g) (1) and (2) that would have allowed Bluesky to meet its interim and/or its final construction benchmarks for its two Lower 700 MHz A and B Block licenses in American Samoa based on population coverage rather than geographic coverage.[1] In that case, the Bureau found that the diligence and efforts of Bluesky to provide coverage to 35 percent of its licensed territory, and an error in the Commission's own shapefiles that caused these efforts to fall short, warranted a short extension of the interim benchmark deadline to avoid accelerating the license expiration date by two years. Significantly, in granting this waiver, the Commission refused to apply a population based coverage benchmark in lieu of a geographic coverage requirement to either the interim or final construction deadlines as requested by Bluesky.

The Bluesky Waiver decision is clearly germane to the Application for Review filed in the present docket (WT Docket No. 16-335) by The Rural Wireless Association, Inc. ("RWA") which challenged a waiver granted to AT&T under circumstances that were far less compelling than those involved in the Bluesky decision. Similar to the arguments made by AT&T in WT Docket 16-335, Bluesky attempted to justify the appropriateness of using population coverage rather

[1] *AST Telecom, LLC d/b/a Bluesky, Request for Waiver of Interim and Final Geographic Construction Benchmarks for Lower 700 MHz Band A and B Block Licenses WQJQ800 and WQOU674 in American Samoa*, ULS File Nos. 0007595216 and 0007597075, DA 17-1083 (November 3, 2017) ("Bluesky Waiver").

than geographic coverage in meeting both the interim and final construction benchmarks based on the uniqueness of its license area. In refusing to apply a population coverage standard in Blue Sky's case, the Commission acknowledged:

> Bluesky's efforts to comply with the Commission's performance rules are noteworthy in light of the difficulties associated with constructing this market. American Samoa is a remote, unincorporated territory of the United States, with limited flights to the mainland and no regular flights or shipping routes between the islands. The bulk of resources must be ordered months in advance and skilled telecommunications personnel capable of constructing wireless facilities usually must be brought in from the mainland. Further, while 98 percent of the territory's population resides on the largest island of Tutuila, and the nearby Aunu'u, those islands account for only 72 percent of American Samoa by land area. American Samoa's volcanic islands, which in some areas lack electricity and basic infrastructure, are extremely rugged, steep, and largely covered by forest, causing difficulties in terms of site construction as well as signal propagation. Moreover, American Samoa experiences a cyclone (hurricane) season for six months out of the year which causes frequent storms that can interfere with deployment and operations.[2]

Despite the significant challenges posed in meeting a population based standard in a remote, climate challenged area with significant amounts of uninhabited territory, challenges that are virtually identical to those faced by AT&T in the present docket, the WTB actually rejected in the Bluesky Waiver decision the very same arguments that served as the basis of its decision in the present docket to apply geographic benchmarks to AT&T's license area and grant AT&T's waiver request.

> We disagree with Bluesky's argument that applying a geographic benchmark in this instance would undermine the purpose [sic] the Commission's 700 MHz construction requirements. In establishing a geographic coverage requirement for certain 700 MHz bands, the Commission sought to encourage licensees to deploy networks in rural and remote areas, rather than focusing service on population centers. In the instant case, while Bluesky provides service to more than 90 percent of the population of American Samoa, its service area accounts for only 45 percent of the geographic area of the territory. By maintaining the 70 percent final geographic coverage requirement, Bluesky will have a continued incentive to expand its network and deploy wireless services to the more remote areas that are home to small communities of American Samoans. Indeed, if we

[2] Bluesky Waiver at pp. 5-6 (footnotes omitted).

> were to grant a waiver to replace the 70 percent geographic coverage requirement with a population-based benchmark, Bluesky would already exceed that benchmark. Grant of the requested relief would therefore undermine the underlying purpose of Section 27.14(g)(2).[3]

The very same concerns and reasoning that underlie the Bureau's decision to deny Bluesky's request to replace the geographic coverage buildout requirement applicable to its 700 MHz licenses with a population coverage standard apply with equal force to the present docket and mandate that RWA's application for review be granted.[4] In the Bluesky Waiver decision the Commission rejected Bluesky's argument that "it would be inequitable, unduly burdensome, or contrary to the public interest to apply the geographic coverage requirement at Bluesky's final construction deadline" noting that Bluesky was well aware of the challenges in meeting the geographic buildout requirements when it acquired its licenses and noting that the difficulties in meeting the final geographic coverage benchmark did not "preclude additional construction or outweigh the public interest in providing service to remote areas of American Samoa."[5] Similarly, the Bureau rejected Bluesky's arguments, modeled on the arguments made by AT&T in the present docket, that potential application of the "keep-what-you serve" ("KWYS") rule as a result of its possible failure to satisfy the final construction benchmark would undermine the underlying goal of the 700 MHz construction requirements or would be inequitable, unduly burdensome, and contrary to the public interest."[6] To the contrary, the Bureau acknowledged that Bluesky would retain the ability to expand service into unserved areas under the 700 MHz Phase II licensing rules and rejected Bluesky's argument that application of the KWYS rule would "undermine [Bluesky's] future ability to expand service in response to developments that reduce barriers to coverage."[7] Based on the foregoing, and in

---

[3] Bluesky Waiver at p. 7 (footnotes omitted).

[4] It is well-settled that an agency may not treat similarly situated applicants differently without a reasoned explanation. *Burlington Northern & Santa Fe Ry. Co. v. Surface Transp. B*d., 403 F.3d 771, 776-77 (D.C. Cir. 2005); *Chadmoore Communs. v. FCC*, 113 F.3d 235, 242 (D.C. Cir. 1997); *Northpoint Tech., Ltd. v. FCC*, 414 F.3d 61, 75 (D.C. Cir. 2005). In granting a waiver to AT&T In the present docket, the WTB failed to provide any reasoned explanation for departing from the Commission's established 700 MHz buildout policies, the very same policies that were clearly articulated and scrupulously followed under virtually identical circumstances in the Bluesky Waiver decision.

[5] Bluesky Waiver at p. 8.

[6] *Id*.

[7] *Id*.

complete contrast with its decision in the present docket, the Bureau found that application of the KWYS rule "serves the exact objectives the Commission had when it set forth stringent performance requirements for the 700 MHz band" and that the purpose of the rule would not be served by allowing Bluesky to warehouse unserved areas indefinitely and prevent others from providing coverage more quickly.[8]

The arguments raised by the Bureau in denying Bluesky's waiver request to substitute population coverage benchmarks for the geographic coverage benchmarks required by the Commission's rules reflect the very same arguments and policies supporting RWA's opposition to the waiver granted to AT&T in the present docket. The waiver granted to AT&T requires it to serve only approximately 10 percent of its licensed territory and to effectively warehouse its licensed spectrum in the remaining 90 percent of the territory that it is not obligated to serve under the terms of the waiver. If a waiver denial was appropriate in the case of Bluesky, which provided coverage to 90 percent of its licensed population but only 45 percent of the territory of American Samoa, there can be no justification for allowing AT&T's waiver to stand given that the terms of that waiver require AT&T to serve only 75 percent of the population in its license area by the final buildout date and 80 percent of the population in its license area three years after the final buildout date, while leaving at least 90 percent of the licensed territory unserved.

Pursuant to Section 1.1206 of the FCC's Rules, this ex parte is being filed electronically with the Office of the Secretary.

Respectfully submitted,

/s/ Caressa D. Bennet

Caressa D. Bennet, General Counsel
5185 MacArthur Blvd., NW, Suite 729
Washington, DC 20016
(202) 551-0010
legal@ruralwireless.org

cc (via email): Robert Vitanza
Roger Noel

[8] Bluesky Waiver at pp. 8-9.