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NATIONAL CONGRESS OF AMERICAN INDIANS

May 14, 2015

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

RE: NCAI COMMENTS ON PUBLIC NOTICE FCC 15-49—REQUEST FOR FURTHER COMMENT ON ISSUES RELATED TO COMPETITIVE BIDDING PROCEEDING; WT DOCKET NOS. 14-170 AND 05-211, GN DOCKET NO. 12-268, AND RM-11395

Dear Secretary Dortch,

On behalf of the National Congress of American Indians (NCAI), the oldest, largest, and most representative organization of American Indian and Alaska Native tribal governments, I respectfully submit these comments on issues related to the competitive bidding proceeding. NCAI has a long history of working with the Commission to advance practical solutions to bridge the digital divide in Indian Country. However, certain proposals that have been included in Public Notice FCC 15-49 (PN) raise serious concerns for the future of tribal participation in spectrum auction proceedings.

Access to and obtaining spectrum licenses historically and presently eludes tribes due to the immense capital needed to competitively bid in spectrum auctions. The promulgation of rules that aims to rescind or increase limitations on certain bidding credits will only further prohibit tribal participation in future auctions, and cripple tribal efforts to deploy wireless services on their lands. Due to certain proposals advanced in the PN, NCAI will be providing specific comments on general spectrum issues pertaining to tribes, and respond to questions regarding the tribal land bidding credit and small business designated entity programs.

WT DOCKET NO. 11-40: AN UNRESOLVED RULEMAKING TO INCREASE TRIBAL ACCESS TO SPECTRUM LICENSES

Since adoption of the *Universal Service Fund/Intercarrier Compensation Transformation Order* (*USF/ICC Order*), the Commission has shifted universal service funds to support commercial wireless deployment throughout the nation. Robust, high-speed, and dependable wireless services are essential to fostering economic growth, enhancing public safety, and supporting vital government functions. However, tribes have consistently faced obstacles and barriers to access or deploy wireless services on their lands. The primary barrier to tribes building their own commercial wireless networks, or negotiating in good faith with non-tribal wireless providers, has been the lack of access to spectrum licenses.

On March 3, 2011, the Commission initiated a Notice of Proposed Rulemaking (NPRM) under WT Docket No. 11-40, *in the Matter of Improving Communications*

Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands (WT 11-40).[1] This was a monumental rulemaking that culminated from decades of tribal input, and it was one of the first initiated with the support of the Commission's newly created Office of Native Affairs and Policy. Several proposals included in WT 11-40 sought to:

1. Expand a tribal licensing priority to wireless radio services;
2. Utilize secondary markets by creating a formal "good faith" negotiation process for tribes to work with incumbent wireless licensees to access spectrum over unserved or underserved tribal lands;
3. Development of a "build or divest" process that would require a licensee to provide wireless services on unserved or underserved tribal lands within its service area—if failing to provide such services then such tribe could file a Notice of Intent to obtain said licensee and initiate their own deployment efforts;
4. Establishment of a tribal lands construction safe harbor for wireless providers; and
5. Proposed modifications to the tribal land bidding credit.[2]

A number of tribes, tribal telecommunications providers, and tribal organizations have filed comments to WT 11-40 in support of the proposals while also providing additional recommendations.[3] However, since 2011 this NPRM has remained bereft of further rulemaking while the Commission has proceeded to shift USF funds to support commercial wireless deployment.

THE BARRIERS TO TRIBAL PARTICIPATION IN THE MOBILITY AND TRIBAL MOBILITY FUNDS

Eight months after the release of WT 11-40, the Commission adopted the *USF/ICC Order*. Under the *USF/ICC Order* the Commission created the Mobility Fund and Tribal Mobility Fund to incentivize wireless deployment to unserved and underserved areas. While these were carved out of the High Cost Fund, certain eligibility criteria effectively excluded tribes and certain tribal telecommunications providers from accessing those funds. Preceding the Phase 1 Auction of the

[1] *See* Federal Communications Commission. *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. *Available* at http://apps.fcc.gov/ecfs/comment/view?id=6016822908.

[2] *Id*. Page 6.

[3] *See*, National Tribal Telecommunications Association, *Comments*, WT 11-40, May 20, 2012; National Congress of American Indians & Native Public Media, *Joint Comments*, WT 11-40, June 20, 2011; Navajo Nation Telecommunications Regulatory Commission, *Comments*, WT 11-40, June 20, 2011; FCC, Office of Native Affairs and Policy, *Notice of Ex-Parte Presentation*, WT 11-40, MB 09-52, CG 11-41, August 8, 2011; FCC, Office of Native Affairs and Policy, *Notice of Ex-Parte Presentation*, WT 11-40, MB 09-52, CG 11-41, August 12, 2011; FCC, Native Nations Broadband Task Force, *Notice of Ex-Parte Presentation*, WT 11-40, CG 11-41, August 18, 2011; Navajo Nation Telecommunications Regulatory Commission, *Notice of Ex-Parte Presentation*, WC 10-90, GN 09-51, WC 07-135, WC 05-337, CC 01-92, CC 96-45, WC 03-109, WT 10-208, CG 11-41, WT 11-40, WC 11-59, WC 09-197, October 28, 2011; National Congress of American Indians, *Letter: Emphasizing the Importance of a Tribal Priority to Spectrum Licenses (Improving Communication Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands, WT Docket No. 11-40)*, WT 11-40, July 20, 2012; National Congress of American Indians, *Letter: National Congress of American Indians Adopts Resolution #SAC-12-034 Promoting Tribal Nation Access and Use of Spectrum for Communications Services (WT Docket 11-40)*, WT 11-40, November 6, 2012; Gila River Telecommunications, Inc., *Notice of Ex Parte Presentation*, AU 13-53, WT Nos.11-40, 10-208, WC Nos. 10-90, 07-135, 05-337, 03-109, CC Nos. 01-92, 96-45, GN 09-51, April 26, 2013; Navajo Nation Telecommunications Regulatory Commission, *Comments*, AU 13-53, WT 11-40, May 10, 2013; Gila River Telecommunications, Inc., *Notice of Ex Parte Presentation*, WT 11-40, June 26, 2013; Navajo Nation Telecommunications Regulatory Commission, *Comments*, AU 13-53, WT 11-40, September 16, 2013; Juan Barrios and Lewis Christman (on behalf of Tule River Tribe), *Comments*, WT 11-40, September 26, 2013; Standing Rock Sioux Tribe, Chairman Dave Archambault III, *Letter*, WT 11-40, May 23, 2014; Makah Tribe, *Ex Parte Meeting*, WC Nos. 10-90, 13-184, 09-197, 03-109, 11-42, CC Nos. 02-6, 96-45, 02-60, GN 13-5, WT 11-40, CG 11-41, June 16, 2014; and Nez Perce Tribe, *Ex Parte Presentation*, WT 11-40, October 20, 2014.

Mobility Fund (Auction 901), the Commission solicited comments to gain guidance in structuring the Auction before it was to commence on September 27, 2012. Yet the Commission adopted certain requirements that would prove problematic for tribes to overcome. In the months leading up to Auction 901, three tribal telecommunications providers attempted to participate in the Auction—Hopi Telecommunications, Inc., Mescalero Apache Telecom, Inc., and Standing Rock Telecommunications, Inc.—but only one tribal provider was able to meet all the eligibility criteria and selected as a winning bidder.[4] The Auction 901 process provided tribes with a glimpse of issues they would encounter in Auction 902—the Phase 1 Auction of the Tribal Mobility Fund.

Tribes, tribal telecommunications providers, and tribal organizations highlighted two core issues with the Mobility Fund Phase 1 Auction in an effort to increase tribal participation in Auction 902.[5] The primary issues tribes encountered in Auction 901 were the requirements to provide an irrevocable letter of credit and to have access to or ownership of a spectrum license(s). On April 29, 2013, the Commission released a Public Notice announcing the schedule for Auction 902 and seeking comment on the competitive bidding procedures.[6] Prior to the release of that Public Notice, representatives from Gila River Telecommunications, Inc. and Mescalero Apache Telecom, Inc. met with staff from the Commission to discuss concerns with the upcoming Tribal Mobility Fund Phase 1 Auction.[7] The April 26, 2013, *Ex Parte Presentation* between the tribal telecommunications companies and the Commission was the first documented proceeding under Docket No. AU 13-53, and upon release of the Public Notice on April 29, 2013, several tribal commenters reiterated the aforementioned two primary concerns that would exclude tribal participation in Auction 902.

While tribes and tribal organizations have requested that the Commission create a program to bring wireless services to tribal lands lacking such infrastructure, the Mobility Fund and Tribal Mobility Fund did little to empower tribes and tribally-controlled entities to serve their own lands. Auction 902 sought to provide incentives to bring commercial wireless service exclusively to tribal lands, yet it provided no new access to or opportunities for tribes or tribally-controlled entities to access vital spectrum licenses on tribal lands. In Auction 901, Standing Rock Telecommunications, Inc. (SRTI) was the only winning tribal bidder, while Hopi Telecommunications, Inc., and Mescalero Apache Telecom, Inc. were unable to meet the Auction criteria. The deciding factors to SRTI's success were that SRTI had access to or ownership of its own spectrum license(s), and the

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[4] *See* Federal Communications Commission, Public Notice Release DA 12-1566, *Mobility Fund Phase 1 Auction Closes; Winning Bidders Announced for Auction 901*, Attachment A: "Bidder Summery". November 1, 2012. *Available* at http://wireless.fcc.gov/auctions/default.htm?job=release&id=275&y=2012.

[5] *See* Gila River Telecommunications, Inc., *Notice of Permitted Ex Parte Presentation*, AU 13-53, WT Nos. 11-40, 10-208, WC Nos. 10-90, 07-135, 05-337, 03-109, CC Nos. 01-92, 96-45, GN 09-51, April 26, 2013; National Tribal Telecommunications Association, *Comments*, AU 13-53, May 10, 2013; Native Public Media & the National Congress of American Indians, *Comments*, AU 13-53, May 10, 2013; Standing Rock Telecommunications, Inc., *Comments*, AU 13-53, May 10, 2013; Affiliated Tribes of Northwest Indians, *Resolution #13-27: Comments of Affiliated Tribes of Northwest Indians on FCC Tribal Mobility Fund Phase 1 Auction 902*, AU 13-53, May 10, 2013; Bad River Band of the Lake Superior Tribe of the Chippewa Indians, *Comments*, AU 13-53, May 10, 2013; Gila River Indian Community & Gila River Telecommunications, Inc., *Comments*, AU 13-53, May 10, 2013; Navajo Nation Telecommunications Regulatory Commission, *Comments*, AU 13-53, WT 11-40, May 10, 2013; Sally Fineday (on behalf of the Leech Lake Band of Ojibwe), *Comments*, AU 13-53, May 10, 2013; Warm Springs Telecom, *Comment*, AU 13-53, May 10, 2013; Oglala Sioux Tribe, *Comments*, AU 13-53, May 10, 2013; Native Public Media & the National Congress of American Indians, *Reply to Comments*, AU 13-53, May 24, 2013; and Mescalero Apache Telecom, Inc., *Reply to Comments*, AU 13-53, May 24, 2013.

[6] *See* Federal Communications Commission, Public Notice DA 13-323, Released April 29, 2013, *Available* at http://apps.fcc.gov/ecfs/comment/view?id=6017170411.

[7] *See* Gila River Telecommunications, Inc., *Notice of Permitted Ex Parte Presentation*, AU 13-53, WT Nos. 11-40, 10-208, WC Nos. 10-90, 07-135, 05-337, 03-109, CC Nos. 01-92, 96-45, GN 09-51, April 26, 2013. *Available* at http://apps.fcc.gov/ecfs/comment/view?id=6017331602.

company was able to provide an irrevocable letter of credit because it was financed through non-conventional federal government programs, such as the New Markets Tax Credit program. SRTI, as the first tribally-owned and operated eligible telecommunications carrier throughout the entire Standing Rock Sioux Reservation, continues to exemplify the success and self-determination of tribes to bridge the digital divide on their lands.

However, many tribes still face immense challenges in gaining access to capital and credit to support infrastructure projects on tribal lands. Tribal commenters in the AU Docket No. 13-53 proceeding constantly stressed that the primary assets of tribes are their lands, which cannot be collateralized because they are held in trust by the federal government—nor should they ever be open to such proposals due to the dismal history of land loss tribes have already experienced in the United States. Similarly, tribal access to spectrum licenses is equally absent in Indian Country due to decades of lotteries and auctions of licenses that have benefited immensely wealthy telecommunications companies. This lack of access to spectrum has left many smaller, yet equally able entities essentially barred from competing for licenses due to their inability to compete with the capital reserves of wealthy companies.

The Commission has made considerable strides in its attempt to address tribal issues in its rulemakings. Yet until the Commission takes concerted action to increase tribal access to spectrum licenses, the opportunities and prosperities wireless services can offer tribal lands will continue to elude our populations. In addition to NCAI's following comments, we respectfully urge the Commission to revisit WT 11-40 so that tribes may have an equal opportunity, if not a sole-empowerment, to bring vital communications services to their lands and citizens.

PRESERVE THE TRIBAL LAND BIDDING CREDIT AND SMALL BUSINESS DESIGNATED ENTITY IN CONSIDERATION OF TRIBAL CIRCUMSTANCES

Due to the general lack of access to capital, future spectrum auctions will further bar tribal participation if incentives like the tribal land bidding credit and small business designated entity programs are eliminated. When the Commission released Public Notice FCC 15-49 (PN) we were alarmed that a commenter had urged the Commission to re-examine its rules concerning the tribal land bidding credit.[8] Upon further inspection we came across the commenter's filing and the blatantly deplorable assumptions and patently untrue statements made regarding tribal nations.[9]

The commenter, NTCH, Inc., questions whether tribes, "continue to merit per se qualification as a disadvantaged category", and that, "the Commission's rules already take into account the fact that a number of Indian tribes have actually become quite wealthy through casino revenues…"[10] Additionally, NTCH, Inc. states:

> The Commission should therefore not treat Indians as a generic category of people deserving special preferences in the auction context. Rather, the Commission should determine the justification for a preference based on whether the affected tribe either

[8] *See* Federal Communications Commission, Public Notice FCC 15-49, *Request for Further Comment on Issues Related to Competitive Bidding Proceeding: Updating Part 1 Competitive Bidding Rules*. April 17, 2015. *Available* at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0417/FCC-15-49A1.pdf.
[9] *See* Comments of NTCH, Inc., WT Nos. 14-170 and 05-211, GN 12-268, RM-11395. February 6, 2015. *Available* at http://apps.fcc.gov/ecfs/document/view?id=60001027478.
[10] *Id*. Page 4.

> already has access to the desired communications service via other Federal programs or whether the tribe has sufficient financial resources of its own to make extra credits based on tribal status unnecessary and actually unfair to others. The Commission's remedial policy toward Indians should not be based on guilt or paternalism but on a fair assessment of the real needs of the tribes concerned.[11]

Apparently the associates at NTCH, Inc. require a lesson in Federal Indian Law & Policy. Tribal nations do not constitute a "generic category of people deserving special preferences". Instead, the federal government—by way of the U.S. Constitution, Executive Orders, Congressional Statutes, and Judicial rulings—has a political and fiduciary trust relationship with the 566 federally-recognized sovereign tribal nations. [12]

By virtue of that trust relationship, the federal government—through its branches and agencies—are legally obligated to protect tribal lands, assets, resources, and to uphold pertinent federal statutes and court cases.[13] There were over 370 treaties signed between the United States and tribal nations between 1778 and 1871—and according to the U.S. Constitution, these treaties are the supreme law of the land on equal footing as those signed between the U.S. and foreign nations.[14] Furthermore, Article 1, Section 8, Clause 3 of the U.S. Constitution recognized tribal nations as sovereign governments.[15]

Following the Indian treaty era, Congress and the Federal Judiciary have upheld this recognition of the government's fiduciary trust obligations to federally-recognized Indian tribes. Consequently, the Commission has recognized this fiduciary trust relationship with tribal nations when it adopted its *2000 Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*.[16] In reaffirming the principles of tribal sovereignty and the federal trust responsibility the Commission stated:

> The Commission recognizes the unique legal relationship that exists between the federal government and Indian Tribal governments, as reflected in the Constitution of the United States, treaties, federal statutes, Executive orders, and numerous court decisions… In this regard, the Commission recognizes that the federal government has a longstanding policy of promoting tribal self-sufficiency and economic development as embodied in various federal statutes… Therefore, as an independent agency of the federal government, the Commission recognizes its own general trust relationship with,

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[11] *Id*.

[12] *See* National Congress of American Indians, *Tribal Nations & the United States: An Introduction*. Published 2014. *Available* at http://www.ncai.org/about-tribes. At page 16:
"Tribal Sovereignty: Nations within a Nation: *Sovereignty* is a legal word for an ordinary concept—the authority to self-govern. Hundreds of treats, along with the Supreme Court, the President, and Congress, have repeatedly affirmed that tribal nations retain their inherent powers of self-government. These treaties, executive orders, and laws have created a fundamental contract between tribes and the United States. Tribal nations are located within the geographic borders of the United States, while each tribal nation exercises its own sovereignty."

[13] *Id*. Page 21.

[14] *Id*. Page 16.

[15] *See* U.S. Constitution, Article 1, Section 8, Clause 3: "The Congress shall have the Power to law and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and gerenal Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Available* at http://www.senate.gov/civics/constitution_item/constitution.htm#a1_sec8.

[16] *See* Federal Communications Commission, Native Nations Consultation Policy. *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*. Adopted June 8, 2000. Released June 23, 2000. *Available* at https://www.fcc.gov/encyclopedia/native-nations-consultation-and-policy.

> and responsibility to, federally-recognized Indian Tribes. The Commission also recognizes the rights of Indian Tribal governments to set their own communications priorities and goals for the welfare of their membership.[17]

Finally, NTCH Inc.'s assumption that tribes "have actually become quite wealthy through casino revenues" is an unfortunate and blatant misperception. Tribal gaming is the most regulated form of gaming in the U.S. and contrary to popular belief 56 percent Indian gaming is comprised of small and moderate gaming operations.[18] Additionally, not all tribes are "gaming tribes"—as of 2012, just 240 tribes were operating gaming establishments.[19] While Indian gaming has become profitable for some tribes, many of these enterprises at a minimum provide tribal members with jobs and critical revenues to support tribal social service programs, scholarships, healthcare, and infrastructure projects such as roads and sewer and water systems.

It is also important to recognize that tribes cannot develop a tax base similar to those of state and local governments. In many instances tribal gaming revenues attempt to fill that void to some degree, as well as the gap left by the federal government not living up fully to its fiduciary trust responsibility to Indian tribes. Due to the economic disparities that exist on tribal lands, and the Commission's own well-documented and understanding of challenges to deploying communications infrastructure on tribal lands, we urge the Commission to preserve the tribal land bidding credit and the small business designated entity programs. Preservation of these programs is essential to providing tribes with the opportunity to participate in the extremely competitive bidding arena of spectrum license auctions. Furthermore, WT Docket No.11-40 contains certain proposals to reform the tribal land bidding credit and the Commission should not take any action to rescind or modify the credit when it still has an open and unresolved docket regarding the program.

CONCLUSION: PRESERVE AND STRENGTH TRIBAL OPPORTUNITIES

Any modifications to the tribal land bidding credit and the small business designated entity programs adopted by the Commission must take into consideration the effects they will have on tribes. Tribal entities severely lack access to spectrum licenses, and modification or rescission of bidding credits that would provide some nominal support for tribes entering future spectrum auctions should be preserved if not strengthened by the Commission.

Currently, there are ten tribally-owned and operated telecommunications companies in the U.S. that are recognized by the FCC as eligible telecommunications carriers. Just one of those companies provides commercial mobile services on its tribal lands. In a previous filing by NTCH, Inc., the company stated:

> There is no reason to assume that tribes or entities controlled by tribes have any expertise in constructing, operating or maintaining sophisticated wireless networks. In some cases, tribes have sophisticated telecom expertise or access to expert consultants. But in others, the tribes are no more qualified to construct or operate a mobile communications network than anyone else… [T]o give tribes an actual preference might well defeat the intended purpose of getting service to the tribal territory and its

[17] *Id. Pages 3-4.*
[18] *See* National Congress of American Indians, *Tribal Nations & the United States: An Introduction*. Published 2014. Page 42. *Available* at http://www.ncai.org/about-tribes.
[19] *Id.*

> inhabitants quickly and reliably, which is the ostensible object of this entire program. An incident from World War II is instructive here. In the Burma campaign, it was decided to allow the fledgling Chinese Air Force to conduct a bombing raid under the watchful oversight of the U.S. Army Air Force which had conducted all air operations to that point. The idea was to give the Chinese people a sense of ownership of the battle against the Japanese. The U.S. personnel then watched aghast as the Chinese Air Force flew off and bombed the wrong village. Making the indigenous people feel good did nothing to advance the war effort, not to mention the suffering experienced by scores of unnecessary casualties. The lesson here is that this is not a social engineering project – the Commission's job is to quickly get mobile service to areas that need them, not to foster tribal pride or profit.[20]

The notion or argument that tribes are incapable of constructing, operating, or maintaining sophisticated wireless networks is a disgraceful perception of Native peoples. At the core of the issue are federal laws and regulations that have disadvantaged tribes from taking full advantage of opportunities bequeathed to non-tribal governments and corporations. We are simply requesting that the Commission preserve and strengthen opportunities for tribes to enter future spectrum auction proceedings.

We are hopeful that in the pursuit of modifying the tribal land bidding credit and the small business designated entity programs, that the Commission will keep in mind the many tribal issues and barriers to participation that currently exist in the realm of spectrum auctions. If you have any questions or concerns please contact NCAI Legislative Associate, Brian Howard, at bhoward@ncai.org.

Sincerely,

Jacqueline Pata
Executive Director
National Congress of American Indians

[20] *See* Comments of NTCH, Inc., WT Docket No. 10-208, *In the Matter of Further Inquiry into Tribal Issues Relating to the Establishment of a Mobility Fund*. May 4, 2011. *Available* at http://apps.fcc.gov/ecfs/document/view?id=7021345979.