

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

In the Matter of)	
)	
Updating Part 1 Competitive Bidding Rules)	WT Docket No. 14-170
)	
Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions)	GN Docket No. 12-268
)	
Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Conditional Waiver)	RM-11395
)	
Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures)	WT Docket No. 05-211
)	

COMMENTS OF NATIVE PUBLIC MEDIA

Native Public Media, by its attorneys, submits these comments in response to the Commission's Request for Further Comment on Issues Related to Competitive Bidding Proceeding (Public Notice).¹

Native Public Media is a non-profit national organization whose mission is to promote healthy, engaged and independent Native Communities through media access, control and ownership. There are 566 federally-recognized American Indian Tribes and Alaska Native Villages ("ANC") in the United States and more than 5 million Native Americans in the United States.² There are currently 53 Native owned and licensed NCE radio stations providing critical

¹ Public Notice, FCC 15-49, released April 17, 2015.

² See www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/;

information about education, culture, public safety, and health to Tribal members across fifteen states. On these stations, you can hear Hopi, Navajo, Sioux, Apache and a host of other rich and vibrant Native American languages. Native Public Media advocates policies that bring the benefits of both current and emerging communications technologies to all Native Americans.

INTRODUCTION

The Public Notice seeks additional comments on changes to the Commission's competitive bidding rules. In particular, it asks how the Commission can best meet its statutory obligations to ensure that small businesses, rural telephone companies, and businesses owned and controlled by members of minority groups, women and Native Nations ("Designated Entities" or "DEs") have an opportunity to participate in the provision of spectrum-based services. Although only obliquely referenced in the Public Notice,³ a critical issue is the application of Northstar Wireless which obtained a substantial bidding credit in Auction 97 for Advanced Wireless Services, based upon the fact that the applicant was "controlled" by Doyon Ltd., an Alaska Native Corporation ("ANC"), although 85% of the equity was owned by Dish Network. As an independent applicant, Dish would not have been entitled to a DE bidding credit.

The following comments are limited to the definition of DE as it pertains to Native American Tribes, including ANCs.

<http://www.census.gov/newsroom/facts-for-features/2014/cb14-ff26.html>.

³ See ¶ 12.

DISCUSSION

The most critical portion of the DE rules for this proceeding is Section 1.2110(c)(5)(xi), which in relevant part, provides that

For purposes of this section, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of this section....⁴

Although Senator McCaskill recognizes that the Commission's designated entity program is "well intentioned," she maintains, "The fact that an ANC with hundreds of millions of dollars in revenue is considered a small business under FCC rules is insulting to the true small businesses that wish to compete for spectrum."⁵

Similarly, NTCH, Inc. questions whether "Indian tribes continue to merit per se qualification as a disadvantaged category." NTCH notes 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 and other business enterprises. Many reservations now receive highly subsidized high speed broadband by virtue of various grant programs targeting their specific needs. ... The Commission should therefore not treat Indians as a generic category of people deserving special preferences in the auction context.⁶

The criticisms contained in these comments are misplaced. The result of this proceeding should not be an abandonment of policies designed to encourage Tribal participation in auctions and Tribal investment in broadband services. As the Commission has frequently noted, it not

⁴ 47 C.F.R. §1.2110(c)(5)(xi).

⁵ Letter from Claire McCaskill (D-MO), U.S. Senator, to Thomas Wheeler, Chairman, FCC at p.1 (February 26, 2015).

⁶ Comments of NTCH at p. 4.

only has a statutory duty to assist members of minority groups to participate in the competitive bidding process,⁷ it has “an historic trust relationship with Tribal Nations, and a longstanding policy of promoting Tribal self-sufficiency and economic development.”⁸

Like the “tribal priority” applicable to broadcast spectrum,⁹ and proposals to reserve spectrum for broadband services, the DE policy is designed to provide communications services to one of the most poorly served population groups in America.¹⁰

In adopting its definition of DE, the Commission recognized that Tribes and ANCs would have difficulty raising the enormous amount of capital generally required for successful bids on spectrum unless they could form joint ventures with other, better capitalized partners.

[E]ntities owned and controlled by Indian tribes and Alaska Regional or Village Corporations should be eligible to bid in future auctions as small businesses, notwithstanding their affiliation with other entities owned by tribes or Alaska Native Corporations whose gross revenues cause the combined average gross revenues of the entity and its affiliates to exceed the general limits for eligibility for bidding as such a business. As we stated in support of a similar exemption from our affiliation rules in LMDS, this exception will ensure that these entities will have a meaningful opportunity to participate in spectrum-based services from which they would otherwise be precluded.¹¹

Rather than reverse a well-established policy designed to help Tribes deploy new wireless services, the Commission should preserve its definition of DE and seek to ensure that its underlying policy objective – service to unserved lands and populations of American Indians and Alaska Natives – is achieved.

⁷ See 47 U.S.C. § 309(j).

⁸ Statement of Policy Establishing a Government-to-Government Relationship with Indian Tribes, 16 FCC Rcd. 1078 (2000).

⁹ See 47 C.F.R. § 73.7000.

¹⁰ See *Improving Communications Services for Native Nations*, Notice of Inquiry, 26 FCC Rcd. 2672 (2011)

¹¹ Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, FCC 97-413, at ¶ 28 (December 31, 1997).

The issue is not whether Tribes are, as NTCH puts it, a “deserving” population. The Commission has repeatedly found that Native Americans have had less access to telecommunications services than any other segment of the population.

Many Tribal communities face significant obstacles to the deployment of broadband infrastructure, including high build out costs, limited financial resources that deter investment by commercial providers and shortage of technically trained members who can undertake deployment and adopting planning. Current funding programs administered by NTIA and RUS do not specifically target funding for projects on Tribal lands and are insufficient to address all of these challenges. Tribes need substantially greater financial support than is presently available to them, and accelerating Tribal broadband deployment will require increased funding.¹²

This lack of access to communications services cannot be dismissed by invoking the stereotype of the “rich Indian,” who takes advantage of governmental preferences while luxuriating in wealth from “casino revenues.” NTCH need not be concerned about windfall benefits to wealthy “casino tribes.” As NTCH itself recognizes, Section 1.2110(c)(5)(xi) attributes to the DE applicant the “gross revenues derived from gaming activities conducted by affiliate entities.” Substantial casino revenues negate the bidding credit to which a DE would otherwise be entitled.

Senator McCaskill comes closer to the mark by suggesting that the “flaw” may not be in the definition of a DE, but in “the Commission’s rules governing the program.” NPM supports the Commission’s efforts to reexamine its program of bidding credits, but respectfully urges the Commission to retain its DE policies. Such policies not only advance the interests of an underserved minority population group, those of Tribal governments which have a sovereign right to set their own communications policies and goals for the welfare of their members.¹³

¹² *Connecting America: The National Broadband Plan*, prepared by the staff of the Federal Communications Commission, March 2010 at 152, Box 8-4.

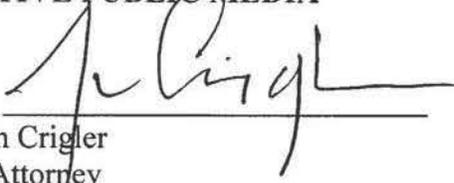
¹³ Statement of Policy Establishing a Government-to-Government Relationship with Indian

The Commission should focus its attention in these proceeding on aligning its laudable DE policy with safeguards that achieve that policy's underlying objectives. The Commission has received a number of comments that propose various revisions to its attribution rules, the levels of equity investment necessary for "control" of a DE and the maximum amounts of bidding credits awarded to an applicant. These comments deserve thoughtful attention. NPM believes, however, that the simplest, and most effective, means of deterring speculation and abuse would be to prohibit applicants that receive a DE bidding credit from realizing a windfall profit by "flipping" spectrum acquired as a speculative investment. Accordingly, NPM supports the proposal that the Commission modify its unjust enrichment rules to encompass the entire license period. The incentive provided by the DE bidding credit should be an incentive to *build* communications systems that actually serve Native Americans. Licenses obtained by means of a DE bidding credit could be sold during the license term only by repaying the bidding credit used to obtain the spectrum *or* by selling the licenses to the Tribe or ANC whose DE eligibility was used to obtain the credit.

Tribes, 16 FCC Rcd. 4078 (2000).

Respectfully submitted,

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