

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

In the Matter of)
)
Extending Wireless Telecommunications) WT Docket No. 99-266
Services to Tribal Lands)
)

To: the Commission

REPLY COMMENTS OF WHIDBEY TELEPHONE COMPANY

Whidbey Telephone Company (“Whidbey”), by its attorneys, hereby submits these reply comments to the Second Further Notice of Proposed Rule Making (“*Second Further Notice*”) in the above-captioned docket relating to proposed modifications to the tribal lands bidding credit program of the Federal Communications Commission (“Commission”) or “FCC”) in order to further facilitate the use of the bidding credit.

I. BACKGROUND

Whidbey is a rural telephone company that qualified under the Commission’s Rules as a small business for purposes of Lower 700 MHz Band Auctions No. 44 and 49.¹ Whidbey provides local exchange telephone service to approximately 14,000 access lines in rural portions of the Puget Sound region of Washington State. Whidbey was a successful bidder in both of these auctions, and it is currently a long-form applicant for Lower 700 MHz Band C-Block licenses in CMA109 (the Spokane, Washington MSA), CMA388 (the Idaho 1 – Boundary RSA) and CMA700 (the Washington 8 – Whitman

¹ For purposes of the Lower 700 MHz Band, a small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.

RSA).² Whidbey has applied for a tribal lands bidding credit in each of these Markets and was recently granted an extension until Monday, September 25, 2003, to amend its long-form application and attach the tribal and winning bidder certifications.³ Whidbey expects to submit its long-form application for the licenses for which it was high bidder in FCC Auction No. 49 in the coming weeks.

II. DISCUSSION

Whidbey applauds the Commission for issuing the *Second Further Notice* and for seeking public comment on ways in which the utility of the tribal lands bidding credit might be improved. In the months since Whidbey filed its own request for tribal lands bidding credits, Whidbey has learned first hand about complexities in the tribal lands bidding credit process, and further issues arising from the Commission's use of wireline telephone penetration rates to define "qualifying tribal lands" that are eligible for the tribal lands bidding credit program. With these experiences in mind, Whidbey provides the following comments and proposals:

a. The Commission's Rules Should Encourage Licensees and Tribal Authorities to Develop Meaningful Service Proposals that are Tailored to a Tribe's Particular Needs

Since submitting its long-form application for FCC Auction No. 44, Whidbey has encountered difficulties in trying to identify certain tribal lands attributable to the Coeur d'Alene Tribe and reliable location, population density and telephone penetration data for Coeur d'Alene tribal lands that are located at the nexus of three adjacent CMA markets.

² The FCC has not yet released its post-auction *Public Notice* announcing the winning bidders in FCC Auction No. 49, which concluded on Friday, June 13, 2003. Whidbey expects to file its long-form application for licenses it won during Auction No. 49 in the coming weeks.

³ See Letter of June 6, 2003, from Linda Ray, Deputy Chief, Policy and Rules Branch, Commercial Wireless Division, to John A. Prendergast, counsel to Whidbey Telephone Company. (*Attached Below.*)

Without such data, it is unclear whether Whidbey or the Coeur d'Alene Tribe will be in a position to certify that relevant tribal lands that fall within a particular CMA market are in fact “qualifying tribal land” as defined in the Commission’s Rules.

In the course of discussions with the Coeur d'Alene Tribe, Whidbey’s representatives have learned that portions of the Coeur d'Alene Reservation (which encompasses more than 610 square miles) have seen significant improvement in the availability of basic telephone service, but may still have less than adequate telecommunications service. Upon information and belief, Whidbey submits that this may be the case across many tribal lands that have seen a substantial increase in wireline telephone penetration. The issue here is two-fold: (1) while aggregate penetration rates for a tribal lands reservation may have improved dramatically, portions of those tribal lands may still be without basic telephone service; and (2) even where basic telephone service penetration rates may be adequate, increasingly important telecommunications services (*e.g.*, broadband) may be lacking.

Language in the *Second Further Notice* suggests that the FCC “may be receptive to considering other methods of determining the actual telephone penetration rate on tribal lands.”⁴ Whidbey is very encouraged by this statement, and Whidbey would suggest that, consistent with this suggested flexibility, the Commission may wish to be receptive to allowing winning bidders and tribal authorities to come up with their own meaningful service proposals that would improve the level and/or variety of telecommunications services available on tribal lands, and that would qualify for the full value of the tribal lands bidding credit(s) at issue. In this regard, Whidbey respectfully

⁴ See *Second Further Notice* at ¶ 28 (Footnote 46).

requests that the Commission modify its tribal lands bidding credit rules and allow winning bidders to submit either the 180-day tribal and winning bidder certifications or a *tribal telecommunications improvement plan* (or “TTIP”) that has been approved in writing by the tribe or tribes involved and that is subject to approval or disapproval by the FCC.

By allowing winning bidders and tribes to submit their own creative service proposals, Whidbey submits that the Commission’s could permit an alternative to legal definitions and statistics that may, in certain instances, be difficult (if not impossible) to apply, and focus more directly on results – *i.e.*, the provision of services that are tailored to a tribe’s particular needs, whether those needs be the extension of basic telephone service to underserved communities, the introduction of high speed data services to tribal schools, government offices and other occupants of tribal lands, or any other mix of services that the tribe(s) themselves deem necessary and appropriate. Moreover, businesses and entrepreneurs that thus far have been reluctant or unable to commit to an aggressive buildout schedule, or 75% coverage requirements, might look more favorably upon having the opportunity to develop a sustainable business model that would take into account such real-life factors as, *e.g.*, population density and distribution on the tribal lands, economic factors, specific geographic and/or topographic constraints, the cost and availability of appropriate infrastructure and customer premises equipment, opportunities to serve nearby highways or communities adjacent to the tribal lands or to collocate transmitters on existing facilities.

Whidbey believes that there would be little risk of applicants abusing the credit since an acceptable TTIP would have the support of the tribe, and the FCC could

condition its approval (or non-disapproval) of the TTIP on the project meeting specific construction benchmarks. Alternatively, the Commission could require successful applicants to submit annual reports detailing the licensee's progress toward meeting the service goals set forth in the TTIP. The tribe's approval of the TTIP should be evidenced by a letter or other signed document, like the current tribal certification, and the TTIP could be implemented through a straightforward application submitted by the licensee and the FCC.

b. Increasing the Bidding Credit Limit

Whidbey agrees with National Telecommunications Cooperative Association (“NTCA”) that it is impossible to say with any certainty whether the size of the tribal lands bidding credit has anything to do with its lack of popularity.⁵ Increasing the size of the bidding credit would clearly give licensees greater financial incentive to pursue the credit, however, standing alone it would not address numerous other factors that might be deterring applications for the credit. As an example, for Whidbey and other applicants for Lower 700 MHz Band licenses, a real question still exists as to whether appropriate 700 MHz infrastructure and customer premises equipment will be available in time for licensees to meet a 3-year buildout deadline, or whether such equipment would perform reliably. Without such assurances, prospective applicants for the credit have little ability to develop a meaningful business plan. Other “unknowns” that are associated with the Lower 700 MHz Band service (as an example) include the impact of the DTV transition process and whether there are incumbent broadcast operations that will need protection. Each radio service will have its own set of unknowns, but the bottom line is that licensees of new wireless services, or licensees that are new to a particular wireless service, often

have very little basis to determine the ultimate value of the credit to them. However, if the FCC were to build additional flexibility into its tribal lands bidding credit rules, such as permitting applicants to submit a TTIP, at least some of these variables (and risks) could be factored into the ultimate service proposal. In fashioning its service proposal, if the licensee believed that the value of the tribal bidding credit should be higher to account for unique challenges, it could propose appropriate adjustments to the bidding credit in its TTIP. If the Commission were to approve of the proposed bidding credit adjustment, it could reduce the final payment amount that the applicant would be required to pay upon license grant.

c. Modifying the Construction Requirements

NTCA also suggests that the FCC should not relax the current 75% population coverage buildout requirement if it increases the size of the tribal lands bidding credit and that it should instead leave the buildout requirement as it currently stands.⁶ In this regard, Whidbey can agree only *in principal* with NTCA that the Commission should not modify its rules in such a manner as to create a windfall for licensees in exchange for little or no legal obligation. However, since the relevant factors associated with the provision of wireless services to tribal lands can be so numerous, and the reasons for low wireline telephone penetration rates may likewise be widely varied, the FCC should not use inflexible criteria when it comes to evaluating any proposal that would lead to meaningful improvement in the quality of services available to a tribe or the ability of occupants of tribal lands to access a variety of telecommunications services. The Commission should therefore be receptive to alternative proposals that, while still placing

⁵ NTCA Comments at p. 2.

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substantial obligation on the licensee, may nevertheless ultimately result in service being extended to less than 75% of the qualifying tribal land for which the credit was awarded, or that propose a buildout deadline that is longer than three years. As discussed above, there may be any of a number of factors (most of which would be beyond a licensee's control) that could contribute to a licensee and tribe needing additional time to implement a meaningful service proposal set forth in a TTIP.

d. The Commission Should Reconsider Its 70% Wireline Penetration Eligibility Threshold

Whidbey agrees with both NTCA and Windsong PCS ("Windsong") that the Commission should raise its current 70% wireline penetration eligibility threshold to account for more recent Census figures.⁷ Even under the 1990 Census figures, the FCC's adoption of a 70% penetration figure as an absolute benchmark amounted to "rough justice" for many tribes that had telephone penetration rates in the high 70s or low 80s, perhaps due to a handful of remote settlements. Since improving access to advanced telecommunications services to tribal schools, tribal governments, homes and small businesses would have the direct effect of improving economic opportunities for the tribe, its members and other occupants of tribal lands, Whidbey submits that relaxing the 70% penetration test would put tribal authorities in a better position to achieve the extension of basic services to underserved portions of their tribal lands. Whidbey therefore urges the Commission to raise its tribal bidding credit eligibility threshold to a wireline telephone penetration rate that is much closer to, yet still below, the national average. In the alternative, if access to high speed Internet (and/or other broadband) services is unavailable on tribal lands, the applicant for a tribal lands bidding credit

⁷ NTCA Comments at p. 3; Windsong Comments at pp. 8-10.

should be able to pursue the credit on this basis in a proposed TTIP, instead of having to rely upon the 70% wireline telephone penetration threshold.

e. Applicants' Own Service Proposals Should Be Permitted to Include Adjacent Non-Tribal Areas with Low Penetration Rates

Whidbey submits that an applicant's own service proposals under the tribal lands bidding credit program should be permitted to include the provision of service to adjacent non-tribal areas with telephone penetration rates (and/or broadband service rates) that are below the relevant threshold. Whidbey agrees with NTCA that such a modification of the tribal bidding credit policy could provide a significant opportunity for rural carriers to obtain enhanced access to spectrum, and that extending the tribal bidding credit to adjacent underserved areas would fulfill the goals of the Communications Act of 1934, as amended (the "Act") by promoting the availability of telecommunications services in underserved areas. Making bidding credits available to carriers that are dedicated to serving both tribal areas and adjacent non-tribal areas would provide additional incentives to carriers willing to undertake such a difficult task.

III. CONCLUSION

For the reasons stated above, Whidbey Telephone Company respectfully requests that the Commission modify its tribal lands bidding credit program to allow for licensees and tribal authorities to work together and to develop meaningful telecommunications service proposals that are tailored to a tribe's particular needs. The Commission should clarify that its policies will be sufficiently flexible to allow bidders to receive a tribal lands bidding credit even though the wireline telephone penetration rate on the tribal lands in question may be significantly higher than 70%, so long as the penetration rate is below the national average; and it should allow tribal telecommunications service

proposals to include the provision of service to adjacent non-tribal areas with telephone penetration rates (and/or broadband service rates) that are below the national average. In the alternative, an applicant for a tribal lands bidding credit should be able to pursue the credit on the basis of a TTIP proposed by it and approved by the relevant tribal authority. Whidbey believes that, with the adoption of these changes, the tribal lands bidding credit program will ultimately prove to be successful in improving the quality of, and access to, telecommunications services on tribal lands and in adjacent underserved rural areas.

Respectfully Submitted,

WHIDBEY TELEPHONE COMPANY

By: /s/ John A. Prendergast
John A. Prendergast
D. Cary Mitchell

Its Counsel

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Filed: June 16, 2003



Federal Communications Commission
Washington, D.C. 20554

June 6, 2003

By facsimile and first-class mail

Mr. John A. Prendergast
Blooston, Mordkofsky, Dickens, Duffy & Prendergast
2120 L Street, N.W.
Washington, DC 20037

Re: Whidbey Telephone Company Request for Partial Waiver; File No. 0001049125; Auction No. 44

Dear Mr. Prendergast:

This letter addresses the above-captioned Request for Partial Waiver ("Waiver Request") filed on January 2, 2003. Whidbey Telephone Company ("Whidbey") seeks a partial waiver of section 1.2110(f)(3)(ii) of the Commission's rules, which states that a winning bidder seeking tribal lands bidding credits must amend its long-form application and attach the tribal and winning bidder certifications ("Required Certifications") within ninety (90) days after the long-form application filing deadline.¹ The long-form application filing deadline for the Lower 700 MHz Band Auction No. 44 was October 4, 2002; therefore, the amended long-form application and Required Certifications were due by January 3, 2003. In its original waiver request, Whidbey requested that it be granted an additional 90 days beyond the January 2, 2003 deadline to submit the required certifications.² Whidbey subsequently amended its application to request that either September 29, 2003 or "90 days following the issuance of a *Report and Order* in response to the *Tribal Lands Second Further Notice*," whichever is later, be the date by which it must submit the Required Certifications for the three markets in which it has applied for tribal land bidding credits.³

We grant the Waiver Request of section 1.2110(f)(3)(ii) in part, because Whidbey has demonstrated that there are unique factual circumstances that would make application of the rule contrary to the public interest.⁴ Specifically, we note that the Coeur d'Alene Tribe, which Whidbey hopes to serve, has indicated to Commission staff that it is working with Whidbey to identify qualifying tribal lands and that it supports Whidbey's waiver request.⁵ Accordingly, Whidbey is granted an extension until

¹ 47 C.F.R. § 1.2110(f)(3)(ii)(A), (B).

² See *In re Application of Whidbey Telephone Company, Request for Partial Waiver*, filed on January 2, 2003.

³ See Amendment to Waiver Request, filed on April 2, 2003; see also *In the Matter of Extending Wireless Telecommunications Services to Tribal Lands, Second Report and Order and Second Further Notice of Proposed Rulemaking*, 18 FCC Rcd 4775 (2003) ("*Second Further Notice*").

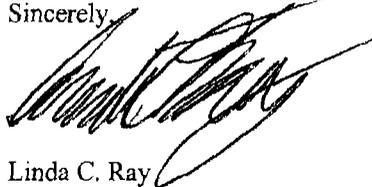
⁴ 47 C.F.R. § 1.925(b)(3)(ii).

⁵ See Amendment to Waiver Request, filed on April 17, 2003; Letter from Valeria Fast Horse, Director, Management Information Systems, Coeur d'Alene Tribe, to FCC Staff.

September 29, 2003 to amend its long-form application (File No. 0001049125) and attach the Required Certifications.⁶

If you have any questions concerning this matter, please contact Michael Connelly, at (202) 418-0132.

Sincerely,



Linda C. Ray
Deputy Chief, Policy and Rules Branch
Commercial Wireless Division
Wireless Telecommunications Bureau

⁶ We deny the Waiver Request to the extent that it requests an extension until 90 days following the issuance of a *Report and Order* in response to the *Second Further Notice*. Whidbey has not shown that the issues raised in the *Second Further Notice* preclude it from securing the Required Certifications by September 29, 2003. Moreover, we note that other applicants in the Lower 700 MHz auction have been able to submit the Required Certifications notwithstanding the release of the *Second Further Notice*.

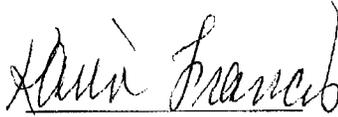
CERTIFICATE OF SERVICE

Letter re: Whidbey Telephone Company

Dated: June 6, 2003

I, Karin Francis, do hereby certify that on this, the 6th day of June, 2003, I have served a copy of the foregoing letter by facsimile transmission and first class U.S. Mail, on the following:

Mr. John A. Prendergast
Blooston, Mordkofsky, Dickens, Duffy & Prendergast
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A handwritten signature in cursive script, appearing to read "Karin Francis".

Karin Francis
Paralegal