

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

WT Docket No. 99-266

**Extending Wireless Telecommunications
Services to Tribal Lands**

**EX PARTE REPLY COMMENTS OF THE
CHEYENNE RIVER SIOUX TRIBE
TELEPHONE AUTHORITY**

Pursuant to the Commission's public notice adopted on March 7, 2003, the Cheyenne River Sioux Tribe Telephone Authority ("Telephone Authority") herein comments ex parte on the *Second Report and Order and Second Further Notice of Proposed Rulemaking* ("Second Notice"), 68 Fed. Reg. 23,431-38 (May 2, 2003), that the Commission issued in this matter.

I. INTRODUCTION

The Commission has asked for comment on issues associated with the bidding credits program designed to improve the availability of telecommunications services in Indian country via the deployment of wireless telecommunications services. Specifically, the Commission seeks comment on "ways in which we can encourage greater participation in the existing tribal lands bidding credit program." Second Notice ¶ 3. Additionally, the Commission seeks comment on whether "consideration should be given to extending the program to underserved tribal communities that are situated on non-tribal lands adjacent to tribal lands." *Id.* The Commission also seeks comment on whether the 2000 census data should alter the bidding program in any way. *Id.*

Only two entities filed comments on the Second Notice. The *Comments of Duluth PCS, Inc., Western Virginia PCS, Inc. and St. Joseph PCS, Inc., Collectively D/B/A Windsong PCS* (June 2, 2003) (“Windsong Comments”), provide three comments: 1) the threshold of 70% penetration rate is too low; 2) the Commission should permit carriers to self-certify compliance with the service requirements; and 3) bidding credits should apply retroactively. The *Comments of the National Telecommunications Cooperative Association* (June 2, 2003) (“NTCA Comments”), state: 1) relaxing the 75% buildout requirement would not necessarily achieve the Commission’s goal of improving penetration rates, and it should be maintained at the current level; 2) the 2000 census data shows that the Indian country penetration rate is 83%, compared to the prior 53%, limiting the bidding credits to areas with a 70% or lower penetration rate may limit too severely the tribal areas to which the bidding credits apply, and, therefore, the Commission should consider increasing the 70% threshold; and 3) the bidding credit should be extended to areas adjacent to Indian reservations that are underserved, but those areas should meet the same penetration rate standards as Indian country. The Telephone Authority herein reiterates the comments it submitted in response to the *Notice of Proposed Rulemaking*, which it filed on November 9, 1999 in this matter, *see* Second Notice ¶ 9 n.15, and replies to the comments submitted by Windsong and the NTCA.

II. COMMENTS

The Telephone Authority agrees with the NTCA that the Commission should not relax the 75% construction requirement for entities who successfully bid for Indian country spectrum, since this is not the likely cause of the underutilization of bidding credits. NTCA Comments at 1-2. Rather, the more likely cause of underutilized bidding credits is the fact that increasingly

fewer Indian reservations have penetration rates of less than 70%. Thus, the Telephone Authority agrees with the NTCA that the Commission should consider raising the threshold 70% penetration rate as a better approach to increasing the utilization of Indian country bidding credits. *See* NTCA Comments at 3. The Commission’s table of tribal lands, <http://www.fcc.gov/wtb/auctions/>, *see* Second Notice ¶ 10 n.17, shows that the average penetration rate for the listed Indian lands is above 80%, and, therefore, the availability of under-70% lands is rapidly diminishing. The Telephone Authority agrees with the Commission, however, that this issue is in flux, and “that it is premature to expand the program . . . to areas with penetration rates of greater than 70 percent at this time.” Second Notice ¶ 16. The Commission should determine whether bidding for spectrum on Indian lands with a less than 70% penetration rate has been exhausted, and subsequently determine whether to increase the threshold penetration rate above 70%.

In determining whether there are areas within Indian country with a less than 70% penetration rate for which no one has submitted a bid, and consequently, whether the Commission should increase the threshold penetration rate, the Commission should consult with the affected Indian tribes on a government-to-government basis. As the Commission has recognized, all persons and entities seeking to conduct business in Indian country must obtain permission from the affected tribal government. *See* Second Notice ¶ 11 (“an assignee contracting with a licensee to transfer a license for which a tribal bidding credit was received bears the risk that the tribal government may not allow the licensee to deploy facilities on its land.”). It is well-established that Indian tribes have the power to decide who may do business on their reservations. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137, 144 (1982); *South*

Dakota v. Bourland, 508 U.S. 679, 688 (1993) (citing *Montana v. United States*, 450 U.S. 544, 558-59 (1981)). It is also well-established that federal agencies must consult with the affected Indian tribal government prior to making decisions that will affect the tribe or its lands. Government-to-Government Relations with Native American Tribal Governments § a, 59 Fed. Reg. 22,951 (Apr. 29, 1994); Consultation and Coordination with Tribal Governments, Executive Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998); *Accord* 25 U.S.C. § 3502 (codifying tribal consultation). Independent agencies such as the Commission should also “comply with the provisions of this [consultation] order.” Executive Order No. 13,084 § 6, 63 Fed. Reg. 27,656.

While the Commission may determine in the first instance whether a particular Indian reservation has a penetration rate of less than 70%, the Telephone Authority reiterates that the tribal determination of who may provide wireless services within that reservation is a critical aspect of tribal self-governance and self-determination, a policy which the federal government has embraced:

It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.

Indian Financing Act of 1974, 25 U.S.C. § 1451. *See also* Indian Reorganization Act of 1934, 25 U.S.C. §§ 461, 462, 463, 464, 465, 466-70, 471-73, 474, 475, 476-78, 479 (“IRA”); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450-450n; Indian Health Care Improvement Act, 25 U.S.C. §§ 1601(a), 1602. *Accord Memorandum Opinion and Order, In re*

the Matter of AB Fillins, 12 FCC Rcd 11755, 11759 (1997). Congress acknowledges that, “Indians will never surrender their desire to control their relationships both among themselves and with the non-Indian governments, organizations, and persons.” 25 U.S.C. § 2501(3). *Accord* 25 U.S.C. § 2502(e) (Congressional commitment to “Federal relations with the Indian Nations.”).

Only by consulting with individual tribal governments on a case-by-case basis can the Commission as a practical matter determine whether an Indian reservation is underserved, and also determine the manner in which that tribal government may wish to address the fact of underservice. Thus, while the Telephone Authority acknowledges the Commission’s requirement that successful bidders certify that they have “consult[ed] with the tribal government regarding the siting of facilities and deployment of service on the tribal land,” Second Notice ¶ 10, that does not relieve the Commission of its responsibility to carry out federal policy promoting government-to-government consultation with tribal governments regarding the degree of service and the manner in which the tribe wishes to address any deficiency. Government-to-government consultation should be the central aspect in the Commission’s examination whether it should increase the 70% threshold penetration rate for tribal land bidding credits.

As an agency of the United States, the Commission has a responsibility to carry out the United States’ trust obligations to Indian tribes. Accordingly, the Telephone Authority agrees that those who successfully bid for spectrum covering Indian country must certify their compliance with the Indian lands service requirements directly to the Commission. Second Notice ¶ 10. In this way, the Commission will be able to ensure that those providing telecommunications services are doing so consistently with federal and tribal regulatory requirements. The Telephone Authority disagrees, then, with Windsong that the Commission

should permit carriers to self-certify. Windsong Comments at 6-8. It is the Commission's trust responsibility to Indian tribes to ensure that all carriers who serve Indian country, whether from facilities located within or without reservation boundaries, *contra id.* at 7, have received the proper permission to do so. The Telephone Authority urges the Commission to continue to exercise its fiduciary oversight over wireless services in Indian country and reject Windsong's proposal to allow self-certification.

The Telephone Authority also agrees with the NTCA that the Commission could expand the bidding credits program to underserved rural areas which are adjacent to Indian lands, consistent with the Commission's goal of improving telecommunications service availability nationwide. NTCA Comments at 3-4. The Telephone Authority also agrees with the NTCA that any such expansion should be on the same terms that apply to Indian lands. *Id.* at 4.

The Telephone Authority expresses no opinion regarding Windsong's argument that bidding credits should apply retroactively. Windsong Comments at 4-6. The Telephone Authority submits that along with its continuing analysis of the appropriate threshold penetration rate for application of the bidding credits, the Commission should also study the question whether retroactive application of the bidding credits will provide additional incentive to providers already serving spectrum that covers Indian country to expand their services to include those Indian lands.

III. CONCLUSION

The Telephone Authority believes that the Commission should take steps to improve the utilization of tribal lands bidding credits for wireless spectrum. The Commission should, in consultation with the affected tribal governments, analyze whether telecommunications service

penetration rates have improved sufficiently in Indian country to warrant an increase in the threshold penetration rate above the current 70%. This, rather than relaxing build-out requirements, is more likely to attract additional bidders for wireless spectrum in Indian country. In examining these options, the Commission should continue to exercise its trust responsibility to Indian tribes and maintain regulatory oversight of all wireless providers serving Indian country.

Dated: June 17, 2003

Respectfully submitted,

Alice E. Walker
Greene, Meyer & McElroy, P.C.
1007 Pearl Street, No. 220
Boulder, Colorado 80302
(303) 442-2021

*Attorneys for the Cheyenne River Sioux
Tribe Telephone Authority*

By: 
Alice E. Walker