

**Before the  
Federal Communications Commission  
Washington, D.C. 20054**

In the Matter of	)	
	)	
Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands	)	WT Docket No. 03-66 RM-10586
	)	
Part 1 of the Commission's Rules - Further Competitive Bidding Procedures	)	WT Docket No. 03-67
	)	
Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico	)	WT Docket No. 02-68 RM-9718
	)	
Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands	)	IB Docket No. 02-364
	)	
Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems	)	ET Docket No. 00-258
	)	
To: Office of Commission Secretary	)	

**Reply Comments of Native Public Media**

Native Public Media ("NPM") submits these reply comments in the above-captioned proceeding to address how the Commission should license unassigned spectrum in the Educational Broadband Service.<sup>1</sup>

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<sup>1</sup> *Third Order On Reconsideration And Sixth Memorandum Opinion And Order And Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking and Declaratory Ruling*, FCC 08-83, released March 20, 2008 [hereinafter "Second FNPRM"].

## **I. Introduction**

NPM represents the media interests of Native America through radio, journalism, new technologies and platforms, and public policy to advance the educational missions of Native communities. NPM advocates for Native-owned community media that serve not only educational goals, but also communicate vital information about public safety, health, community events, and help preserve Native cultures and languages.

Having witnessed the many positive experiences of the Native Media System that broadcasts Native educational programming, NPM has a special interest in the Educational Broadband Spectrum (“EBS”) that is set aside for educational entities. Hundreds of tribal schools and offices of education serve Native communities. NPM believes that media has a vital role to play in supporting the education, economic and community needs of Native peoples. The ability of Native Americans to access, operate, produce, participate in and control critical media outlets is essential to the future of Native America, and given the significant lack of Native voices in media, including educational media, as well as the historical lack of quality broadband service among tribal communities, the importance of our access to EBS spectrum cannot be overstated.

NPM believes that, when developing the rules for licensing the EBS, the Commission should place a primacy on the needs of Native Americans to access this unassigned spectrum so we can serve rural and historically underserved tribal communities. Opening up the EBS to the Native American community, and placing a priority on its use by Native Americans, would create incredible opportunities for an important segment of the new entrant community and would enhance the diversity of ownership in broadcasting and wireless services, with potential benefits for public safety as well. In addition, it would advance the tribal (and hence individual)

sovereignty values upon which Native Americans place a premium. To exercise both, individuals have a responsibility, among other things, to be informed of the issues about which decisions are being made. To do so, access to electronic media is essential. In today's complex world, the notion of literacy goes far beyond the ability to read. There must be an ability to understand and operate in a world that is becoming increasingly dominated by communications delivered through a variety of electronic mediums. Excluding Native American communities from the informational and educational broadband highways – either financially, culturally, or politically – risks leaving our tribal societies behind while others enjoy the advantages that are often taken for granted in other communities. Herein, NPM articulates its thoughts on the way in which the Commission can ensure that Native Americans enjoy priority access to the EBS, and thus take an important step toward advancing the very real needs of Native communities.

**I. Any Method Chosen for Assigning the EBS Should Give Priority to “Eligible Entities,” the Definition of which Should Account for the Special Relationship Between Native American Tribes and the Federal Government.**

In considering the manner in which the EBS is assigned, the Commission should follow the same path it has followed in the radio broadcast services by giving priority to “eligible entities,” the definition of which – as discussed in NPM’s Comments in *Promoting the Diversification of Ownership in the Broadcasting Services* – should include “Indian Tribes” and “Tribal Governments.”<sup>2</sup> Such an approach properly reflects the unique relationship between the federal government and Indian Tribes. In its Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes, the Commission acknowledges that the “Federal government has a federal trust relationship with Indian Tribes, and this historic trust relationship requires the federal government to adhere to certain fiduciary standards in its dealings with

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<sup>2</sup> See Comments of Native Public Media and The National Federation of Community Broadcasters, *In the Matter of Promoting Diversification of Ownership In the Broadcasting Services*, MB Docket No. 07-294, at pp. 3-7.

Indian Tribes.”<sup>3</sup> Further, the Commission has acknowledged that “certain communities, particularly Indian reservations and Tribal lands, remain underserved”<sup>4</sup> and has sought to further the goals of competition, localism, and diversity in broadcasting by incorporating “Indian policy goals into its ongoing and long-term planning and management activities.”<sup>5</sup> By giving priority in EBS licensing to applicants such as Indian Tribes and Tribal Governments, which are acutely underrepresented in communications media even in comparison with other minority voices, the Commission would advance its stated policy goals regarding Native Americans and promote diversity by providing opportunities for communities with significantly underrepresented viewpoints.

In assigning the EBS, strengthening and expanding the voice of Native America should be one of the Commission’s primary goals. There are over 2.5 million Native Americans in the United States and 563 Native Nations; however, the disadvantaged situation of many Native Nations hinders our ability to gain ownership and maintain strong broadcasting stations. There is little funding available for the initiation and development of Native television and radio on many reservations. In addition, Native stations are limited in their capacity to produce quality programming due to shoestring budgets, distances radio personnel and staff must travel to get to the station, and the absence of broadcast training opportunities in tribal communities. The less than ideal circumstances under which they operate further hinder the ability of Native stations to participate in the larger broadcast community. Bringing robust communications technology to

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<sup>3</sup> Federal Communications Commission, *In the Matter of Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, FCC 00-207, p. 3 (“hereinafter “Policy Statement”).

<sup>4</sup> *Id.* at 1.

<sup>5</sup> *Id.* at 5.

Native American lands has been a constant struggle,<sup>6</sup> but helping Native communities gain access to the EBS will do much to create more opportunities and strengthen the voice of Native broadcasting.

## **II. The Commission Should Adopt “Open Entry” Application Rules For Licensing Unassigned EBS Spectrum**

### **A. A point system is the best way to afford a fair and meaningful opportunity for “eligible entities” to acquire EBS spectrum.**

In its comments, The Catholic Television Network (“CTN”) observed that, “[f]or many years, the EBS spectrum was licensed through a comparative point system that favored local accredited applicants.”<sup>7</sup> That point system also preferred applicants that requested four or fewer channels within the proposed service area.<sup>8</sup> Similarly, the point system used for awarding non-commercial educational broadcast stations prefers applicants that do not already hold licenses for the proposed service areas.<sup>9</sup> As CTN further observed, when the law changed to require auctions to license spectrum without exempting EBS, the Commission was so concerned that it asked Congress in 2000 to create such an exemption, but Congress failed to act.<sup>10</sup>

NPM agrees with CTN and other commenters that auctions are not well-suited for EBS. NPM thus urges the Commission to renew its request to Congress to exempt EBS auctions so that a point system can be used for selecting among applications for new EBS licenses. Any

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<sup>6</sup> The first tribal radio stations only began in the 1970’s. *See Native Public Media Brings Native American Voices to Washington Policymakers*, Media Minutes (May 30, 2008).

<sup>7</sup> Comments of The Catholic Television Network, p. 2.

<sup>8</sup> 47 C.F.R. §74.913 (1998).

<sup>9</sup> *See*, e.g. 47 C.F.R. §73.7003(b)(2) (two points awarded for local diversity of ownership if the principal community contours of the applicant’s proposed station in which any party to the application holds and attributable interest do not overlap).

<sup>10</sup> CTN Comments, p. 2.

point system adopted, however, should afford special status to “eligible entities,” which (as discussed above) must explicitly include “Indian Tribes” and “Tribal Governments.”

A group of educational associations which jointly filed comments in this proceeding observed that education is the “raison d’etre of EBS,” and that, “as its very name suggests, EBS was intended for educational purposes.”<sup>11</sup> NPM agrees. For that reason, NPM believes that unassigned EBS spectrum should be licensed in a manner that allows for “open entry” and serves the educational missions of individual licensees, and not in a manner that closes off the chance for many educational entities to apply for EBS licenses.

A point system that compares applicants proposing 35-mile Geographic Service Areas (GSAs), the same service areas of existing EBS licensees, is the fairest method for distributing licenses for unassigned EBS spectrum among a wide diversity of educational entities. The point system that was in place for this spectrum for many years, as well as the point system used for noncommercial educational broadcasting, should be proof of that. A first phase of licensing using a point-system then could be followed by a second phase of applications for the remaining “white space” on the basis of larger geographic areas, such as Basic Trading Areas.

**B. If a point system is not used, another type of open entry process should be adopted that also gives primacy to applications by eligible entities.**

NPM appreciates that the Commission’s ability to use a point system requires that Congress first create an exemption for EBS from the auction law. If that does not happen, however, there are alternatives to auctions for the EBS spectrum, as the Commission and commenters such as CTN and the Educational Associations have recognized. As do CTN and

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<sup>11</sup> Comments of American Association of School Administrators (AASA), Association of Educational Service Agencies (AESNA), Association of School Business Officials International (ASBO), Consortium for School Networking (CoSN), International Society for Technology in Education (ISTE), National Association of State Board of Education (NASBE), National Education Association (NEA), National Association of Independent Schools (NAIS), National Rural Educational Association (NREA), Organizations Concerned about Rural Education (OCRE), and Rural Schools and Community Trust (“Educational Associations”), p. 4.

the Educational Associations, NPM favors an “open entry” alternative. Such an alternative should favor “eligible entities,” which as discussed above should explicitly include “Indian Tribes” and “Tribal Governments.” The licensing rules should provide a genuine opportunity for Native licensees to serve their communities (by not requiring them, for instance, to propose to serve an entire Basic Trading Area), and not favor existing EBS licensees by simply expanding currently licensed GSA boundaries.

The Commission proposed frequency coordination – on a first-come, first-served basis – as one way to avoid mutually exclusive applications.<sup>12</sup> NPM does not oppose the designation of a frequency coordinator, but believes that any “coordination” that is done must account for the under- and un-served, and otherwise underrepresented, communities in need of access to communications channels. Allocating spectrum on a first-come, first-served basis would not necessarily achieve that goal. Rather, the frequency coordinator should be instructed to give primacy to applications filed by “eligible entities” that: (1) have no existing EBS licenses and (2) propose serving Tribal Lands. There is ample precedent for such a preference in the Commission’s award of “bidding credits” to winning bidders of spectrum auctions that propose service to Tribal Lands.<sup>13</sup> Opening up the EBS, while at the same time giving priority to applicants whose voice has historically been underrepresented in the broadcasting community, would create opportunities for new entrants and enhance the diversity of ownership in broadcasting.

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<sup>12</sup> *Second FNPRM*, ¶¶202-203.

<sup>13</sup> *See* 47 C.F.R. §1.2110(f)(3). A “localism” requirement should be adopted, too, so that applicants are serving students located in the proposed area of EBS operations.

### **III. The Commission Should Reject “Maximization” Proposals**

A number of existing EBS licenses have proposed that the Commission should first “maximize” their licenses by extending their current service area boundaries to those of Basic Trading Areas (BTAs), before accepting applications from new entrants. From the perspective of Native communities, this would be a very harmful outcome.

Exhibit 1 to these comments is a map of Alaska depicting the 35-mile circle geographic service areas of existing EBS licenses. The two largest BTAs of Alaska, Anchorage (shown in pink) and Fairbanks (shown in yellow) are shown in full on the map. Tribal Lands are depicted as the smaller colored areas in the remaining places where no EBS is assigned. If the boundaries of the current EBS contours are extended to BTA boundaries, every eligible entity in every Tribal Land located outside the circles will be completely shut out from any opportunity to even apply for an EBS license.

Another demonstration of the unfair outcome of “maximization” is provided in Exhibit 2. Fort Belknap College, located in Harlem, Montana, is a two-year accredited institution providing educational opportunities for the residents of the Fort Belknap Reservation. Fort Belknap College is located in a large area where EBS spectrum is currently unassigned. It is eligible to apply for an EBS license, but that opportunity will disappear if existing EBS contours are “maximized” to the boundaries of the Great Falls BTA to completely cover the Fort Belknap Reservation. Other examples of reservations that will be shut out of EBS licensing by “maximization” can be easily identified in Exhibit 2. The unfairness of that approach, if adopted, will doubtlessly be repeated many times across the country as existing licensees receive more EBS spectrum and Indian Tribes end up empty-handed.



Exhibit 1

The circles represent existing EBS contours in the Basic Trading Areas for Anchorage, AK (shown in pink) and Fairbanks, AK (shown in yellow). The other colored areas in the BTAs represent Tribal Lands. The ones located outside the existing EBS contours will have no opportunity to apply for EBS licenses if those contours are “maximized,” i.e. expanded to cover the Basic Trading Areas in their entirety.

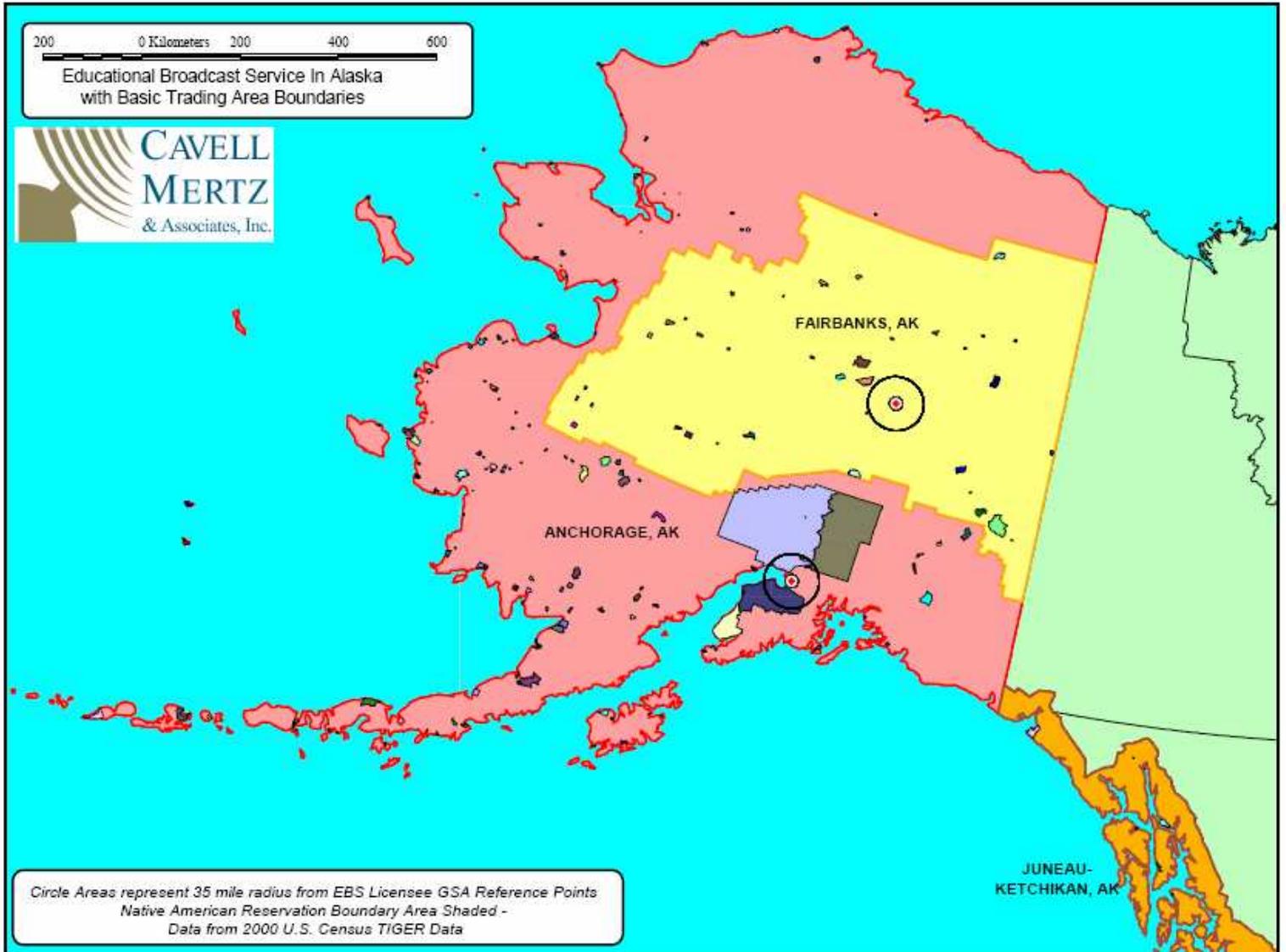


Exhibit 2

With “maximization” of existing EBS contours in the BTA for Great Falls, MT, new entrants such as Fort Belknap College will have no opportunity to file for EBS licenses. Indeed, no other eligible entity will be able to apply.

