NATIVE PUBLIC MEDIA

Post Office Box 3955
Flagstaff, Arizona 86003
Telephone: 928-853-2430
www.nativepublicmedia.org

June 12, 2009

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WT Docket No. 03-66; 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

Dear Ms Dortch:

On behalf of Native Public Media ("NPM"), I am responding to the ex parte letter filed by Catholic Television Network ("CTN") in the referenced proceeding on June 1, 2009.

In its letter, CTN described a new proposal to license EBS white spaces, which it intends as a "compromise to reconcile fundamental differences among participants in this proceeding so as to allow the Commission to finally resolve this issue and license EBS throughout the nation."[1] NPM appreciates CTN's effort to present a compromise. Unfortunately, however, CTN's proposal fails to accommodate NPM's concern that many Tribes will be denied a meaningful opportunity to obtain EBS white space licenses if the licensing process includes, as CTN proposes, expanding incumbent EBS licenses to the boundaries of Basic Trading Areas (BTAs).

Under CTN's proposal, EBS white spaces would be licensed on the basis of BTAs. During a filing window, an eligible entity with a "physical presence" in a BTA could file one application for one channel group for that BTA, to "request a license covering all of the white space in the BTA or a specific contiguous geographic area (as specified by the applicant) within the white space in the BTA." A Public Notice would list applicants and the areas and channels applied for, and non-conflicting applications would be processed and granted. Conflicting applicants would have 90-days to reach "voluntary settlements." If they fail to do so, their applications would be dismissed. A second round of applications would follow with no "localism requirement." If conflicting applicants again failed to reach "voluntary settlements" then "any channels remaining in a BTA would be licensed though GSA expansions upon application of incumbent licensees, which would include newly-licensed entities that obtain white space licenses."[2]

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[1] *CTN June 1, 2009 Ex Parte Letter, p. 1.*

[2] *Id.* at Attachment.

From NPM's perspective, the problem with CTN's proposal is twofold. First, incumbent licensees will have all the leverage in the "voluntary settlement" process because, absent settlement, all conflicting applications will be dismissed, and if after a second round of applications there is still no settlement, the service areas of incumbent licensees will be expanded to BTA boundaries. Knowing this, what incentive will an incumbent licensee have to settle with a conflicting white space applicant? NPM sees none. In short, under CTN's proposal, incumbent licensees can simply file BTA-wide applications, not settle, and then have their licenses expanded to BTA boundaries.

Second, the use of BTA service boundaries for the purpose of "expansion" of incumbent licenses severely disadvantages the Tribes. For example, as shown in NPM's reply comments in this proceeding, if boundaries of incumbent EBS licensees in the two largest BTAs in Alaska (Anchorage and Fairbanks) are extended to BTA boundaries, every eligible entity in every Tribal Land in those BTAs will be precluded from obtaining an EBS license.[3] This is not just a possibility but the likely outcome under CTN's proposal, since incumbent EBS licensees in the Alaska and Fairbanks BTAs would be allowed to file applications to serve the entire BTAs and then, in the absence of "voluntary settlements" they have no real incentive to reach, obtain expansion of their existing licensees to the boundaries of those BTAs.

No party in this proceeding has convincingly demonstrated why a community college, for example, needs its EBS license expanded to cover an *entire* BTA to fulfill its educational mission, especially if it means preventing new entrants from acquiring any EBS license.

In sum, CTN's proposal gives incumbent licensees far too great an advantage in obtaining EBS white space licenses, to the detriment of new entrants such as Indian Tribes.

The Commission Should Adopt A Tribal Priority For EBS White Space Licenses

NPM takes this opportunity to restate its own recommendations for EBS white space licensing, which it believes should recognize the Commission's unique trust relationship with Indian Tribes. As shown below, in recognition of principles of tribal sovereignty, the obligations of Tribal Governments to their members on tribal lands, the government-to-government relationship between tribes and the federal government, and the latter's historic trust responsibility to promote self-sufficiency and economic development among tribes, the Commission should adopt a tribal priority for awarding EBS white space licenses.

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[3] *See* Exhibit 1 to NPM's October 22, 2008 reply comments filed in this proceeding.

In its *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes,* the Commission acknowledged 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 Indian Tribes."[4] The Tribal Policy Statement also acknowledged that "certain communities, particularly Indian reservations and Tribal lands, remain underserved,"[5] and that the Commission intends 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."[6]

Citing the Tribal Policy Statement, the Commission recently proposed to create a Section 307(b) priority for Native American and Alaska Native tribal groups serving tribal lands when awarding licenses for new radio broadcast stations.[7] In creating this tribal priority for radio broadcast licensing, the Commission reaffirmed its federal trust relationship with the Tribes and "a longstanding policy of promoting tribal self-sufficiency and economic development, stating, "[w]e therefore believe that it is in keeping with our policy toward and relationship with Tribes, as well as the public interest, to aid Tribes and tribal consortia in their efforts to provide educational and other programming to their members residing on tribal lands, as well as to assist them in acquiring and operating commercial stations for purposes of business and commercial development."

Moreover, last month the Commission's Acting Chairman reported:

> Many Native Americans are still struggling to receive basic telephone service and, based on the Commission's data, have the lowest percentage of basic telephone service subscribers by group. Indeed, 2007 data from the Census Bureau's Current Population Survey reveal that nationwide, American Indian/Alaskan Native households have a broadband subscription rate of only 30 percent, by far the lowest subscription rate among any ethnic group identified. The situation is likely to be even worse in rural areas.[8]

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[4] *Federal Communications Commission, In the Matter of Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, FCC 00-207 (June 23, 2000), p. 3 [hereinafter "Tribal Policy Statement"].

[5] *Id*. at p. 1.

[6] *Id*. at p. 5.

[7] *See In the Matter of Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, Notice of Proposed Rulemaking*, MB Docket No. 09-52; RM-11528, released April 20, 2009, at ¶¶19-24.

[8] BRINGING BROADBAND TO RURAL AMERICA, REPORT ON A RURAL BROADBAND STRATEGY, Federal Communications Commission Acting Chairman Michael J. Copps, May 22, 2009, at ¶30 (footnotes omitted).

The Chairman's report further stated that it was "critical that federal agencies devote increased attention to improving coordination and collaboration with Tribal governments, consortia, and organizations regarding broadband deployment in rural Tribal areas."[9]

Broadband penetration on Indian lands is estimated at less than ten percent.[10] Given the historical lack of quality broadband service in tribal communities, and in view of the educational purpose of Educational Broadband Service, a tribal priority is as necessary and as justified for EBS licensing as it is for radio broadcasting. By giving priority in EBS licensing to Indian Tribes and Tribal Governments, which are acutely underrepresented in all types of communications media, the Commission would advance the goals of the Policy Statement regarding Native Americans.

NPM thus makes the following recommendations in the referenced proceeding:

1. The Commission should adopt a tribal priority for EBS white space licensing. The tribal priority should take the form of a preference for EBS white space applicants that are federally-recognized Tribes proposing service to Tribal Lands, and should apply to any EBS white space licensing process adopted by the Commission. Thus, if a filing window system is implemented in a process designed to avoid mutually exclusive applications and auctions, the first window should be limited to applicants claiming the tribal priority.

2. The EBS eligibility rule (47 C.F.R. §27.1201) should be modified to explicitly include all federally-recognized Indian Tribes and Tribal Governments. Although they may provide many programs and services for tribal members, including educational programs and services, they may not be "engaged in the formal education of enrolled students" as stated in the current eligibility rule. In recognition of this and the Policy Statement, Indian Tribes and Tribal Governments should be eligible for EBS licensing regardless of whether they are engaged in "formal education of enrolled students."

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[9] *Id*. at ¶62 (footnotes omitted). The *Tribal Policy Statement* provides that the Commission "in accordance with the federal government's trust responsibility, and to the extent practicable, will consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources." *Tribal Policy Statement*, p. 4.

[10] United States General Accountability Office, *Challenges To Assessing And Improving Telecommunications For Native Americans On Tribal Lands*, (GAO-06-189)(Jan. 2006).

3. NPM continues to recommend that the Commission renew its request to Congress to exempt mutually exclusive EBS white space applications from the auction mandate. If Congress does so, the Commission should utilize a point system to process such applications as it has used in the past for EBS licensing and currently uses for Noncommercial Educational (NCE) FM radio service licensing.

4. The Commission should not adopt BTAs as the service areas for EBS white space licenses. If the Commission uses wide-area service licensing for EBS white spaces, it should use Cellular Market Areas (CMAs), thereby reducing the chances for application conflicts and increasing opportunities for new entrants such as Tribes. CMAs generally are smaller than BTAs and therefore a better "fit" geographically for the typical EBS white space applicant. An applicant should be allowed to file an application for one channel group in each CMA where it has a physical presence or, in the case of Indian Tribes and Tribal Governments, each CMA where Tribal Lands are located.

Absent a tribal priority as described above, NPM opposes expanding incumbent EBS licenses in the event conflicting applicants do not reach "voluntary settlements."

Thank you for this opportunity to present NPM's positions in the referenced proceeding. NPM trusts the Commission will reach a fair decision on EBS white space licensing that takes account of the important objectives of the Policy Statement regarding Native Americans.

Sincerely,

Loris Taylor, Director
Native Public Media

cc (via email):
Chairman Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Robert M. McDowell
Jennifer Schneider
Renee Roland Crittendon
Angela Giancarlo
James Schlichting
Joel Taubenblatt
Blaise Scinto
John Schauble