**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, DC 20554**

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| In the Matter of | ) | |
| Further Inquiry into | ) | WT Docket 10-208 |
| Tribal Issues Relating to | ) | |
| Establishment of a Mobility Fund | ) | |

To: The Commission

**COMMENTS OF NTCH, INC.**

As a provider of wireless communications services in many rural areas and as a prospective provider in tribal areas, NTCH, Inc. ("NTCH") offers these brief comments in an effort to ensure that the Commission, in its zeal to facilitate mobile service to tribal areas, does not inadvertently impede and delay such service. In this regard, NTCH has three observations.

First, the Further Inquiry proposes to give tribally-owned or controlled providers a preference in the auction. This suggestion is well-meaning but misguided. There is no reason to assume that tribes or entities controlled by tribes have any expertise in constructing, operating or maintaining sophisticated wireless networks. In some cases, tribes have sophisticated telecom expertise or access to expert consultants. But in others, the tribes are no more qualified to construct or operate a mobile communications network than anyone else. Award of the rights to serve the tribal area should be based on merit rather than racial or tribal status. Not to base the award on qualifications would do the tribes a disservice and probably doom the tribal areas to slower or less reliable service.

Tribal ownership of communications facilities is fine where the tribe is truly competitive with private companies willing to provide the same services. In fact, all other things being equal, principles of diversity would argue that tribal units be preferred. But to give tribes an actual preference might well defeat the intended purpose of getting service to the tribal territory and its inhabitants quickly and reliably, which is the ostensible object of this entire program. An incident from World War II is instructive here. In the Burma campaign, it was decided to allow the fledgling Chinese Air Force to conduct a bombing raid under the watchful oversight of the U.S. Army Air Force which had conducted all air operations to that point. The idea was to give the Chinese people a sense of ownership of the battle against the Japanese. The U.S. personnel then watched aghast as the Chinese Air Force flew off and bombed the wrong village. Making the indigenous people feel good did nothing to advance the war effort, not to mention the suffering experienced by scores of unnecessary casualties.

The lesson here is that this is not a social engineering project – the Commission's job is to quickly get mobile service to areas that need them, not to foster tribal pride or profits. This is, of course, in addition to the obvious problems which would be posed by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) if the Commission established a race or ethnicity-based preference, something which the Constitution regards with strong disfavor. Unless the Commission is prepared to overcome the "strict scrutiny" test required by *Adarand*, it should not go down this road.

Second, the Further Inquiry considers whether tribes should have a say in designating which areas have the highest priority for Mobility Fund access. At first blush, this proposal seemed to make sense: allow the tribes themselves to identify needy areas. But on reflection,

this skewing of the process would seem to be an unfair disservice to other needy areas. The conception of the nationwide auction proposed in the Mobility Fund proceeding is to let the marketplace determine how best to serve areas with the greatest need and to allocate the funds on that basis. If tribes are allowed to prioritize themselves, they will certainly do so, but this will necessarily be to the detriment of some other area which may actually be more needy. Many tribal areas are certainly in dire need of mobile communications, and their eligibility for funds should be based on that need – not on a special preference for Indians *per se*. There is certainly no reason for the Commission to declare that a needy rural area in Nebraska should be denied service in deference to a *less* needy tribal area. Again, the operative principle should be to ensure that tribes have equal access to mobile communications with everyone else – not *better* access.

Finally, the Commission seeks input on "engagement" with tribal governments prior to auction. The concept seems to be that early engagement will ensure that the proposed network meets the needs of the tribe. Again, the concept sounds good, but in fact will do the opposite. There is understandably not much incentive (and usually no financial support) for tribes to develop detailed service requirements, needs assessments, rights-of-way procedures, etc. in the absence of a concrete commitment to provide service on their lands. The Commission's proposal presupposes a fairly detailed and expensive plan for the provision of mobile service which the tribes would have to undertake themselves or commission someone else to do at great expense with no assurance that anyone would actually place bids to serve their territory. Indeed, if they did undertake such a study, the plan they developed might actually *deter* companies from bidding to serve their areas. At the same time, if the tribes were going to place bids themselves

to serve their territory, they would not necessarily want to share the fruits of their study with entities that might be competing with them in the auction. So the idea that tribes would routinely provide such input to multiple potential auction bidders in advance of an auction is not realistic.

In any case, tribes should be affirmatively *barred* from imposing any conditions on the network constructor and operator beyond those normally required of business operations in the tribal areas. Tribes, like other governmental units, may have an incentive to try to build employment concessions or other concessions, into the requirements demanded of mobility providers. The classic example here is cable TV franchisors (typically municipal or county governments) whose demands for various freebies and other concessions from cable TV operators eventually led to limits being imposed. Imposition of conditions to, for example, provide jobs to members of the tribe at higher-than-market rates or other similar concessions would raise the cost of constructing and operating the network. Such conditions should not be permitted here or in any situation where governmental units have a say in the licensing decision.

If tribes or other governmental authorities are allowed to impose self-serving conditions on the auction winner, the basis of the auction will be distorted because the cost of developing the network will be artificially increased after the fact. The very possibility of such financially onerous and unjustified conditions will either deter bidders in the first place or incent them to bid higher than otherwise necessary because of the potential for having to accommodate possible tribal financial demands. Again, the object of the FCC's program is not to redistribute wealth from the Mobility Fund to Indians – it is, rather, to ensure that Indians and all other rural Americans have access to high speed mobile communications. NTCH is confident that if the market is allowed to work in an undistorted manner, bids to develop the networks at the lowest

cost to the American people will be received, awards to serve tribal areas either by tribes or private firms will be made, and many Indians will be hired in the natural process of building out facilities in the areas where Indians live and work. That is exactly how the process should work.

Respectfully submitted,

NTCH, Inc.

By:_____/s/_____

Donald J. Evans

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