



ROSEBUD SIOUX TRIBE

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May 10, 2013

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The Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

Re: Tribal Mobility Fund Phase I Auction Scheduled for October 24, 2013
AU Docket No. 13-53

COMMENTS OF THE ROSEBUD SIOUX TRIBE CHALLENGING THE COMMISSION'S CRITERIA FOR EXCLUDING CENSUS BLOCKS FROM ELIGIBILITY FOR TRIBAL MOBILITY FUND SUPPORT

Pursuant to the Commission's *Public Notice* of March 29, 2013,¹ and Section 1.419 of the Commission's Rules, the Rosebud Sioux Tribe submits these comments challenging the Commission's criteria for excluding census blocks from eligibility for Tribal Mobility Fund support, and proposing specific steps that the Commission should take to ameliorate the harm that will be caused if those criteria are implemented as proposed.

I. INTRODUCTION AND BACKGROUND

The Rosebud Sioux Tribe is a sovereign entity, with 15,438 enrolled members. The Rosebud Sioux Reservation has a population of 12,763, and a total land area of 1,442 square miles, located in south-central South Dakota. The Rosebud Reservation borders the Pine Ridge Reservation of the Oglala Sioux Tribe.

A wireline local exchange carrier, Golden West, provides service in some areas of the Reservation, but the majority of residents use cellular phone service from AT&T or Verizon as their primary source of telephone service. As with most of the Sioux Tribes in the Midwest, Rosebud is a predominantly rural area. As recognized by the Commission, Tribal Lands – including the Rosebud Reservation – currently are poorly served, lacking adequate access to broadband and other advanced services, and lacking access to even basic service over large portions of the Reservation. Like most Tribal Lands, the Rosebud Reservation finds that the support made available through the Commission's Universal Service programs is critical to

¹ *Tribal Mobility Fund Phase I Auction Scheduled for October 24, 2013; Comment Sought On Competitive Bidding Procedures For Auction 902 And Certain Program Requirements*, Public Notice, AU Docket No. 13-53, DA 13-323 (March 29, 2013) ("Public Notice").

maintaining the current level of service – as inadequate is it is – and is the only means of bringing improved basic service and advanced services to the Tribe.

The Public Notice establishes rules and procedures for competitive bids for the upcoming \$50 million Tribal Mobility Fund Phase I auction. The focus of these comments is the criteria that have been applied by the Commission in determining “Unserved Census Blocks” eligible for Tribal Mobility Fund support. The criteria used by the Commission to identify eligible census blocks is as follows:

1. Exclude all census blocks “without population,” as defined by the Census. (¶ 18)
2. Exclude all census blocks for which “*any* provider has made a regulatory commitment to provide 3G or better wireless service . . . notwithstanding the absence of 3G service.” (¶ 19, emphasis in original).
3. Apply other filters, such as census blocks subject to a “promise to serve” by recipients of BIP or BTOP funds, or similar federal funding commitments.

As discussed below, the application of criteria 1 and 2 have led to anomalous and patently unreasonable results, and must be revised prior to the October auction. The third criterion is not applicable to the Rosebud Reservation and so is not discussed in these comments.

II. THE PROCESS USED FOR THE IDENTIFICATION OF ELIGIBLE CENSUS BLOCKS IS INHERENTLY FLAWED AND HAS YIELDED AN ARBITRARY AND CAPRICIOUS RESULT

1. The Commission’s Selection Process Excludes Virtually All Of The Rosebud Reservation From Tribal Mobility Funding Support, Which Is A Demonstrably Unreasonable Result

As a result of applying its criteria for excluding census blocks, the Commission has determined that an area of **0.48 square mile** is eligible for Tribal Mobility Fund support. (Page 46) That is, **less than one-half mile of the Rosebud Reservation’s land area of 1,442 square miles**. In terms of road miles, the Commission’s criteria find that **3.24 road miles** are eligible for Tribal Mobility Support. (Page 46.) This for a Reservation that is more than **55 miles x 25 miles square**.

The result of the application of the Commission’s criteria is unreasonable on its face – such a miniscule amount of eligible territory effectively denies any Tribal Mobility funding for the Rosebud Reservation. Moreover, the criteria essentially conclude that every resident of Rosebud currently has 3G service, or will obtain it imminently because some provider has promised it. But this is nowhere near the case:

- The Commission defines “3G” service as “supporting circuit and packet data at rates of 2 Mbps for indoor use.” <http://transition.fcc.gov/3G/> Such high capacity service simply is not available on the Reservation.
- There are massive “dead zones” across the Reservation where no service of any kind is available.

- A map of existing radio towers clearly shows that the Rosebud Reservation lacks the infrastructure to provide adequate mobile service to its people. Appended at Attachment A is a map of the Rosebud Reservation that shows all existing mobile service towers – there are only five such towers on the entire Reservation, with an average spacing of approximately 20 miles, and large expanses of the Reservation are 40-50 miles away from the nearest tower. In contrast, a nearby non-native town is served by four towers in a 10 mile-radius area. This map alone provides prima facie evidence that the Reservation is grossly underserved.

Moreover, the result of the Commission’s selection criteria cannot be squared with prior Commission statements regarding the state of communications on Native Lands. In establishing the Tribal Mobility Fund, the Commission stated:

In the *Mobility Fund NPRM*, the Commission acknowledged the relatively low level of telecommunications deployment on Tribal lands and the distinct challenges in bringing connectivity to these areas. The Commission observed that communities on Tribal lands have historically had less access to telecommunications services than any other segment of the population. The *Mobility Fund NPRM* also noted that Tribal lands are often in rural, high-cost areas, and present distinct obstacles to the deployment of broadband infrastructure. The Commission observed that greater financial support therefore may be needed in order to ensure the availability of broadband in Tribal lands. In light of the Commission’s unique government-to-government relationship with Tribes and the distinct challenges in bringing communications services to Tribal lands, the Commission also noted that a more tailored approach regarding Mobility Fund support for Tribal lands may be beneficial.

Connect America Fund, 26 FCC Rcd 17663, 17818-19, ¶ 479 (2011) (footnotes omitted). If the Commission just repeated these findings three years ago, how can it be that the Rosebud Reservation – and most of the Sioux Tribes identified in the Public Notice – are effectively barred from receiving Tribal Mobility support?

Finally, the Commission’s criteria essentially conclude that “if nobody lives there, they don’t need service.” This completely ignores the fact that people on the Reservation have to travel from one population center to another, or to points outside the Reservation. Simply assuming that service is not needed on roads across unpopulated areas is not only arbitrary and unreasonable, it is dangerous. In a state where winter temperatures routinely fall below zero, the inability to obtain any signal in cases of accident or car failure can be – and has been – fatal.

The application of the census block eligibility criteria as reflected in the Public Notice have yielded a patently absurd result, inconsistent with the Commission’s repeated findings over many years. As such the criteria are arbitrary and capricious on their face, and must be corrected.

2. The Commission’s Selection Process Makes It Impossible For Interested Parties To Determine The Grounds On Which Any Specific Census Block Was Excluded, And So Makes It Unreasonably Burdensome, If Not Impossible, To Challenge The Exclusions

The Public Notice also contains a fundamental procedural flaw. The Notice invites affected Tribes to “identify census blocks for . . . addition to our list of potentially eligible census blocks” (§ 64), but neither the Public Notice nor the related Commission databases identifies the reason why any specific census block was eliminated in the first place. As noted above, the Commission has several criteria for eliminating a census block – lack of population, a “promise” by some provider, or federal funding that already applies to such census blocks. But there is no way for the Rosebud Tribe, or any interested party, to determine which of these criteria are responsible for excluding the census blocks on their land.

As is clear from these comments, the Rosebud Tribe disagrees with the Commission’s decision to eliminate virtually all the census blocks on their Reservation from Tribal Mobility Fund eligibility, and the Tribe wishes to reverse the exclusion for the majority of them. It is unreasonably burdensome to task the Tribe with the responsibility of researching every possible basis for excluding every affected census block on its 1,442 square mile Reservation.

3. The Rosebud Sioux Tribes Supports And Adopts The Comments Filed By The Oglala Sioux Tribe

The Rosebud Tribe has reviewed the comments being filed in this proceeding today by the Oglala Sioux Tribe, and particularly their description of the adverse impact the Commission’s proposed rules have on Tribal Lands. Those comments accurately reflect the concerns of the Rosebud Sioux Tribe as well, and we fully support them, and adopt them by reference as our own.

III. THE COMMISSION SHOULD TAKE SPECIFIC STEPS TO MITIGATE THE HARM CAUSED BY ITS UNREASONABLE EXCLUSION PROCESS

As noted above, the criteria by which the Commission has excluded the vast majority of Rosebud Reservation census blocks from Tribal Mobility Fund eligibility lead to absurd results, and so are arbitrary and capricious. To ameliorate the damage to Tribes caused by the application of these unreasonable criteria, the Commission should, at a minimum, take the following steps:

1. Do Not Exclude Census Blocks On The Basis Of Promises Of Service By Incumbent Carriers

The Commission should reverse its presumption of adequate service, based on a “promise” by a “provider” if an auction participant requests it, and provides a reasonable basis for the reversal. For example, assume a wireless provider is currently providing service, received its Eligible Telecommunications Carrier designation four years ago, and its “promise” of providing 3G service is the basis for excluding a census block from funding eligibility.

In such a case, the promising provider has been receiving, or could have been receiving, USF support for four years, but had yet to build out 3G service. The Commission should no longer rely on the “promise” in this situation, because the provider failed to build out in a reasonable time, and should consider auction bids for those census blocks from competing bidders. Such a conclusion would be fully consistent with the obligation that the Public Notice places on winning bidders – they are obligated “to deploy 3G service within two years . . . after the date on which it is authorized to receive support.” (§ 9)

Giving Tribes the ability to reverse the exclusion of census blocks based on unfulfilled promises of another provider would ameliorate the harm caused by the rote application of this criterion. It would also fix a rule that is obviously skewed toward incumbent providers, and would allow new, Tribally-owned service providers to compete for the funding that is essential to provide service to high-cost, underserved Tribal Lands.

2. Provide Support For Service Covering Roads That Transit Unpopulated Census Blocks

The Public Notice focuses on providing service to the maximum number of people – bids will ranked on a per-population basis. (§ 37 and passim.) This is entirely appropriate because it ensures the largest impact for limited subsidy dollars. However, measuring service to the greatest number of residents must not be equated to service to population centers. To do so would be to limit “mobile” phone service to the same function as a landline or fixed wireless service.

The Rosebud Reservation, like all rural communities, does not consist of isolated and self-contained population centers. Rather, there is constant travel across the Reservation, as residents commute to work, and pursue business, family and personal matters across the Reservation, and between points on the Reservation and off-Reservation destinations. Limiting bid evaluations to service only within the limited number of towns on the Rosebud Reservation would not support a useable mobile service to support the daily needs of the population.

The average low temperature for January, February and March in South Dakota is in the single digits, and extended periods of below-zero weather are common, as are blizzards. http://en.wikipedia.org/wiki/South_Dakota When residents travel across the Reservation in these conditions, an accident or car failure can be – and has been – fatal. It is of critical importance that the roads across the extensive dark areas on the Reservation be covered with basic voice and data service, so that motorists can call 911 and family and friends. The Commission must consider, and provide a preference for, bids that address this critical concern of the Tribe.

3. Grant Exceptions From Exclusions On A Census Block-Specific Basis If Such Requests Are Included In Auction Bids

As discussed in section II above, the criteria employed by the Commission to exclude census blocks from Tribal Mobility Fund support have yielded in patently unreasonable results,

and have effectively denied the Rosebud Reservation access to these funds. This fundamental flaw must be addressed.

This problem can best be addressed by considering exceptions to the Commission's rules on an ad hoc basis. That is, if a bid for the Tribal Mobility Fund shows that particular census blocks are underserved, that an incumbent ETC's "promise" of service has not been fulfilled within a reasonable time, or that an unpopulated census block requires support to provide service to motorists or for other reasons, these showings cannot be ignored by the Commission. Indeed, as discussed throughout this section, such showings will be deserving of a preference in considering a bid. The Commission is fully empowered to forbear from applying its rules when the public interest requires it – indeed, it is required to do so by Section 10 of the Communications Act (47 U.S.C. § 160). Whether characterized as a waiver, exception, exemption or forbearance, the Commission should not apply its restrictive exclusion criteria if a bid application makes the case for it.

4. Establish An Auction Preference For Providers Of 4G Service And For The Highest Broadband Speed

A final flaw in the Public Notice is that it does not differentiate between types of advanced services, but rather lumps 4G service and data speeds in excess of standard 3G service in with a category of "3G or better." (¶ 2 & n.3, and passim.) The Public Notice only distinguishes 3G and superior services when defining the deployment responsibilities of a winning bid (¶ 9 & n.63.)

Yet the distinctions between 4G and 3G service are dramatic, as are the consumer benefits of faster upload and download speeds, and synchronous versus non-synchronous transmission. The Commission has long recognized this – in May of 2010, in response to an initiative announced by Verizon, Chairman Genachowski and then-Commissioner Baker issued a joint statement stressing the importance of bringing 4G technology to rural areas:

Bringing the benefits of mobile broadband to rural America is one the Commission's top priorities. The news of Verizon Wireless' plan to partner with rural providers to accelerate investment in 4G networks is very encouraging. Seamless universal connectivity is essential to economic growth and world-class technology leadership. We look forward to learning more about Verizon Wireless' initiative, its successful implementation, and other examples of industry-led innovation.²

This statement reflects a longstanding Commission preference for more interactive and higher-bandwidth technology, and applies equally today to 4G and other high-speed applications on Native Lands. Indeed, such a preference for advanced services is mandated by Section 706 of the Communications Act (47 U.S.C. § 706).

² Joint Statement Of Chairman Julius Genachowski And Commissioner Meredith A. Baker On Verizon Wireless' Rural 4G Initiative, FCC News, released May 12, 2010.

To be consistent with the Commission's long-established practice, and the mandate of § 706, any evaluation of competitive bids for the Tribal Mobility Fund must award a preference for 4G service over 3G, and higher bandwidth applications over lower bandwidth.

IV. CONCLUSION

The current criteria for excluding census blocks from Tribal Mobility Fund support eligibility eliminate support for the vast majority of the land area of the Rosebud Reservation, and of other Tribes. In order to prevent an unjust, unreasonable, and arbitrary and capricious result, the Rosebud Sioux Tribe respectfully requests that the Commission amend its auction rules as discussed above.

Respectfully submitted



Cyril Scott, President

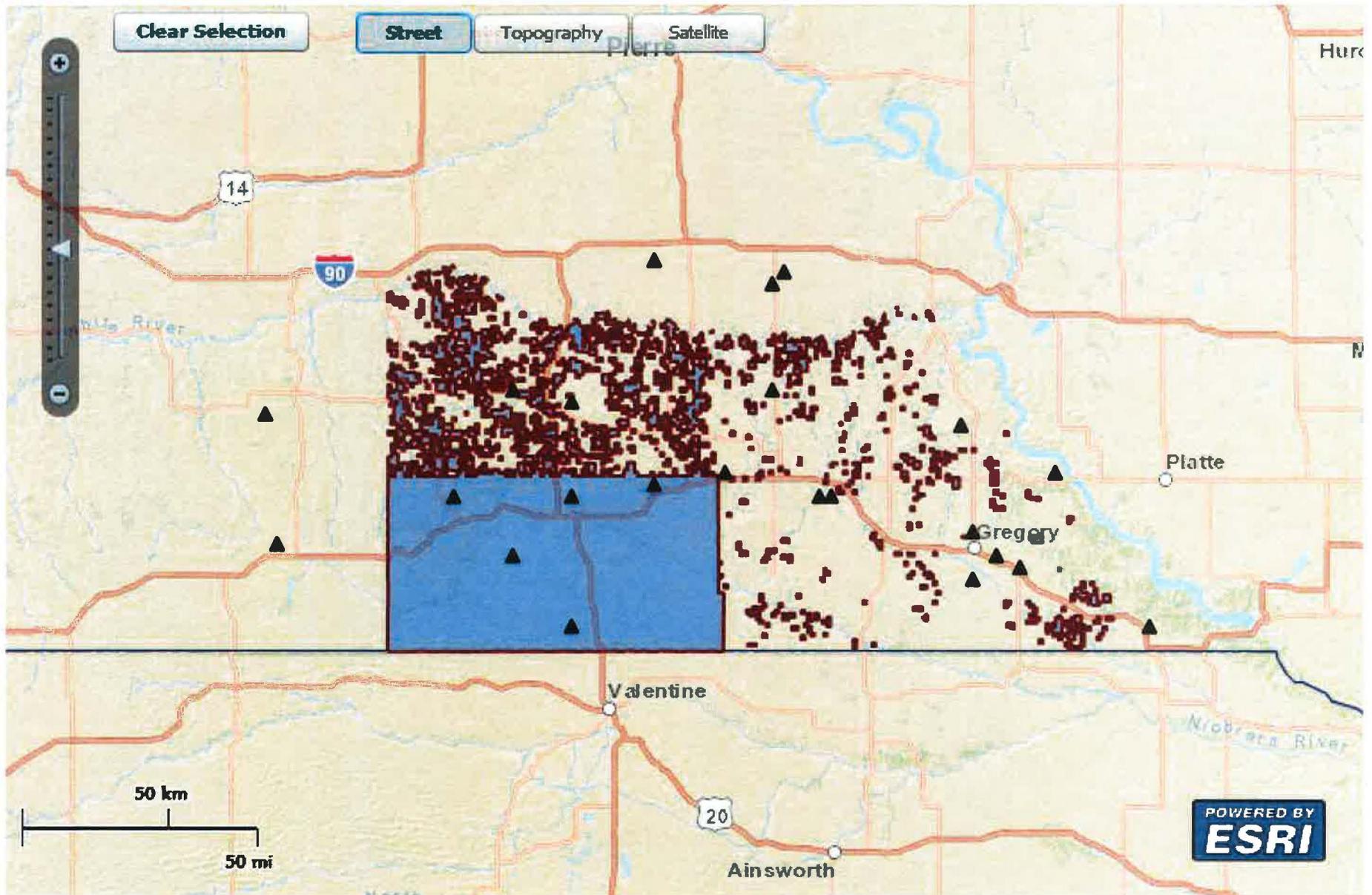
ROSEBUD SIOUX TRIBE

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ATTACHMENT A

MAP OF CELL TOWERS ON ROSEBUD RESERVATION

Rosebud Indian Reservation – Cell Phone Towers



Phone 605-856-2727
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**Tribal Utility Commission
Meeting Motion Excerpt
Of May 10, 2013**

MOTION made by Shawn Bordeaux that the Rosebud Sioux Tribal Utilities Commission submit the following comments of the Rosebud Sioux Tribe, challenging the Federal Communications Commission's criteria for excluding census blocks from eligibility for Tribal Mobility Fund Support, and to show support for the comments submitted by the Oglala Sioux Tribe. Seconded by Flora Black Bear. 3 for 0 opposed 1 not voting. **MOTION CARRIED.**

Respectfully Submitted By:



Jesse Black Bonnet, Recording Secretary