

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Tribal Mobility Fund Phase I Auction Scheduled for October 24, 2013)	AU Docket No. 13-53
)	
Improving Communication Services for Native Nations by Promoting Greater Utilization of Spectrum Over Tribal Lands)	WT Docket 11-40
)	
To: The Commission		

**COMMENTS OF THE NAVAJO NATION
TELECOMMUNICATIONS REGULATORY COMMISSION**

The Navajo Nation Telecommunications Regulatory Commission (“NNTRC”), through undersigned counsel, respectfully submits these Comments in response to the *Tribal Mobility Fund PN* released March 29, 2013 in the above-referenced proceeding.¹ In support of these Comments, NNTRC submits:

I. INTRODUCTION

The NNTRC applauds and supports the efforts of the FCC to bring better telecommunications services to Indian Country. The Tribal Mobility Fund is one such step, designed to provide funds specifically to entities that can better serve Tribal lands. The NNTRC also is pleased with the speed with which the FCC has moved to implement Auction 902. Moving this fast with this auction, however, while not moving forward on other initiatives, may result in an auction that is less effective in bringing mobile broadband to areas where it otherwise might not be delivered for many years to come. Nonetheless, the NNTRC is pleased to comment on the *Tribal Mobility Fund PN*. The *PN* seeks comments on a number of different issues related

¹ *Public Notice*, DA 13-323, released March 29, 2013 (hereinafter “*Tribal Mobility Fund PN*” or “*PN*”).

to the upcoming Tribal Mobility Fund Auction (currently set for October 24, 2013). The NNTRC limits its comments to the following areas:

- 1) Eligible Areas
- 2) Bidding Eligibility Requirements
- 3) Tribal Bidding Credit

II. BACKGROUND

As the largest native nation in the United States, the Navajos have been particularly disadvantaged by Federal and state communications policies. The Navajo Nation consists of 17 million acres (26,111 square miles) in portions of three states (Arizona, New Mexico, and Utah). The Navajo Nation is comparable in size to West Virginia, which is considered a rural state (ranked 29th in population density). Were it a state, the Navajo Nation would rank 41st in geographic size but would rank 4th smallest in population density; only Montana (6.5 persons per square mile), Wyoming (5.4) and Alaska (1.2) are less densely populated.² The “information age” has scarcely reached Tribal Lands, only 70 percent of which are served by Plain Old Telephone Service (“POTS”), as compared with near ubiquitous POTS service elsewhere in America (98%).³

The 2009-2010 Comprehensive Economic Development Strategy of the Navajo Nation

² Compare http://en.wikipedia.org/wiki/List_of_U.S._states_by_area (states ranked by geographic area) with http://en.wikipedia.org/wiki/List_of_U.S._states_by_population_density (states ranked by population density).

³ As recently as 2000, POTS penetration in Navajo households was only 22 percent. See FCC “Fact Sheet Promoting Deployment/Subscribership in Underserved Areas, including Tribal and Insular Areas,” released June 8, 2000. Because of the failure of the Federal government to make a place at the table for Tribes in the past, the Navajos find themselves without effective 911 service, while the state of Arizona in 2009 returned \$8,655,700 of the \$17,460,160 collected (or almost exactly 50 percent) to the state general fund, apparently concluding that all Arizonans had access to 911 service. See *Second Annual Report to Congress on State Collection and Distribution of 911 and Enhanced 911 Fees and Charges*, issued August 13, 2010 (released August 16, 2010), p. 10.

(“CEDS”) summarizes Navajo Nation economic data including budget figures, primary sources of revenue, major employers, poverty, employment and unemployment figures.⁴ According to the CEDS, in 2007 the unemployment rate for the Navajo Nation was five times higher than the unemployment rate of the highest ranked U.S. State (Rhode Island at 10%), increasing from 42.16% in 2001 to 50.52% in 2007.⁵ In 2007, the percentage of Navajo people on the Navajo Nation living below the federal poverty level was 36.76%.⁶

The NNTRC was established pursuant to Navajo Nation Council Resolution ACMA-36-84 in order to regulate all matters related to telecommunications on the Navajo Nation. Telecommunications is defined broadly under the Navajo Nation Code to include broadband and “any transmission, emission or reception (with retransmission or dissemination) of signs, signals, writings, images, and sounds of intelligence of any nature by wire, radio, light, electricity or other electromagnetic spectrum.”⁷

The NNTRC’s purpose is to service, develop regulation and to exercise the Navajo Nation’s inherent governmental authority over its internal affairs as authorized by the Navajo Nation Council.⁸ NNTRC is specifically authorized, pursuant to the Navajo Telecommunications Regulatory Act, to act as the intermediary agency between the Navajo Nation and the Federal Communications Commission, including representing the Navajo Nation in proceedings before the Commission, intervening on behalf of the Navajo Nation on matters

⁴ 2009-2010 Comprehensive Economic Development Strategy of the Navajo Nation (“CEDS”), available at http://www.navajobusiness.com/pdf/CEDS/CED_NN_Final_09_10.pdf.

⁵ CEDS at 20.

⁶ *Id.* at 23.

⁷ 21 N.N.C. § 503 (V).

⁸ Codified at 2 N.N.C. §§ 3451 -55; 21 N.N.C. §§ 501-529

pending before the Commission, and filing comments in rule making proceedings. It is within this capacity that the NNTRC submits these comments.

III. NNTRC BELIEVES THAT THE ELIGIBLE AREAS MAP SIGNIFICANTLY UNDERSTATES THOSE AREAS OF THE NAVAJO NATION “EASTERN AGENCY” THAT ARE CURRENTLY UNSERVED AND WILL REMAIN UNSERVED FOR THE FORSEEABLE FUTURE

The *Tribal Mobility Fund PN* invites Tribes and interested parties to comment as to whether the census blocks attached to the *PN* accurately reflect unserved areas on Tribal lands either to exclude census tracts listed as eligible, or add additional census tracts not included in the eligibility list, and provide support for such changes.⁹

A. NNTRC Believes That Some Areas May Have Been Excluded From the Eligibility List Based On the Incorrect Conclusion That They Are Not Tribal Lands

The NNTRC requests that FCC revisit its eligibility list concerning census tracks located in San Juan, McKinley, and Sandoval Counties, New Mexico. The FCC’s eligibility map for those counties show only a few pockets of eligible areas.¹⁰ NNTRC believes that much larger portions of those three counties remain unserved and should be eligible in Auction 902. NNTRC also believes that it is possible that some areas were excluded because they were not on trust land, even though they are within the exterior boundaries of the Navajo Nation, populated by Navajo citizens, and generally considered part of the Navajo Nation.

Exhibit 1 is a map which shows the “checkerboard” nature of much of Navajo Eastern Agency.¹¹ Land in the Eastern Agency is a mix of Navajo Tribal Trust, Indian Allotment, Navajo Tribal Fee, and Private Fee land. It appears from a review of the FCC’s eligible areas

⁹ *Tribal Mobility Fund PN*, ¶ 21.

¹⁰ See <http://www.fcc.gov/maps/tribal-mobility-fund-phase-i-potentially-eligible-areas>.

¹¹ Source: “Eastern Navajo Infrastructure Assessment,” produced by the Eastern Navajo Land Commission, February, 2012, p. 18, Map 4.

map that the only areas found to be eligible are Navajo Trust Lands and Navajo Fee lands. The *PN* does not fully disclose the methodology used by Bureau to “identif[y] census blocks within Tribal lands using 2010 data.”¹² Although footnote 38 of the *PN* defines “Tribal lands,” it does not do so with sufficient specificity to determine whether all of the types of lands located within the external borders of the Navajo Nation were considered. In other contexts, where the goal was to provide services to Tribal members, the FCC has concluded that it would consider eligible all areas “that generally have been considered tribal lands for purposes of other federal programs targeted to federally-recognized Indian tribes. Again, we conclude that such lands properly should be included within our definition insofar as they are Indian lands on which principles of Indian sovereignty and the special trust relationship apply.”¹³

The Navajo Nation considers all areas within the external borders of the reservation to be part of the Navajo Nation.¹⁴ The federal government also treats the checkerboard area of Eastern Agency as Navajo lands.¹⁵ The NNTRC therefore requests that the FCC revisit its eligible areas map to ensure that all Navajo lands were considered.

¹² *Tribal Mobility Fund PN*, ¶ 18.

¹³ *Federal-State Joint Board on Universal Service, Twelfth Report and Order*, 15 FCC Rcd. 12261, ¶ 16 (2000).

¹⁴ 7 N.N.C. Section 254, Territorial Jurisdiction states, “The territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian Country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian communities, all Navajo Indian allotments, all land owned in fee by the Navajo Nation, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Nation of any Band of Navajo Indians.”

¹⁵ See 18 U.S.C. § 1151 definition of “Indian country.”

B. NNTRC Does Not Believe That Any Carrier Currently Provides Service, or has Announced its Plans to Provide Service to These Census Tracts

According to the *Tribal Mobility Fund PN*, once Tribal lands were determined, the FCC next overlaid the Mosiak data to determine whether 3G or better service was available.¹⁶

NNTRC is aware that Smith Bagley, Inc. (“SBI”) is filing a drive test study, in which it submits that less than 15% of Navajo Eastern Agency currently is being served with 3G or better service (e.g., above 200 kbps service). Although the NNTRC does not have the technical capabilities to conduct such tests, based on what it knows of the area, the placement of cell towers, and the stories that Navajo citizens have related to NNTRC in terms of lack of service, NNTRC believes that the number submitted by SBI is probably very close to the mark. Moreover, NNTRC is unaware of any carrier who has taken federal, state, or Tribal grant money with a promise to deliver such service to the Navajo Eastern Agency in New Mexico, and NNTRC is unaware of any other public commitment to provide such service, outside of the support contemplated from the Tribal Mobility Fund Phase I Auction. Based on the SBI study, therefore, NNTRC formally requests that the FCC include the Census Blocks depicted in Exhibit 2 and Exhibit 3 as eligible areas for Auction 902.

IV. TRIBALLY OWNED AND/OR CONTROLLED PROVIDERS SHOULD NOT BE REQUIRED TO SUBMIT AN IRREVOCABLE STANDBY LETTER OF CREDIT IF A TRIBE CAN CERTIFY THAT THE CARRIER IS FINANCIALLY QUALIFIED

NNTRC notes with interest the *ex parte* comments jointly filed in this proceeding by the Gila River Indian Community and Mescalero Apache Telecom, Inc.,¹⁷ in which they argue that the FCC should not require tribally-owned carriers to obtain and file irrevocable standby letters

¹⁶ *Tribal Mobility Fund PN*, ¶ 17.

¹⁷ See *ex parte* comments of Gila River Indian Community and Mescalero Apache Telecom, Inc., filed April 26, 2013 (hereinafter GRI/MATI).

of credits (LOC's), because the assets that would be used as collateral for such LOC's are often held in trust by the federal government. GRI/MATI seeks the elimination of this requirement.

NNTRC agrees that there is a fundamental unfairness in requiring a Tribe to meet the LOC requirement if its inability to do so is a direct result of its special trust relationship with the United States such that the United States holds the assets in trust. Doing so specifically prejudices Tribes and Tribally-owned entities vis-à-vis non-Tribal entities. NNTRC therefore supports the concept behind waiving the requirement of an LOC for a tribe or a tribally-owned or controlled carrier, but does not believe that a blanket waiver of this requirement serves the best interests of all Tribes. Instead, the FCC should waive the LOC requirement if the following can be demonstrated:

- 1) A Tribe or tribally-owned/controlled carrier can demonstrate that obtaining the LOC would create a hardship because the assets that would be used to collateralize the LOC are held in trust by the federal government and therefore not eligible to be pledged as collateral; and
- 2) In the case of the applicant being a Tribe, the Tribe's comptroller or other official in a similar capacity certifies that the Tribe has the financial wherewithal to meet its build-out obligations for the areas bid for; or
- 3) In the case of the applicant being a tribally-owned or controlled carrier, A tribal entity with jurisdictional authority over the carrier (and not just the carrier itself), certifies that the carrier has the financial wherewithal to meet its build-out obligations for the areas bid for.¹⁸

Such an approach would both honor the trust relationship between Tribes and the United States and at the same time meets the FCC's goals of ensuring that a bidder in the Tribal Mobility Fund auction has the financial wherewithal to meet its build-out and other obligations.

¹⁸ NNTRC believes that tribally-owned carriers who act as their own regulators (e.g., where the carrier is regulated only by its board of directors or board of governors), should not be making certifications that could ultimately bind the Tribe as a whole. Rather, such a certification should come from the Tribe itself, or from a Tribal agency with delegated authority to regulate a tribally-owned carrier.

V. **THE FCC SHOULD IMMEDIATELY CONSIDER ADOPTING INNOVATIVE APPROACHES TO APPLYING ITS TRIBAL BIDDING CREDIT**

Under the rules established for the Tribal Mobility Fund, bidders must be able to demonstrate that they have access to the spectrum necessary to build out and provide service to the areas bid for.¹⁹ As the FCC is well aware, however, the lack of access to spectrum has been such a huge barrier to Tribes self-provisioning services to tribal lands.²⁰ While the FCC is considering several measures in WT Docket 11-40 to try and ameliorate this problem, it is extremely unlikely that any of the those proposed measures will be implemented in time to assist Tribes in the Tribal Mobility Fund auction. The vast majority of Tribes and Tribally-owned carriers, therefore, simply won't be able to participate in the Tribal Mobility Fund auction.²¹

On the opposite side of the equation, those few Tribes who have obtained spectrum rights that would allow them to bid in the auction will have a distinct advantage because of the 25% Tribal Bidding Credit.²² Since they will be bidding head-to-head against entities that control spectrum but are not tribally-owned yet seek to provide service to tribal lands, these Tribal entities are at a distinct advantage vis-à-vis Tribes that do not currently control spectrum. NNTRC, therefore, urges the FCC to consider innovative arrangements whereby carriers that are not Tribally-owned, but have rights to spectrum over Tribal lands, might have access to the Tribal bidding credit. NNTRC urges the FCC to consider the following scenarios:

¹⁹ *USF/ICC Transformation Order*, 26 FCC Rcd at 17799-801, paras. 393-99; 47 C.F.R. § 54.1003(b).

²⁰ *See Tribal Spectrum NPRM* (WT Docket No. 11-40), ¶ 15.

²¹ To date, there is no evidence that effective mechanisms exist to get spectrum in the hands of Tribes. The "secondary market" for spectrum for Tribes does not exist. Undersigned counsel reviewed the comments filed in Docket 11-40, and not a single instance was cited in any comments of a Tribe successfully negotiating a license lease with a carrier to serve Tribal lands.

²² *See USF/ICC Transformation Order*, 26 FCC Rcd at 17823, para. 490; 47 C.F.R. § 54.1004(c).

- 1) The non-Tribally-owned entity could qualify for the Tribal Bidding Credit if it enters into an agreement with a Tribe to donate all equipment used and located on Tribal lands to the Tribe in exchange for exercising the Tribal Bidding Credit.
- 2) The non-Tribally-owned entity grants a Right of First Refusal to the Tribe to acquire the licenses from the non-tribal carrier at a 25% discount over any other offer if that carrier were to ever sell its licenses, and a right to acquire the licenses for \$1.00 if the carrier ever sought to discontinue service to the Tribal lands.
- 3) A finding by a Tribal regulatory authority (either a Commission, Agency, or Department of the Tribal government), that a carrier has already met all the requirements of the FCC's Tribal Engagement Obligations *and* a specific finding that the carrier is serving the special needs of the Tribe, including agreeing to submit itself to the full regulatory authority of the Tribe.

All of these uses of the Tribal Bidding Credit would advance tribal sovereignty. In the case of the first proposal, it would put into the hands of the Tribes on their tribal lands the physical assets necessary for the provision of telecommunications services to their peoples. Carriers simply would not be able to “pick up and leave,” if they didn’t meet their economic goals. If they did so, they would have to leave behind the equipment necessary to allow the Tribe to continue service to its people.²³ In the second scenario, the Tribe would have the opportunity to acquire the necessary licenses in the event the carrier ever decided to sell its licenses to someone else. The final scenario advances Tribal sovereignty by bringing carriers under the full jurisdiction of Tribes under the *Montana v. U.S.* doctrine.²⁴ NNTRC therefore urges the FCC to explore these and other innovative mechanisms to apply the Tribal Bidding Credit in such a way as to speed the deployment of broadband in Indian Country.

²³ This would need to be coupled with a “build-or-divest” (“use it or lose it”) approach to spectrum, whereby any carrier that either failed to build out on Tribal lands or chose to discontinue service to such lands would forfeit the spectrum license for those Tribal lands. See Comments of NNTRC in Docket 11-40, filed June 20, 2010, p. 5.

²⁴ *Montana v. United States*, 450 U.S. 544 (1981).

VI. CONCLUSION

The FCC has made great strides over the past few years to both recognize the lack of access to broadband in Indian Country, and to begin to put into place policies and programs to redress the 80 years of neglect with which Native peoples have been treated. While Auction 902 is an important step, it may well be slightly out of sequence with other measures that are necessary before Tribes can be empowered to have a positive impact on the provisioning of broadband services within their borders. As demonstrated herein, better data about the actual availability broadband service are critical – the FCC is making one-time only decisions based on assumptions that simply are not correct. Further, without access to spectrum, Tribes and Tribally-owned carriers can't be real players in Auction 902. The FCC needs to move forward with suggested changes in Docket 11-40 before conducting Auction 902 if it wants Auction 902 to bring mobile broadband to where it is needed most, in the most rural parts of Indian Country.

Respectfully submitted,

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