

**BAD RIVER BAND OF THE
LAKE SUPERIOR TRIBE OF THE CHIPPEWA INDIANS**



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

In the Matter of)
)
Competitive Bidding Procedures for) Docket No. 13-53
Auction 902 and Certain Program Requirements)
)

To: The Commission

Comments of the Bad River Band of the
Lake Superior Tribe of the Chippewa Indians

Respectfully submitted,

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Summary

The Bad River Band of the Lake Superior Tribe of the Chippewa Indians asks that, in Auction 902, the FCC apply its policies and rules with the type of realistic flexibility that will best foster the construction of facilities providing modern telecommunications services to unserved tribal lands. This will require a flexible approach to (a) defining tribal lands to include the areas where tribal members live and where tribal governments provide services to tribal members, and (b) removing barriers to entry that might otherwise prevent tribal entities from bringing advanced telecommunications to tribal members in unserved tribal areas.

The Tribe submits that its tribal lands extend beyond its reservation and that the census blocks identifying Bad River tribal lands should be expanded to include areas in which (a) Tribal members actually reside, (b) the Tribal Government provides services and (c) Tribal members exercise their economic rights under treaties with the United States.

Barriers to entry that potentially affect tribal entities seeking to bring advanced telecommunication services to tribal members include proposals requiring (a) spectrum access and ETC application prior to auction, (b) auction and performance default payments, (c) deposits/letters of credit securing default payments and (d) maximum acceptable bids. These provisions should be eliminated or substantially modified to facilitate full participation of tribes and tribal entities in the auction process. Additionally auction design should employ a single round similar to that used in Auction 901 and the Commission should evaluate post-auction requirements in a practical manner that seeks first and foremost to bring actual service to affected tribal lands and their inhabitants.

Comments of the Bad River Band of the
Lake Superior Tribe of the Chippewa Indians

The Bad River Band of the Lake Superior Tribe of the Chippewa Indians (the “Tribe”) submits the following comments in response to the proposals set out in Public Notice, DA 13-323, released March 29, 2013 (the “Public Notice”). While the Tribe applauds the Commission’s efforts to bring modern telecommunications facilities to Native American communities, both the Commission and the commenting parties need to approach this process mindful that general market conditions do not support service to unserved tribal areas at affordable rates and that past efforts to induce commercial carriers to serve these tribal areas through the Mobility Fund Phase I process have not been successful. Accordingly the Commission should apply its rules and policies in the Tribal Mobility Fund Phase I proceeding in a flexible manner that minimizes barriers to entry that might otherwise obstruct tribal entities seeking to provide needed telecommunications services to their members.

The Facts

A. About the Tribe

The Bad River Band of the Lake Superior Tribe of the Chippewa Indians is one of eleven Chippewa tribes residing and sharing the ceded territories in the States of Michigan, Wisconsin and Minnesota. The Bad River Band of Lake Superior Tribe of Chippewa Indians is a federally recognized Indian Tribe and is located on a 125,000 acre reservation in northern Wisconsin on the south shore of Lake Superior and is located in both Ashland and Iron Counties.

The Tribe has 7,356 enrolled members, many of whom reside in the vicinity of the Tribe’s reservation. The Bad River Tribal Enrollment Office reports approximately 1,414 tribal

members live on the reservation, and another 3,000 tribal members live in counties contiguous to the reservation and in the areas served by the Tribe's Health and Wellness Center. Non-member spouses/children and non-member land owners also reside within the reservation; 75% of all land within reservation is owned by the Tribe, 5% by individual tribal members, and 20% by non-tribal members. The Bad River Tribal Planning Office estimates populations of approximately 2,343 individuals reside within the boundaries of the reservation; as evident by public utilities/service data collected (WI DNR Responsible Unit data gathered and reported for waste and recycling pick-up, public housing data, and social and family services data).

The Bad River Band of Lake Superior Tribe of Chippewa Indians operates as a governmental entity that serves tribal members through the Tribal Council, a governing body of elected tribally enrolled members. The Tribal Council is comprised of seven officers, a Chair, Vice-Chair, Treasurer, Secretary, two Senior Council members, and one Junior Council member. The elections are staggered two-year terms and subsequently, each officer serves a two-year term. As members of the Tribal Council, the Chair and Treasurer are full-time employees to ensure day-to-day management of the tribal government, tribal enterprises, and tribal programs.

The Tribal Administration provides financial, accounting, communication, and management support for all employees, programs, and services including tribal facilities, utilities, roads, grounds, legal services, law enforcement, human resources, natural resources, property and procurement, enrollment, planning, health and human services, and six tribally owned enterprises. Bad River Tribe has a five-member police department whose officers serve both on the reservation and in Ashland County through a cross-deputizing arrangement with the Ashland County Sheriff's Department. The Tribe's court system employs four judges whose jurisdiction includes child welfare, divorce and conservation matters. Two full-time and one

part-time Tribal Game Wardens are tasked with enforcing conservation matters on the reservation. A part-time fire chief and 10 volunteer first-responders staff the Tribal Fire department as needed on an on-call basis.

Most of the Tribal Government's services are provided to tribal members both on and off reservation. The Tribal Government operates and provides services for tribal members through an Indian Health Service Clinic referred to as the Health and Wellness Center. Dental services are also provided. The Tribe provides social services and maintains a Head Start Program on the reservation, which serves both members living on and off reservation. Children from the Tribe are educated in the Ashland School District and, as of November 2010, comprised 21% of the district's student population. The Tribe operates a gas station, a grocery store, a lodge, restaurant, smoke shop, and a casino on its reservation. The Tribe employs approximately 482 people, making it the largest employer in Ashland County, Wisconsin. Individual tribal members operate several independent businesses located in Ashland, Iron, Price, Sawyer, Bayfield and Taylor Counties. The Tribe's facilities and the reservation provide an important focal point for all Tribe members seeking to connect with their cultural heritage and advance their common social and economic interests.

Limited development and unfulfilled Tribal infrastructure forces more than 75% of tribal members' off-reservation. Limited housing, public utilities, such as: electrical lines, roads, telephone, community water and sewer lines have thwarted development. Utilizing 911 fire numbers that were assigned to each home in 2004 within the Bad River Tribal Reservation, 612 housing units have been identified; of these homes 30% are owned by Tribal Public Housing and occupied by low-income renters, 30% are owned by non-members' living on taxable land's

within the boundaries of the reservation, 20% are owned individually by Tribal Members; and 20% are substandard abandoned units. The lack of available housing has forced many Tribal members to live off reservation in various Ashland, Iron, and Bayfield County communities, including Hurley, Butternut, Marengo, and Mellen.

Northern Wisconsin is historically an economically depressed area with both Ashland and Iron Counties having a high unemployment rate; however, the Bad River Tribal community is a severely financially distressed community. As published in the August 2011 Bad River Housing Demographic Statistical report, the following statistics demonstrate the significant draw on Tribal enterprise revenue and all Federal and State funds: 20% of all Bad River Housing tenants live on SSI benefits with an annual income of approximately \$4,786; 14% survive on Social Security benefits with an annual income amounting to \$8,549; 3 % rely on unemployment insurance with an annual income amounting to \$4,727 each; 44% are employed and have an annual mean household of \$17,480. Furthermore, 16% of all head of households are 65 or older; 22% of all head of households are disabled and/or handicapped; 63% have children living in the home; and 90% of all households fall within HUD's low income guidelines requiring 60% income below the county median income. According to the 2000 U.S. Census Bureau, the Bad River Tribe ranked 4th highest in the state of Wisconsin for the number of families living in poverty at 21.5%.

High speed internet service and, to a lesser extent, advanced wireless communications are a critical part of the Tribal Government's plans to enhance economic opportunity for Tribal members. The Tribe believes that equal access to information for all Tribal members through the provision of high-speed bandwidth will assist low- and moderate- income Tribal members to stay

connected within and outside the reservation boundaries. Connectivity will increase job opportunities for Tribal members through information sharing and coordination with tribal, city, county, state, and federal work support services (e.g., TANF and SSI) and on-line education and career services. Connectivity will also enable Tribal members to become lifelong learners and teachers, proactive citizens, innovative entrepreneurs, and skilled collaborators. Given that Bad River Tribal students are bused to school, staying after school to complete school projects has not always been possible and has created hardships for students and families. Wireless high-speed Internet access at home will provide the Tribe's children the ability to complete school projects at home, complete college applications with parental input, and stimulate and coordinate student learning and innovation.

B. About Tribal Lands

The Bad River Reservation is comprised of approximately 125,000 acres of land located mostly in Ashland and Iron County, Wisconsin.¹ The reservation land is largely undeveloped and includes 100 miles of rivers and streams and 17 miles of Lake Superior shoreline.

Before the arrival of Europeans, the Bad River Chippewa Indians resided in what is now Quebec and Ontario Canada. They later migrated to area around Lake Huron, Lake Superior, Minnesota, and Dakotas; settling later on Madeline Island in Lake Superior. The present Bad River Band members are descendents from these Chippewa on Madeline Island. Around, 1841 a Protestant missionary named Wheeler came to LaPointe and a few years later the LaPointe Band of Chippewa separated, and the settlements were established at Bad River and

¹ A portion of the reservation is located on Madeline Island in Lake Superior.

Red Cliff. In 1854 a treaty was signed at LaPointe between the Chippewa Bands and the US Government, recognizing the Bands' Bad River and Red Cliff reservations that exist today. This treaty guaranteed year-round fishing, hunting, trapping, and gathering rights for tribal members in land ceded to the United States. It also recognized the tribes as politically sovereign entities, as they remain today. The Bad River Reservation was to be 124,335 acres in size bound by Lake Superior to the north; included in this acreage was 196 acres on Madeline Island.

Originally, much of the land East of the Mississippi within the Northern regions of the territory that would become Michigan, Wisconsin and Minnesota was held by the Chippewa. In the 19th century, most of this land, including the Northern third of Wisconsin, was ceded to the United States under several treaties with the Chippewa. The treaties ceding Chippewa land to the United States granted the Tribe and other Chippewa groups hunting, fishing and harvesting rights throughout the ceded territories.² Consequently, the ceded territory in Ashland County, Wisconsin, is an important economic resource for the Tribe and is critical to maintaining tribal practices and culture, including practices associated with hunting, trapping, fishing, wild rice harvesting, maple sugaring, harvesting birch bark, canoe building, harvesting balsam, and other traditional economic and social activities associated with the traditional Chippewa way of life.

The Bad River Reservation and Ashland County are rural areas. The county's estimated 2012 population is only 15,992 and much of its land area is comprised of forests and wetlands used by the Tribe to maintain its traditional economy and practices. Ashland County's population density, 15.5 persons per square mile, is one seventh of Wisconsin's overall

² A history and description of these treaty rights can be found in A Guide to Understanding Ojibwe Treaty Rights (Great Lakes Indian Fish and Wildlife Commission, 2011), appended hereto as Exhibit A.

population density of 105 persons per square mile. With the exception of single cell site serving the City of Ashland, there is no 3G or 4G wireless service in the county and, in the Tribe's opinion, there will never be 3G or 4G service outside of the City unless the Tribe provides it.

Comments

A. For Auction Purposes, the Tribal Lands of the Bad River Band Should Include Additional Areas of Rural Ashland County.

For purposes of Auction 902, the tribal lands of the Bad River Band of the Lake Superior Tribe of the Chippewa should be defined to include the actual territories in which Tribe members reside and in which the Tribe exercises its economic rights under its treaties with the United States.³ The rural areas of Ashland County, Wisconsin, are at the center of the geographic area in which the Tribe conducts its activities. Consequently it is the region in which numerous Tribe members reside. It is also an area which desperately needs advanced communications services that will not likely be provided without the Tribe's active participation.

The Tribe submits that expansion of the definition of its Tribal Lands for auction purposes is crucial to the economic development of the Tribe and the economic, educational and cultural interests of its members. The Tribe is an important agent of economic development throughout rural areas in Ashland County. Limiting advanced wireless services to the confines of the Bad River Reservation will exclude many Tribal members from these services and will impede the Tribe's development of its traditional economic activities granted in ceded territories under treaties with the United States. The Tribal Government is particularly interested in bringing high speed internet access to its members' households to foster digital literacy in the

³ The specific description of the proposed Tribal Service Area, including affected census blocks, is found in the Technical Statement of Scott Ritchie appended hereto as Exhibit B and in the accompanying excel spreadsheet attached as Exhibit C.

next generation of Tribal members. The educational and informational promise of modern communications technology should not be withheld from Native American families and the Tribe seeks the Commission's help to bring this important service to all Tribal members. In this connection, many of the areas the Tribe seeks to add to its Tribal Lands for purposes of Auction 902 were available for support in Auction 901, but no one came forward to serve these lands. It would be a great tragedy to permit the population of the Tribe's proposed rural Tribal Service Area to be twice excluded from the benefits of digital wireless internet, through nothing more than government unwillingness to recognize the important interconnected relationships among the Tribal government, Tribal economic rights and Tribal members living in rural areas outside of official reservation boundaries.

Finally, the Tribe submits that the public interest is better served on the facts presented by extending the definition of Tribal Lands to the proposed Tribal Service Area, rather than by limiting the Tribe's Tribal Lands to the Bad River Reservation.⁴ Specifically, FCC Rule 54.412 establishes the following standards for designating land outside of reservations as Tribal Land for purposes of the Lifeline and Tribal Link Up program:

--- A request for designation must clearly describe a defined geographical area for which the requesting party seeks designation as Tribal lands.

--- A request for designation must demonstrate the Tribal character of the area or community.

--- A request for designation must provide sufficient evidence of a nexus between the area or community and the Tribe, and describe in detail how program support to the area or community would aid the Tribe in serving the needs and interests of its citizens and further the Commission's goal of increasing telecommunications access on Tribal lands.

⁴ See WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969), where the Court observed "The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances."

Applying these standards to the Tribe's Tribal Service Area proposal, the Commission should conclude that the Tribe has clearly described the geographical area it seeks to include as Tribal Lands for purposes of Auction 902.⁵ Further the economic rights granted the Tribe by treaty throughout the Tribal Service Area, the presence of significant populations of Tribal members throughout the Tribal Service Area and the services and support provided by the Tribal Government to Tribe members throughout the Tribal Service Area demonstrate the tribal nature of the area. Finally the absence of 3G or 4G mobile service and high speed internet access throughout the proposed Tribal Service Area demonstrates that the public interest will be served by allowing these areas to participate in the Tribal Mobility Fund Phase I Auction. Accordingly the Tribe asks that the Commission waive any rule or policy limiting Tribal Lands to the Tribe's actual reservation and apply the standards of Rule 54.412 to include the Tribe's entire proposed Tribal Service Area in Auction 902.⁶

B. The FCC Should Adopt Auction Policies and Procedures That Minimize Burdens on Tribal Entities Seeking to Bring Service to Tribal Members

The Tribe is thankful for the opportunity to assist the FCC in bringing modern telecommunications services to its members and asks that the FCC apply its policies in the Tribal Mobility Fund Phase I Auction to maximize the chances that tribal entities will succeed in constructing and operating wireless systems designed to meet the interests and needs of tribe members. To this end, the Tribe supports the Commission's flexible definition of 3G and 4G

⁵ These areas are identified with specificity in the Engineering Statement of Scott Ritchie appended hereto as Exhibit B and in the excel Spreadsheet of affected census blocks appended hereto as Exhibit C.

⁶ In this connection the Tribe supports the Public Notice's proposal to aggregate census blocks into discrete areas for bids and requests that its proposed Tribal Service Area be regarded as a single eligible area for purposes of bidding in Auction 902.

services.⁷ The Tribe's primary interest in the auction is obtaining the educational and informational benefits of high speed internet access for its rural Tribal members. This enterprise would be impeded by imposing rigid carrier-like technical standards on a tribal communications system. By defining service as in terms of specific data rates and latency sufficient to support real time applications, the Commission has allowed for the design and deployment of mobile technologies that should accommodate both the Tribe's pressing need for internet service and the its more general need for advanced mobile communications.

The Tribe notes that part of the reason the Tribal Mobility Fund Phase I Auction is necessary is that no one committed to bring service to these unserved Tribal Lands in the Mobility Fund Phase I Auction, an auction awarding six times more financial support than the present auction proceeding. Carriers with established wireless networks and economies of scale could not be induced by a \$300,000,000 mobility fund to serve the rural areas in which our tribes are located. Now the Commission seeks to bring service to these areas with only a \$50,000,000 fund that will likely be disbursed to tribal entities that lack the economies of scale and established network infrastructure of the carriers who have previously declined the offer of government funding to serve roads on tribal lands. The task before the tribes is daunting and the resources available to the tribes are very small. According it would be extremely counterproductive to approach this auction as if the only participants were the major wireless carriers.

⁷ Paragraph 27 of Public Notice, DA 12-641, released May 2, 2012, explains that "the Commission refers to a network as a 3G network if it achieves outdoor minimum data transmission rates of 50 kilobits per second(kbps) uplink and 200 kbps downlink at vehicle speeds appropriate for the roads covered..." and that "the Commission refers to a network as a fourth generation (4G) network if it achieves outdoor minimum data transmissions rates of 200 kbps uplink and 768 kbps downlink at vehicle speeds appropriate for the roads covered. With respect to both 3G and 4G networks, transmission latency must be low enough to enable use of real-time applications such as Voice over Internet Protocol (VoIP)."

The Tribe submits that the only way to bring advanced wireless services to unserved tribal lands is to approach each element of the auction process and the design and construction of wireless facilities on tribal land with realistic flexibility. To this end, the Tribe urges the Commission to move the requirements of spectrum availability and ETC applications from the pre-auction phase of the proceeding and impose these requirements as a post-auction condition of funding. Pre-auction spectrum access requirements are an unnecessary roadblock to tribal entities seeking to provide telecommunication services to unserved tribal lands. Any policy that prevents uncontested bids from tribal entities solely because spectrum access is not yet obtained is a sure way to prevent service to the inhabitants of unserved tribal lands.

Similarly, the Tribe views proposed procedures for punishing auction defaults with a 5% penalty or performance defaults with a 10% penalty as completely counterproductive. To date, no one, not even established carriers, has come forward to serve the tribal areas that are subject to this auction. This is so despite the availability of greater amounts of government funds in the Mobility Fund Phase I Auction than in the current Tribal Mobility Phase I Auction. It makes no sense to impose default payments on any tribal entity willing to risk its time and money to bring service to its tribal members. Similarly, proposals requiring deposits and letters of credit designed to secure default payments are costly and unnecessary barriers to entry that could preclude tribes and tribal entities from seeking to provide the communications services that the established wireless carriers are unwilling or unable to provide. The Commission's processes need to recognize that, unlike commercial wireless carriers, tribes are not proposing to provide service to their members solely out of the profit motive. They are proposing to provide service because service is needed and no one else wants to provide it.

The Public Notice asks whether a single round or multiple round auction process should be employed to award Tribal Mobility Fund Phase I support. The Tribe submits that the Commission should use a single bid procedure as it did in Auction 901. Complicated multi-round auction procedures may lighten the hearts of economists, but they are an unnecessary burden on tribal entities seeking to participate in the auction process. A single round bid process was successfully employed in Auction 901, where many of the expected applicants were established carriers. No reason exists to subject tribal entities to a more complex and expensive auction procedure than the one employed for the wireless industry establishment.

Similarly, the Tribe opposes the Public Notice's proposal to establish maximum acceptable bids or reserve amounts for auctioned tribal lands. The various communications projects on tribal lands will cost whatever they cost and arbitrarily assigning a maximum bid to each project is just that, arbitrary. If the Commission's goal of serving the maximum unserved population on tribal lands is not advanced by accepting a specific bid, it should reject that specific bid. The Commission should not impose bid limitations in advance of receiving proposals.

With respect to the Public Notice's inquiry into how population in partially-covered census blocks should be counted, the Tribe suggests that any reasonable approach used consistently by the applicant should be accepted. If the applicant chooses to actually count residences and inhabitants of each partially covered census block, it shouldn't be faulted for its precision. If an applicant consistently applies an average population per area model to uncovered census blocks, that should also be deemed reasonable. There really is no need to identify in advance each and every reasonable method of counting population served. Indeed the Tribe urges the Commission to approach coverage requirements in a reasonable and flexible

manner and to avoid placing applicants into default unless such an action would actually assist in bringing service to unserved tribal lands.

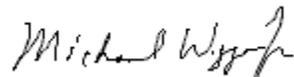
The Tribe believes that the Commission should exercise its discretion at each phase of the auction, construction and service elements of the Tribal Mobility Fund Phase I proceeding to achieve the best practical results for tribal members residing in unserved areas. This includes its evaluation of whether an awardee is providing service at rates comparable to those available in urban areas. While the Tribe has no objection to the proposals set out in the Public Notice for proving the comparability of rates, the Tribe asks that in addition to accepting the showings set out in the Public Notice's discussion of rates, the Commission retain a willingness to accept any reasonable showing on this matter.

Conclusion

The Bad River Band of the Lake Superior Tribe of the Chippewa again thanks the Commission for its actions pursuing the just and valuable goal of bringing the benefits of modern telecommunications services to Native Americans residing in rural areas. The Tribe asks that the Commission's actions in pursuit of this public good be tempered with the type of realistic flexibility that is absolutely necessary if Native Americans are actually to receive the benefits of the Commission's efforts. The Commission should bear in mind that past efforts to attract established carriers to provide advanced wireless services to the unserved Tribal Lands have failed, even when greater sums of money were offered as an inducement for service. Many bidders in this Tribal Mobility Phase I Auction are likely to be tribal entities that will face significant hardship in navigating the administrative and technical process needed to bring

service to tribal lands. At each step of the process, the Commission should ask itself, does my proposed administrative action advance the cause of actually providing modern telecommunications services to unserved tribal lands? If this test is consistently applied throughout the Tribal Mobility Fund Phase I process, the Commission will have served a genuine, and not a hypothetical, public interest.

Respectfully submitted,



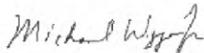
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