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June 25, 2013

Via Electronic Delivery

Ms. Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, DC 20554

**Re: Notice of *Ex Parte*
Competitive Bidding Procedures for Auction 902 and Certain Program
Requirements
AU Docket No. 13-53**

Dear Ms. Dortch:

Windy City Cellular, LLC (“Windy City”), by its attorneys, submits this *ex parte* in response to the public notice issued by the Wireless Telecommunications and Wireline Competition Bureaus (“the Bureaus”) of the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding.¹ Windy City respectfully requests that the FCC correct the *Public Notice* to include as eligible Tribal Lands in Auction 902 those populated census blocks located on Adak Island (*see* Attachment A).

Windy City supports the Commission’s decision to establish a separate auction process in order to award one-time support expressly designated for the deployment of “mobile broadband to unserved Tribal Lands.”² The Commission has already determined that “[t]ribal lands are often in rural, high-cost support areas”³ and that “infrastructure generally is less developed on Tribal lands, particularly in Alaska.”⁴ Accordingly, with so many undeveloped and underdeveloped tribal lands across the country, Auction 902 should be conducted such that the number of potentially eligible areas should be as broad as possible, and at the very least, the list

¹ *In the Matter of Competitive Bidding Procedures for Auction 902 and Certain Program Requirements*, Public Notice, AU Docket No. 13-53, DA 13-323 (released March 29, 2013) (“*Public Notice*”).

² *In the Matter of Universal Service Reform – Mobility Fund, et. al.*, Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 10-208, et. al., FCC 11-161 (released November 18, 2011) (“*USF/ICC Transformation Order*”).

³ *Id.* at ¶ 479.

⁴ *Id.* at ¶ 488.

of potentially eligible markets should include any community that qualifies as “Tribal land” as it is defined in both the *USF/ICC Transformation Order* and the Commission’s rules.⁵ For almost a year and a half since the *USF/ICC Transformation Order* was released, parties interested in participating in Auction 902 in order to better serve remote and hard-to-serve parts of Alaska were under the assumption that Tribal lands included all “Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act,” just as it was spelled out in the *USF/ICC Transformation Order*. However, in the *Public Notice* released earlier this year, the Commission, without notice and comment, amended its definition of “Tribal lands.”⁶ Specifically, the standard definition of “Tribal lands” found in the *USF/ICC Transformation Order* had the following language added to the very end as a qualifier:

Tribal lands in Alaska, *i.e.*, the Annette Island Reserve and areas where federally recognized Alaska Native villages are located within the Alaska Native Regions, were identified using 2010 Census data identifying the Annette Island Reserve and Alaska Native village statistical areas.

By adding the qualifying language that used the 2010 Census data identifying the Annette Island Reserve and Alaska Native village statistical areas as eligible areas, the FCC triggered a major policy shift in violation of administrative law that has the impact of potentially denying thousands of Native Alaskans from being afforded the same status as those living on tribal lands in Hawaii and the Lower 48 States.

Located on Adak Island in the Aleutian Islands of Alaska, Windy City operates a mobile network using Second Generation (“2G”) technology in order to serve the wireless needs of the area’s visitors and residents. While Adak Island was not originally included in the list of Alaskan lands designated under the Alaska Native Claims Settlement Act (“ANCSA”) in 1971, a significant portion of the island’s lands were indeed transferred from various federal agencies to The Aleut Corporation upon an act of Congress⁷ following the execution of a land transfer agreement.⁸ Accordingly, as of today, the “[l]ands and interests therein exchanged and conveyed by the United States” pursuant to the 2002 law “shall be considered and treated as conveyances of land or interests therein under the Alaska Native Claims Settlement Act.”⁹ As such, these areas must be included as eligible Tribal lands in Auction 902.

⁵ *Id.* at ¶ 196, n. 197. (“Throughout this document, “Tribal lands” include any federally recognized Indian tribe’s reservation, pueblo or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian Allotments, *see* 47 C.F.R. § 54.400(e), as well as Hawaiian Home Lands – areas held in trust for native Hawaiians by the state of Hawaii, pursuant to the Hawaiian Homes Commission Act, 1920, Act July 9, 1921, 42 Stat. 018, *et seq.*, as amended.). *See also* 47 C.F.R. §§ 1.2100 54.400(e).

⁶ *Public Notice* at ¶ 18, n. 38.

⁷ Alaska Land Exchange Agreement, Pub. L. 107-239, 116 Stat. 1488 (Oct. 11, 2002) (“Adak Land Exchange Act”). The purpose of the law was to “ratify an agreement between The Aleut Corporation and the United States of America to exchange land rights received under the Alaska Native Claims Settlement Act for certain land interests on Adak Island, and for other purposes.”

⁸ Agreement Concerning the Conveyance of Property at the Adak Naval Complex, Adak, Alaska between The Aleut Corporation, the Department of the Interior, and the Department of the Navy (effective September 20, 2000).

⁹ Adak Land Exchange Act, Section 4.

Separate and distinct from the fact that Adak Island contains ANCSA land, and thus qualifies as having “Tribal lands” under the definitions provided in the *USF/ICC Transformation Order* and the Commission’s rules, there is a significant public interest argument for the Commission to reconsider which Alaskan lands should be included in Auction 902 this fall. When the lands on Adak Island were ultimately transferred to The Aleut Corporation in 2004, the percentage of the island’s population that self-reported as “Alaskan Native or Native American” was 35.1%.¹⁰ Furthermore, despite its remote location, Adak Island serves as a crucial re-fueling outpost for the commercial fishing industry and a jumping-off point for tourism and scientific research expeditions in the Aleutian Island chain. Specifically, contractors cleaning up the decommissioned Naval base, Maritime Exchange members tracking commercial vessels, and U.S. Fish and Wildlife Service researchers located on nearby islands all use Windy City service today. In short, the residents of (and visitors to) Adak Island depend upon Windy City mobile wireless service and they should be afforded the chance to experience more robust mobile wireless access. Inclusion of Adak Island census blocks in Auction 902 affords such an opportunity. The census blocks located on Adak Island were included in Auction 901 – which underscores the current lack of 3G and 4G access on the island – and but for the unfounded change in definition to “Tribal lands,” these same census blocks should also be included in Auction 902.

Windy City knows all too well that there are “significant telecommunications deployment and connectivity challenges”¹¹ not just in the state of Alaska, but on Tribal lands like Adak Island in particular. Auction 902 was created for the sole purpose of funding mobile broadband projects on the unserved Tribal lands of this country, including those in the state of Alaska. In concurrence with General Communication, Inc. and the Alaska Rural Coalition, Windy City urges the Bureaus to re-examine its decision to modify its long-standing definition of Alaskan Native lands so that Adak Island and other ANCSA towns and villages are rightfully included in Auction 902.¹² If you have any questions, please do not hesitate to contact me at dzakov@bennetlaw.com or 202-551-0013.

Respectfully yours,

/s/ Daryl A. Zakov

Daryl A. Zakov

Attachment

¹⁰ “Community Profiles for North Pacific Fisheries – Alaska/South West Alaska/Alaskan Peninsula Aleutian Islands/Adak,” National Oceanic and Atmospheric Administration; *See* <http://www.afsc.noaa.gov/Publications/AFSC-TM/NOAA-TM-AFSC-160/COMMUNITIES/Adak.pdf>.

¹¹ *Public Notice* at ¶ 2.

¹² *See* Comments of General Communications, Inc. at pp. 1-3 (filed May 10, 2013); Reply Comments of the Alaska Rural Coalition at pp. 5-6 (filed May 24, 2013).

Attachment A

CENSUS BLOCK	Latitude	Longitude	STATE	COUNTY NAME	CMA	CENSUS TRACT	BLOCK GROUP	POPULATION
20160001001250	51.8294376	-176.6299943	AK	Aleutians West Census Area	316	2016000100	20160001001	217
20160001001270	51.8795999	-176.6311721	AK	Aleutians West Census Area	316	2016000100	20160001001	30
20160001001291	51.8746868	-176.6322494	AK	Aleutians West Census Area	316	2016000100	20160001001	18
20160001001297	51.8850518	-176.6268914	AK	Aleutians West Census Area	316	2016000100	20160001001	22
20160001001298	51.8697585	-176.6545041	AK	Aleutians West Census Area	316	2016000100	20160001001	7
20160001001406	51.8808321	-176.6321033	AK	Aleutians West Census Area	316	2016000100	20160001001	7
20160001001415	51.8727502	-176.6358607	AK	Aleutians West Census Area	316	2016000100	20160001001	3
20160001001685	51.871515	-176.6302522	AK	Aleutians West Census Area	316	2016000100	20160001001	18
20160001001686	51.8723729	-176.628996	AK	Aleutians West Census Area	316	2016000100	20160001001	2
20160001001688	51.8702621	-176.6304434	AK	Aleutians West Census Area	316	2016000100	20160001001	2