

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

In the Matter of)
)
Tribal Mobility Fund Phase I (Auction 902)) AU Docket No. 13-53

**COMMENTS OF
THE NATIONAL TRIBAL TELECOMMUNICATIONS ASSOCIATION**

I. INTRODUCTION AND SUMMARY

The National Tribal Telecommunications Association (NTTA) provides these comments regarding the Tribal Mobility Fund Phase I Auction, currently scheduled to take place on October 24, 2013.¹

NTTA consists of Tribally-owned communications companies including Cheyenne River Sioux Telephone Authority, Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., Hopi Telecommunications, Inc., Mescalero Apache Telecom, Inc., Native American Telecom – Crow Creek, Native American Telecom - Pine Ridge, Saddleback Communications, San Carlos Apache Telecommunications Utility, Inc., Tohono O’odham Utility Authority, and Warm Springs Telecom. NTTA’s mission is to be the national advocate for telecommunications service on behalf of its member companies and to provide guidance and assistance to members who are working to providing modern telecommunications services to Tribal lands.

NTTA commends the Commission on this important step in developing more widespread availability of mobile broadband services in Tribal areas. Even with the efforts put forth thus far for the Tribal Mobility Fund Phase I, there are some fundamental deficiencies that

¹ See March 29, 2013 Public Notice (DA 13-323), *Tribal Mobility Phase I Auction Schedule for October 24, 2013, Comment Sought on Competitive Bidding Procedures for Auction 902 and Certain Program Requirements (Auction 902 Notice)*

must be addressed before the Commission can award any funding. NTTA will show that the procedures outlined in the *Auction 902 Public Notice* contain barriers to participation for some Tribally-owned companies, and ignore some of the basic tenants of Tribal sovereignty. As a result, the Commission must take additional steps to resolve these issues before proceeding with Auction 902.

II. AUCTION 902 PROCEDURES CONTAIN BARRIERS TO PARTICIPATION FOR TRIBALLY-OWNED CARRIERS

The procedures outlined in the *Auction 902 Public Notice* contain some avoidable barriers to participation for certain Tribally-owned carriers. First, the Commission has yet to solve the problem of reasonable access to spectrum in Tribal areas. Secondly, the post-auction letter of credit requirement may prove to be impossible for some Tribally-owned carriers. Finally, the mobility-related build-out requirements adopted for other areas will not work in Tribal areas.

A. Reasonable Access to the Spectrum Necessary for Mobile Broadband is not Readily Available to Tribally-Owned Companies

As noted in the *Auction 902 Public Notice*, any “applicant for Auction 902 must also demonstrate that it has access to the spectrum necessary to satisfy the applicable performance requirements.”² In addition, the Commission correctly suggests that, due to the lead time involved with obtaining eligible telecommunications carrier (ETC) designation and gaining access to spectrum necessary to provide 3G or better service, companies should initiate the necessary processes as soon as possible.³ While NTTA agrees that obtaining access to the necessary spectrum involves some lead time, it is also apparent that access to spectrum in Tribal areas has been historically problematic, and that the Commission has not done everything it can to ease the difficulties related to such access.

² *Auction 902 Public Notice* at 8

³ *Id.*

In early 2011, the Commission initiated a proceeding designed to improve communications services in Tribal areas by promoting better utilization of spectrum.⁴ This proceeding has for all intents and purposes stalled, even though the Commission received comments pursuant to the comment schedule, and has received Ex Parte presentations since that time. While NTTA recognizes the difficulty in establishing an overall framework for reasonable access to spectrum in Tribal areas, the fact remains that specific Commission action on this issue has not yet occurred. For example, in an Ex Parte filing made by the National Congress of American Indians (NCAI), it was recognized “Tribal Nations are still waiting for the promulgation of important rules to increase tribal access to spectrum...” and listed a number of recommendations to accomplish better access to spectrum in Tribal areas.⁵ NTTA noted that the Commission “should support Tribal efforts to use spectrum or provide their own spectrum services by making high-propagation spectrum available to Tribes to meet public needs without auctions.”⁶

In order to recognize that access to spectrum in Tribal areas, and especially by Tribally-owned entities, is a “top priority on multiple counts”⁷, the Commission should adopt an exception to the rule requiring Auction 902 applicants already have access to spectrum capable of providing 3G or better mobile broadband services. NTTA recommends the Commission accept, as proof that a Tribally-owned entity has access to spectrum sufficient for providing 3G or better mobile broadband service, a certification from the Tribal government or other Tribally-owned entity that owns and operates the carrier demonstrating either (1) the Tribal government is in the process of obtaining access to wireless spectrum currently not held by a licensee, or (2) the Tribe has begun the process⁸ of obtaining access in the secondary market. The Tribal entity would also have to certify that access to the spectrum will occur in time to meet any of the Commission’s build-out requirements.

⁴ *In the Matter of Improving Communication Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands*, WT Docket No. 11-40, Notice of Proposed Rulemaking (rel. March 3, 2011)

⁵ NCAI November 6, 2012 Ex Parte filing in WT Docket No. 11-40

⁶ NTTA Comments, WT Docket No. 11-40, filed May 20, 2011

⁷ Office of Native Affairs and Policy (ONAP), 2012 Annual Report at 4

⁸ This could either be proof of the intent to negotiate, or proof that negotiations have commenced

B. The Letter of Credit Requirement Represents a Barrier to Participation for Tribally-Owned Carriers

Applicants are required, under proposed Auction 902 procedures as well as other Commission-adopted reverse auctions, to produce a stand-by, irrevocable letter of credit (LOC) in regards to possible default payments and to “secure the Commission’s financial commitment.”⁹ As has been stated in the past, this is proving to be a barrier to certain Tribally-owned carriers for participating in Auction 902 and other reverse auctions designed to determine support for mobile broadband.¹⁰

In addition to being a barrier to participation, the LOC requirement also conflicts with how Tribally-owned assets can be treated. As stated in a recent Ex Parte filing, “Tribally-owned assets are held in trust by the federal government for federally-recognized tribes. Because these trust assets cannot be used as collateral with private banking institutions, private banking institutions will not issue letters of credit to tribal governments.”¹¹

Considering these facts¹², the Commission should waive the LOC requirement for Tribally-owned carriers, and instead rely solely upon such applicant’s financial and technical capability showing, as well as the applicant’s history of providing service in Tribal areas.

C. The Commission’s Coverage Requirements Will Not Work in Tribal Areas

It is NTTA’s understanding that once applicants are approved for and receive Tribal Mobility Fund Phase I support, build-out and providing voice and broadband service to 75% of the covered area must occur in 2 years (for 3G service) or 3 years (for 4G service).¹³ NTTA members routinely run into major construction delays, many of which are not under the Tribe’s control, that could make meeting the two or three year coverage requirements impossible.

⁹ *Auction 902 Public Notice* at 9

¹⁰ See comments of Mescalero Apache Telecom, Inc. (MATI), WC Docket No. 10-90, WT Docket No. 10-208 (Mobility Fund Phase II issues), filed December 21, 2012 at 4-7

¹¹ Gila River Telecommunications, Inc., Gila River Indian Community, and MATI Ex Parte communication, filed April 26, 2013 in AU Docket No. 13-53

¹² The Commission should also take into account its stated policy in working with federally-recognized Tribes - see discussion in Section II *supra*

¹³ 47 CFR § 54.1006(a)-(b)

Considering that many of the issues facing carriers serving on Tribal areas are not due to Tribal policies, the Commission should consider extending the coverage time frame to four (for 3G) or five years (for 4G), depending on whether 3G or 4G service will be utilized by the applicant. An example of these likely delays was documented recently by ONAP:

“HTI [Hopi Telecommunications, Inc.] illustrated the fact that requirements such as rights-of-way and permitting approval processes that are outside of a Tribe’s control can cause considerable delays in deploying and upgrading infrastructure, which then result in higher costs.”¹⁴

III. THE COMMISSION MUST RECOGNIZE BASIC TRIBAL SOVEREIGNTY PRINCIPLES

The Commission is clearly aware that Tribal governments must be involved in the implementation of Tribal Mobility Phase I funding.¹⁵ NTTA agrees that the Tribal Engagement provisions adopted by the Commission require a certain level of communication between the winning bidder and the Tribal government over whose land it will serve. NTTA further recommends such communication must occur as soon as possible in the Tribal Mobility Fund Phase I process.

As the Commission is well aware, it should recognize the general trust relationship it has with federally-recognized Indian Tribes, and as a result of this responsibility, recognize the rights of Tribal governments to set their own communications priorities and goals for the welfare of the Tribal members.¹⁶ The Commission has also stated that it “will endeavor to streamline its administrative process and procedures to remove undue burdens that its decisions and actions place on Indian Tribes.”¹⁷ In order to operate under the auspices of the *Tribal Policy Statement*, the Commission should, during the adoption and application of Auction 902 procedures, make sure any “administrative and organizational impediments that limit the FCC’s ability to work with Indian Tribes...are identified.”¹⁸ In order to provide the best possible

¹⁴ ONAP 2012 Report, at 33

¹⁵ *Auction 902 Public Notice* at 16, which consists of a brief discussion of the Commission’s Tribal Engagement obligations

¹⁶ See *Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078, 4080-81 (2000) (*Tribal Policy Statement*).

¹⁷ *Id.*

¹⁸ *Id.*

chance of Tribal areas gaining access to mobile broadband services, the types of impediments discussed herein must be, to the greatest extent possible, mitigated or completely removed.

In order to recognize Tribal sovereignty and operate under the *Tribal Policy Statement*, the Commission should reconsider how and when Tribal governments become involved in Auction 902. The Commission states that the winning bidder must notify the relevant Tribal government within five business days of after being identified by public notice as a winning bidder.¹⁹ NTTA submits that this is not early enough in the process. Instead, the prospective bidder should be required to notify the relevant Tribal government of its *intent* to bid on serving its Tribal land. In that way, the Tribal government can provide better input into the process of determining how mobile broadband services are brought to the lands under which it is the sovereign government. NTTA also recommends that the Commission strongly encourage prospective bidders to meet, or otherwise correspond with, Tribal leaders prior to bidding.

IV. COMMENTS ON ELIGIBLE CENSUS BLOCKS

The Commission released a preliminary list of census blocks where Tribal Mobility Fund Phase I support will be available in conjunction with the *Auction 902 Public Notice*. This list is based on information generated by Mosaik Solutions, which purports to show where 3G or better service is or is not available. In order to be eligible for funding, a census block must, in essence, not have 3G or better service available at the centroid of the census block.²⁰

NTTA members, to the extent possible, will provide additional detail on whether the list of eligible census blocks is reasonable in individual comments or in reply comments. However, NTTA notes that basing eligibility on whether 3G or better service is available at the census block's centroid may preclude some areas where such service is not, in reality, available. In addition, in at least one Tribal area, the list of eligible census blocks underwent a substantial change between the end of Auction 901 and the beginning of Auction 902.

As noted previously, some commenters stated that measuring service availability at the census block centroid could present an inaccurate picture of where service is in reality

¹⁹ *Auction 902 Public Notice* at 16

²⁰ *Id.*, at 17-18

available.²¹ This is especially true for large census blocks - those that may be substantially greater in size than the 2.1 mile average noted by the Commission.²² While NTTA recognizes that the Commission chose the centroid method in part due to the lack of more granular data, the fact remains that if service is available at the centroid, there is no guarantee such service is available everywhere in that census block. Furthermore, for census blocks substantially larger than the average size (for example, 10 miles), the potential for uncovered areas is exacerbated. Therefore, NTTA recommends the Commission consider extending the area in which coverage must be available in order to be ineligible for support further out from the centroid, perhaps as far as ten miles.

The list of eligible census blocks in the Mescalero Apache Tribe's (MAT) area underwent a drastic change between Auction 901 and 902. While MAT is in the process of determining whether 3G or better service is indeed available in all areas in which the Mosaik data reflects it is, the mere fact of the change causes inherent concern for the reliability of the Mosaik data. In MAT's case, there were 91 census blocks listed as being eligible for support for Auction 901 (Mobility Fund Phase I).²³ By contrast, there are 4 eligible census blocks listed in MAT's area for Auction 902.²⁴ The only difference in how the eligible census block lists were generated between Auction 901 and 902 is the Mosaik data was updated. Considering that Mosaik data "relies on reporting by existing providers and therefore may tend to over-report the extent of existing coverage"²⁵, NTTA recommends the Commission reconsider the level of reliance on Mosaik data when reviewing challenges to the eligible census block lists for Auction 902.

V. CONCLUSION

While NTTA commends the Commission in recognizing the specific needs of Tribal areas in adopting its Tribal Mobility Funds, steps need to be taken in order for Phase I to be as successful as it can be. NTTA urges the Commission to adopt the recommendations discussed

²¹ See Report and Order and Further Notice of Proposed Rulemaking (Nov. 18, 2011 FCC 11-161), WC Docket No. 10-90, et. al., (*ICC/USF Transformation Order*) at 344 (references Mid-Rivers Mobility Fund comments)

²² *Auction 902 Public Notice* at 13

²³ See May 2, 2012 Public Notice (DA 12-641), AU Docket No. 12-25

²⁴ *Auction 902 Public Notice*, Attachment A-1

²⁵ *ICC/USF Transformation Order* at 336

above, not only to ensure the success of Phase I, but also to carry these practices forward to Tribal Mobility Fund Phase II. Only in this way will the Commission be able to meet its goals of bringing mobile broadband services to Tribal areas.

Respectfully Submitted,

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National Tribal Telecommunications Association

May 10, 2013