May 14, 2015

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Ms. Dortch:


I. Introduction

Doyon and Chugach are two of the thirteen Native regional corporations established by Congress under the terms of the Alaska Native Claims Settlement Act (“ANCSA”), Pub. L. No. 92-203, 85 Stat. 688 (1971), as amended. Headquartered in Fairbanks, Doyon has more than 19,000 shareholders. Doyon’s mission is to continually enhance its position as a financially strong Native corporation in order to promote the economic and social well-being of its shareholders and future shareholders, to strengthen its Native way of life, and to protect and enhance its land and resources. Chugach represents more than 2,500 shareholders and exists to serve the interests of the Alaska Native people of the Prince William Sound region. Chugach is
committed to profitability, providing opportunities to its shareholders, celebrating and preserving its culture and traditions for future generations, and responsibly managing its lands.

Doyon and Chugach recently participated in the Federal Communications Commission’s (FCC’s) Auction No. 97 (Auction 97). Doyon is the manager member of Northstar Manager, LLC, which entered into a strategic partnership with a DISH Network subsidiary, and owns and controls Northstar Wireless, LLC, a Designated Entity. We were successful in the auction, and we are proud of our participation.

II. The Designated Entity Program

The Designated Entity Program was established to promote competition in the wireless market. In 1993, when Congress passed the Omnibus Budget Reconciliation Act of 1993, it directed the FCC to ensure widespread dissemination of licenses, specifically among small businesses, including minority and women-owned businesses, and rural telecoms. Through that law the Designated Entities came to be.

The FCC’s Designated Entity Program was created, among other things, to fulfill a congressional mandate of assigning licenses to a wide variety of applicants. Because many such applicants access to capital is limited, the Designated Entity program today provides bidding credits in order to encourage Designated Entity participation in FCC-conducted spectrum auctions. But the Designated Entity program is not intended to be limited to small or rural wireless providers. The program has historically encompassed small firms partnering with larger investors with greater access to capital, facilitating Designated Entity competition against large incumbents in large markets and on a nationwide level.

In 1993, two large telecommunications companies dominated the wireless market. Congress recognized the dangers of excessive concentration in the wireless market, and directed
the FCC to find ways to encourage competition throughout the industry. Those concerns are just relevant today. Indeed, large telecommunication firms have a vested interest in limiting competition. One way these companies can limit competition is to limit the Designated Entity program to a small, rural providers in order to keep down the costs of spectrum during FCC auctions.

Doyon and Chugach ask the FCC to take several broad points into account in this proceeding. We recognize the challenges faced by new entrants to the marketplace, and prudent review of public policy programs like the Designated Entity program can be key to successful implementation. The dissemination of licenses, specifically to small, minority-owned business and rural telecoms have been one tool used to help new entrants into the market place, and also increase competition. On the other hand, restrictive rules restrict competition. Restrictive rules include hold period rules, limits on wholesaling, or limiting bid credits. Restricting competition resulting in lower prices in spectrum auctions costing taxpayers billions of dollars in lost auction proceeds.

Our investment in Northstar Wireless, LLC will benefit our over 21,700 shareholders, as well as American consumers in general. Beyond those benefits, we also know that true competition witnessed in Auction 97 generated substantial auction proceeds, $7 billion dollars of which will go to FirstNet. This in turn will benefit rural Alaska, as FirstNet is the first nationwide wireless broadband network dedicated to public safety. This is vitally important, as rural Alaska remains underserved by both broadband service and public safety resources.

III. Eligibility for Bidding Credits

We urge the FCC to preserve without change 47 C.F.R. § 1.2110(c)(5)(xi) (and 47 C.F.R. §§ 1.2110(b) and (c)(5)) regarding Native American Tribes and Alaska Native Corporations
(“ANCs”). Under Federal law, Native corporations are considered a minority and economically disadvantaged business enterprise. Furthermore, tribal affiliation rules used in size determinations for “small” business status as they pertain to Tribes and ANCs are based in statute.

For twenty years, the FCC has properly followed the requirements of the law as it relates to size determinations of entities owned and controlled by Tribes and ANCs. Under the Indian Commerce Clause of the United States Constitution, Congress has a separately enumerated power which provides for plenary authority regarding Indian tribes. U.S. Const. Art. 1, § 8. Tribes (including Alaska Native Corporations) are recognized under federal law as “unique aggregations” which force numerous, poor individuals to operate under a common entity with a common pool of capital. See United States v. Antelope, 430 U.S. 641 (1977). In 1988, Congress determined that “[f]or all purposes of Federal law, a Native Corporation shall be considered to be a . . . minority and economically disadvantaged business enterprise.” 43 U.S.C.§ 1626(e).

In 1990, Congress enacted legislation which provided that in determining the qualifications for a “small” business status, the Small Business Administration (“SBA”) shall determine the size of a small business concern owned by an Indian tribe or an Alaska Native Corporation “without regard to its affiliation with the tribe, any entity of tribal government, or any other business enterprise owned by the tribe.” 15 U.S.C. § 636 (j)(10)(J)(ii). This principal, which exempts tribal and Alaska Native Corporation assets from the size determination is based upon the above “forced aggregation” concept and is known as the “tribal affiliation rule.” In 1992, the SBA adopted the above statutory language as part of its affiliation regulations for determining the size of a “small” business. 13 C.F.R. § 121.401(b).

The FCC is required to ensure that its own policies, in areas outside its area of expertise,
are consistent with other bodies of federal law. See, e.g., La Rose v. Commission, 494 F.2d 1145, 1147 n.2 (D.C. Cir. 1974). In 1994, following the development of an extensive record concerning the unique structure and economic status of Tribes and ANCs, the FCC adopted its own tribal affiliation exemption that is an important component of its competitive bidding designated entity rules. See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Order on Reconsideration, 9 FCC Rcd 4493, 4493-94 (1994); Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 427-29 (1994). In 1995, in the wake of the decision of the Supreme Court of the United States in Adarand Constructors v. Peña raising the level of judicial scrutiny of racial classification, the FCC eliminated the race-based preferences built into its broadband PCS competitive bidding rules, but it expressly retained its tribal affiliation exemption. See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Sixth Report and Order, 11 FCC Rcd 136, 143-44, 155-56 (1995).

According to the FCC, this “affiliation rule exception is different from the exception applicable only to minority investors in that it is premised on [Indian tribes’] unique legal status as recognized in the ‘Indian Commerce Clause’ of the United States Constitution.” Id. at 156 (foot note omitted). The FCC’s rules on this issue is firmly and properly grounded in statute. There is no basis for changing them now.

Apart from this statutory basis, strong public policy considerations support continuation of the tribal exemption. Tribes and ANCs have unique obligations and restrictions regarding investment funding. As a practical matter, Tribal members and shareholders of ANCs participate in spectrum auctions through their Tribe or ANC. Pursuant to this model, entities controlled by ANCs have participated in eight of the most successful FCC spectrum auctions, have placed
winning bids valued in the aggregate at $12.4 billion, have been granted scores of FCC spectrum licenses, have successfully partnered with companies such as T-Mobile, Leap Wireless and AT&T Wireless, and have built out wireless networks in markets such as Chicago, Dallas, Philadelphia, Seattle, Detroit, El Paso, Louisville and many other cities.

Against this background, attacks on the Tribal and ANC affiliation rule have no basis in law and are ill-founded. We ask the FCC to preserve intact the current rules regarding Tribes and ANCs.

IV. Conclusion

Doyon and Chugach strongly urge the FCC to take steps to enhance the ability of the agency’s decades-old designated entity program to continue to bring real competition to incumbent wireless companies in markets of all sizes, ranging from small villages in Alaska to New York City, and to resist calls to preserve incumbents’ market positions through the adoption of proposals that will restrict both designated entities’ access to capital and designated entities’ ability to bring the benefits of competition to consumers.

Thank you for this opportunity to comment.