



Oct. 3, 2019

BY ELECTRONIC MAIL

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RE: OMB Control Number: 3060-1094, *Transforming the 2.5 GHz Band*, WT Docket No. 18-120.

I. Summary

The Federal Communications Commission (FCC) has submitted an emergency request to the Office of Management and Budget (OMB) for expedited review and approval of three information collection requests (ICR) associated with the FCC's newly adopted rules for Educational Broadband Service (EBS) 2.5 GHz spectrum band.¹ The Schools, Health & Libraries Broadband (SHLB) Coalition shares the FCC's view that deploying broadband to underserved rural areas and on Tribal lands is critically important. To achieve those goals, however, the FCC needs to take the time to collect feedback and provide OMB with accurate information about complying with these ICRs. Otherwise, the Commission risks undermining its own objectives for the 2.5 GHz band, including the first-ever priority window that grants Tribal entities priority access to this valuable spectrum. In fact, the burden estimates in the FCC's ICR are flawed, inaccurate, and inconsistent with the Order. SHLB respectfully requests that OMB reject the FCC request for emergency processing, direct the FCC to provide a new submission that contains accurate information, and review this submission through normal procedures and timeline.

II. Background

The SHLB Coalition is a broad-based coalition of organizations that share the goal of promoting open, affordable, high-quality broadband for anchor institutions and their communities. SHLB Coalition

¹ *Transforming the 2.5 GHz Band*, Report and Order, FCC No. 19-62, WT Docket No. 18-120 (rel. July 11, 2019) ("Order").

members include representatives of schools, libraries, health care providers and networks, state broadband offices, private sector companies, state and national research and education networks, and consumer organizations. See <http://shlb.org/about/coalition-members> for a current list of SHLB Coalition members.

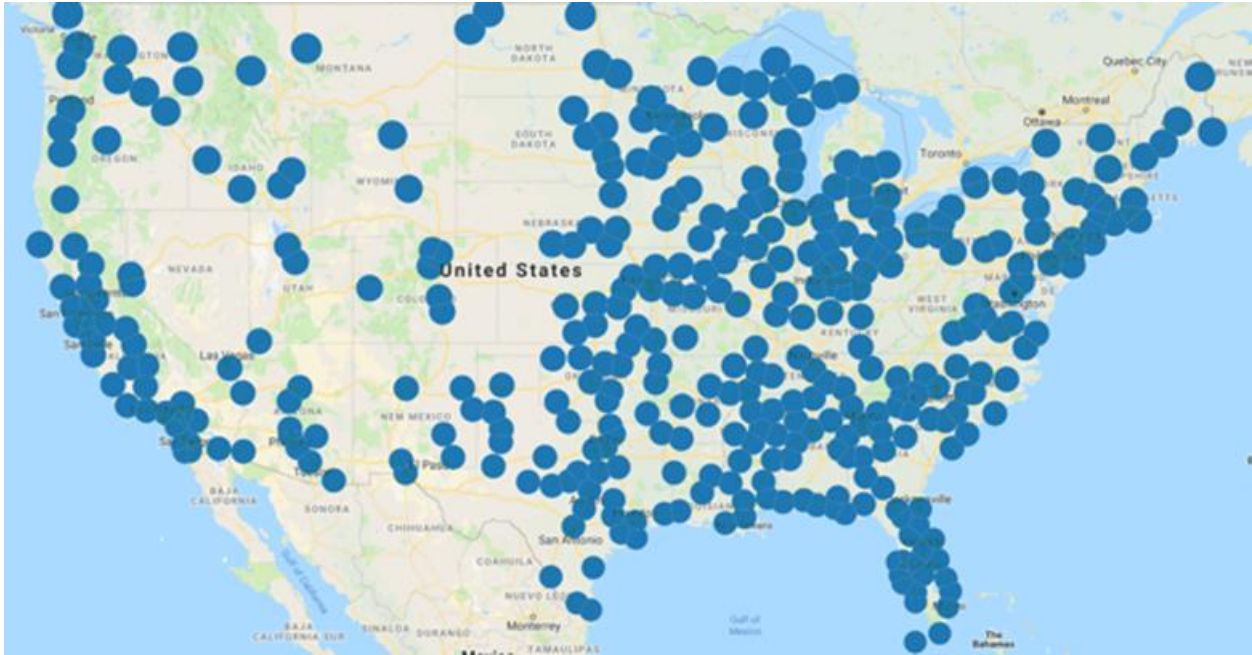
The SHLB Coalition participated actively in the FCC proceeding and filed several sets of comments with the FCC, urging it to make EBS licenses available to Tribal entities and to educational institutions. The SHLB Coalition also commissioned and filed an economic study documenting the economic benefits of issuing these EBS licenses in rural markets.²

Adopted on July 11, 2019, the FCC's EBS Order reshapes the regulations that govern the licensing of the 2.5 GHz band of spectrum in order to facilitate deployment of the new 5G wireless networks. Since 1995, the FCC had frozen licensing of EBS 2.5GHz spectrum, which had been reserved for educational purposes since the 1960s.³ As a result, the FCC had left unassigned 2.5GHz spectrum across approximately 50 percent of the United States, mostly in rural areas, that would reach about 20 percent of the population. The map below shows existing EBS license areas and white spaces of available areas for one current EBS channel.⁴

² Some examples of the SHLB Coalition's filings are located [here](#), [here](#) and [here](#).

³ Over time, the FCC allowed these institutions to lease much of their allocated spectrum to commercial mobile broadband operators as long as they continued to use a portion of their assigned spectrum for educational purposes. Today, existing EBS license holders use their EBS spectrum in many ways. Some, like Northern Michigan University have built their own educational broadband networks, connecting previously unserved communities throughout the upper peninsula. Others, like Voqal and the North American Catholic Educational Programming Foundation, lease their spectrum in exchange for substantial numbers of educational broadband accounts that they provide to schools, libraries, nonprofits, and low-income individuals that provide internet access as a platform for opportunity and lifelong learning. Comments of Northern Michigan University (<https://ecfsapi.fcc.gov/file/108081307109435/NMU%20NPRM%20Docket%2018-120%20Comments.pdf>), Voqal ([https://ecfsapi.fcc.gov/file/10809748206409/Voqal%20Comments%20\(8-8-2018\).pdf](https://ecfsapi.fcc.gov/file/10809748206409/Voqal%20Comments%20(8-8-2018).pdf)), and NACEPF & Mobile Beacon (<https://ecfsapi.fcc.gov/file/10808199794637/NACEPF%20EBS%20Comments%2008.8.2018.pdf>) (all comments were filed to WT Docket No. 18-120 on August 8, 2018).

⁴ Note – this does not reflect the new band plan which would combine various EBS channels into three new license blocks. Nevertheless, it shows EBS as it exists today to illustrate the availability of large areas of spectrum in rural areas and the small slivers of spectrum around existing licensees in more urban areas.



In May 2017, SHLB asked the FCC to take action to unfreeze EBS spectrum and was pleased when the FCC issued a Notice of Proposed Rulemaking that, among other things, proposed windows of opportunity for Tribal Nations and educational institutions to have priority access to the available spectrum.⁵ SHLB largely supported that proposal.

Having held up the licensing of rural EBS licensing for more than two decades, the FCC's July 2019 Order adopted a two-phase plan for licensing that unassigned spectrum.⁶ First, the FCC decided to hold a Tribal Priority Filing Window, giving Tribal entities a priority opportunity to access spectrum on rural Tribal lands. Second, after that window, the FCC decided to hold a commercial auction of overlay rights to the remaining spectrum for any county that contains unassigned 2.5 GHz spectrum. The FCC adopted new performance requirements for all new 2.5GHz licensees, whether obtained through the Tribal window or the auction.

The FCC has now requested expedited OMB review and approval of three ICRs in the Order. First, under section 27.1204, the FCC request provides that an EBS applicant applying for a license in the Tribal Priority Filing Window must demonstrate that it : (1) is a federally-recognized American Indian tribe or Alaska Native Village; or an entity that is owned and controlled by a federally-recognized Tribe or a consortium of federally-recognized Tribes; (2) is requesting a license on Tribal land; (3) is requesting a license in a rural area; and (4) has a local presence on the Tribal land for which it is applying. Second, the FCC requests emergency approval of section 27.14(u), which requires new licensees to file construction notifications and certify that they have met the applicable performance benchmarks. Third, the FCC requested renewed ICR approval on an expedited basis for Section 27.1221(f), which

⁵ *Transforming the 2.5 GHz Band*, Notice of Proposed Rulemaking, 33 FCC Rcd. 4687 (2018).

⁶ The FCC ultimately declined to adopt the educational priority window and made a number of other changes removing educational requirements from the band.

requires that Broadband Radio Service (BRS) and EBS licensees provide information about their antennas to any nearby licensees who request it. This information, which is necessary for avoiding interference, is comprised of the antenna's geographic coordinates, the height above ground level of the center of radiation for each transmit and receive antenna, and the date on which transmissions commenced.

As discussed below, SHLB has concerns with the FCC's burden estimates for each of these three ICRs. But, as a threshold matter, we first turn to the emergency nature of the FCC request.

III. The FCC's Emergency Request is Unreasonable and Risks Undermining the FCC's Goals

In the FCC's emergency request, the agency asks for expedited treatment because "[t]he Commission wants to auction spectrum in the 2.5 GHz band in 2020" and the regular PRA review process would "delay the auction and the provision of service in Tribal lands."⁷ SHLB agrees that service deployment is extremely important, particularly in unserved and underserved rural and Tribal communities. Respectfully, however, the FCC's desire to auction these long-frozen licenses on the agency's preferred schedule does not amount to an emergency under OMB's rules. The FCC's emergency assertion is undercut by the pace of its proceeding, its delay in filing the ICR submission, and its inconsistency with how it has sought approval for prior auctions. In fact, rushing the PRA process creates the risk that neither the FCC nor OMB will have accurate information about these burdens, which would undermine the agency's own objectives, including the success of the tribal window.

OMB rules require an emergency request to show that (1) the regular process is reasonably likely to result in public harm; (2) an unanticipated event has occurred; or (3) the regular process would be "reasonably likely to prevent or disrupt the collection of information or is reasonably likely to cause the agency to miss a court or statutory deadline."⁸ The FCC has not identified any conceivable public harm that would result from the normal clearance procedures, much less made any attempt to show that the harm is "reasonably likely" to occur. Similarly, the FCC has not identified any unanticipated events, potential disruptions of their ICRs, or any "statutory or court ordered deadlines" that are in danger of being missed if normal procedures are followed.

The FCC's scheduling preferences fall far short of the emergency processing justifications that OMB has recently accepted. Emergency processing has been used to help agencies avoid depriving Medicaid recipients of needed care (81 FR 26798), track the multistate outbreak of a drug-resistant disease in puppies (ICR Ref. No. 201904-0920-006), quickly provide assistance to schools serving areas affected by natural disasters (84 FR 45136), comply with a newly adopted statutory mandate (ICR Ref. No. 201903-1850-004), and promptly address IT security risks (ICR Ref. No. 201907-3255-002). The FCC has identified no equivalent justification for its emergency request.

The FCC claims that it wants to hold a spectrum auction in the 2.5 GHz band in 2020 and that the regular PRA process would significantly delay that timing. Contrary to these claims, though, the true "public

⁷ Mindy J. Ginsburg, Deputy Managing Director, FCC, Letter to Alexander Hunt, Chief – Information Policy Branch, OIRA, OMB, Aug. 22, 2019 ("Emergency Justification Letter"), at 2.

⁸ 5 C.F.R. 1320.13.

harm” is more likely to come from refusing to take the time to get the deployment of this spectrum right. The FCC’s Emergency Justification Letter lacks the necessary historical context for the 2.5 GHz band auction. Despite the claimed emergency, this mid-band 2.5 GHz spectrum has already been licensed and deployed for about 80 percent of the population and the FCC froze licensing of the remaining spectrum in the mid-1990s. Outside of a handful of waivers, the FCC has not issued new licenses for decades. The deployment of this specific spectrum has not been considered an emergency for many years. Spectrum auctions are also not uniquely emergencies, as shown by the FCC’s use of the normal PRA approval procedures for its other recent spectrum auctions. It is clear that the supposed emergency in the 2.5 GHz band is entirely of the FCC’s own making.

The FCC’s emergency request is also undercut by the agency’s deliberate pace up to this point. The proceeding that led to the Order rightly took over a year to resolve. The FCC took the time it needed to collect input from various stakeholders, evaluate the record, and make a decision. OMB should likewise be able to take the time it needs get this PRA review and approval right by collecting feedback from stakeholders, evaluating the record, and making an informed decision. In fact, despite the agency’s current claim that avoiding a two-month delay constitutes a valid emergency, the FCC waited nearly two months after the final rules were publicly released to even submit this “emergency” ICR request.

The FCC also claims that the need for broadband connectivity on tribal lands supports their emergency request. No one disputes that tribal broadband is important and SHLB can understand that some tribal entities want the tribal window to open as soon as possible. But we understand that many tribes need time to get educated about this opportunity and to follow their internal decision-making processes. There are over 500 Tribal Nations that could participate in the FCC’s tribal window if they are given the time and opportunity to understand the potential for these licenses to benefit their residents. Thus, rushing the PRA process and moving the Tribal Priority Filing Window forward too quickly will likely result in *fewer* tribes having the time to effectively participate. An expert witness knowledgeable about the particular challenges faced by tribes with broadband deployment told the Senate Indian Affairs Committee that the 2.5 GHz band will be “very positive” for the tribes but that additional publicity about the Tribal Priority Filing Window “would be very helpful.”⁹ She said that the tribes need basic information on how to take advantage of the 2.5 GHz spectrum but the necessary information on the application process is not readily available.

Finally, the FCC has announced that due to other scheduled auctions that will be held first, the 2.5GHz auction will be held in the second half of 2020.¹⁰ The FCC may only conduct one auction at a time. While the FCC needs to hold the tribal window prior to the auction, the regular PRA process is not likely to delay the EBS auction from the announced planned timeline.

IV. The FCC’s Information Collection Request Burden Estimates Are Flawed and Inaccurate

⁹ *Oversight Hearing on “GAO Report on Tribal Access to Spectrum: Promoting Communications Services in Indian Country” Before the S. Comm. On Indian Affairs*, (statement of Belinda Nelson, Chairperson, Gila River Telecommunications, Inc.) <https://www.indian.senate.gov/hearing/oversight-hearing-gao-report-tribal-access-spectrum-promoting-communications-services-indian>.

¹⁰ See, <https://docs.fcc.gov/public/attachments/DA-19-977A1.pdf>.

In all events, the FCC's ICR request inaccurately estimates the burdens these information collections will impose on stakeholders. Each of the FCC's three burden estimates is too low, incomplete, and inconsistent with the Order and its objectives. These flaws underscore the problems with the FCC's attempt to rush OMB to approve these ICRs.

The FCC's Federal Register Notice sets the total burden from all three ICRs at 26 respondents, 226 responses, 221 hours, and \$72,000. However, it appears that the estimate in their Supporting Statement nearly triples the total number of respondents and more than doubles the total hours required. While we believe the FCC's estimates are inaccurate, the ICR and the Supporting Statement do not clearly synch up.

Tribal Window ICR. The FCC's burden estimate for the tribal window ICR is plagued with problems. For the tribal application window, the FCC undercounts the likely number of tribal applicants, fails to consider all of the different burdens arising from the collections, and sets an unrealistically low time burden for tribal applicants. The Federal Register Notice estimates the number of tribal applicants at 8 (including consultants, the supporting statement appears to estimate 32 respondents) and estimates 10 hours for the application process. Both of these estimates are unreasonably low. According to the Order, there are 573 federally recognized tribes eligible to use the tribal application window.¹¹ But the window is not limited to just the tribes; any communications provider or other entity, such as the 38 tribal colleges and universities, that is owned and controlled by an eligible tribe can also apply. Early outreach efforts suggest that the tribes and tribal entities are very interested in taking advantage of the application window. Estimating that only 8 tribal entities will respond is unreasonably low.

The FCC's 10-hour time burden also dramatically underestimates the time required for participating in the application window. In addition to the special circumstances for tribal applicants discussed above that will likely require additional time, this estimate fails to account for tribal decision-making and review processes. The FCC also fails to recognize all of the obligations placed on tribal applicants or quantify the additional burdens associated with those obligations. According to the FCC, all a tribe deciding to participate in the tribal window needs to do is to identify whether they are: (1) a federally recognized American Indian tribe or Alaska Native Village; or an entity that is owned and controlled by a federally-recognized Tribe or a consortium of federally-recognized Tribes; (2) requesting a license on Tribal land; (3) requesting a license in a rural area; and (4) have a local presence on the Tribal land for which they are applying. Not so. An additional obligation unrecognized by the FCC's formulation is that tribal applicants must also identify where EBS spectrum is available in the first place. The FCC has not yet made this information available to potential applicants in any kind of systematic way. The FCC's Universal Licensing System identifies current licensees' areas but does not easily identify the contours of available white space in the tribal areas that are eligible for licensing in the tribal application window. It also reflects only the current EBS band plan. In the tribal application window the Commission will apply a radically different approach to dividing up this spectrum with new licenses composed of various fragments of the existing EBS channel groups. Thus, a simple map of existing license areas will tell tribal applicants little about the licenses that will be available in the tribal window. Mapping available EBS spectrum on tribal land is a time and money burden that is ignored by the FCC. We understand that the

¹¹ Order at ¶ 49.

FCC is in the process of revising the ULS system, but the burdens associated with the updated system are difficult to estimate until it is available.

Construction Notification ICR. For the construction requirement, the FCC burden estimates are far too low and inconsistent with the FCC's Order. The FCC estimates that 8 tribal respondents will be subject to this construction reporting requirement. For all of the reasons above, the estimate of tribal respondents subject to this requirement is likewise too low. But, bizarrely, the FCC appears to estimate that there will be zero new 2.5GHz licensees that acquire their licenses through the auction would also be subject to the same construction requirement. That makes no sense. Based on the Order, we understand the FCC intends to hold county auctions for three blocks in each county with available EBS spectrum. We estimate that about 77% of the nation's 3,200 counties -- about 2,500 counties -- will be subject to auction for each license block. That is a large number of auctions, resulting, presumably, in a large number of new licenses. That the FCC itself estimates that there will be zero new EBS licenses after the auctions is either just plain error or suggests that the FCC itself has very little faith that there will be any significant participation in the auction—despite the claimed urgent need for mid-band spectrum.

Interference ICR. The FCC's burden estimate for the interference ICR is also unreasonably low, unsupported by any evidence, and contrary to the FCC's Order. The FCC estimates only 10 respondents for the interference ICR, which we understand to be unchanged from the prior ICRs approved by OMB.

To begin with, there is no basis for this estimate. The Order in the EBS proceeding makes no mention of the interference requirements, and there is negligible discussion of them in the record. At a minimum, the FCC needs some record on which to base its estimate. Indeed, the current interference rules make little sense for the FCC's new band plan. They continue to impose channelization requirements and other technical restrictions inconsistent with the new band plan the Commission described in its order. And because the Commission did not take steps to avoid issuing tiny slivers of overlay spectrum, the existing interference protection rules, which tie interference protection to distance from the edge of the license area, will leave some licensed receivers completely unprotected. The FCC should really be undertaking a new rulemaking to revise those rules to match the new band plan.

Second, it is entirely unreasonable to conclude that the combination of new rules, the tribal window, and the auctioning of overlay rights for all remaining 2.5 GHz spectrum across the country would have zero effects on the burden from this requirement. Historically, much of this spectrum has been leased and operated by one national carrier. This reduced the need for interference communications among users of the same spectrum band. However, if the tribal application window and the auction are successful under the FCC's own terms, there will soon be many new licensees, with irregularly shaped areas in which they hold primary license rights and must build out, in close proximity to each other and existing licensees. In fact, the Order places an obligation on overlay auction winners to protect existing licensees within their areas from interference. There is no question that the number of interference information requests will be greater than the historical estimate.

Conclusion

SHLB respectfully requests that OMB reject the FCC's emergency request for PRA approval to give stakeholders and the agency time to accurately estimate the burdens from these ICRs. Mid-band spectrum deployment is important, particularly in rural and Tribal areas. But the FCC should take the time it needs to provide more accurate estimates consistent with its Order, give stakeholders the time they need to provide input, and ensure that OMB has an accurate burden estimate to review and approve.

Sincerely,



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