ORAL ARGUMENT NOT YET SCHEDULED

Nos. 18-1026, 18-1080 (consolidated)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NATIONAL LIFELINE ASSOCIATION; ASSIST WIRELESS, LLC; BOOMERANG WIRELESS, LLC D/B/A ENTOUCH WIRELESS; EASY TELEPHONE SERVICES COMPANY D/B/A EASY WIRELESS,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents,

_____

On Petition for Review of an Order of the
Federal Communications Commission

BRIEF OF PETITIONERS NATIONAL LIFELINE ASSOCIATION; ASSIST WIRELESS, LLC; BOOMERANG WIRELESS, LLC D/B/A ENTOUCH WIRELESS; EASY TELEPHONE SERVICES COMPANY D/B/A EASY WIRELESS

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Dated: May 9, 2018

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. Parties and Amicus Curiae

The parties to this petition for review are Petitioners National Lifeline Association ("NaLA"), Assist Wireless, LLC, Boomerang Wireless, LLC d/b/a enTouch Wireless, and Easy Telephone Services Company d/b/a Easy Wireless, and Respondents Federal Communications Commission ("FCC") and the United States of America.

No party has filed a motion for leave to intervene in support of Respondents.

There are currently no amici.

II. Rulings Under Review

The ruling under review is an order of the FCC captioned *In the Matter of Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support*, WC Docket Nos. 17-287, 11-42, 09-197, Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, FCC 17-155, ¶¶ 2-31, 142, 145, (FCC Rel. Dec. 1, 2017) (*Fourth Report and Order*).

III. Related Cases

Crow Creek Sioux Tribe v. FCC, No. 18-1080, has been consolidated with this case. Counsel for Petitioners are not aware of any other related petitions for review of this order pending before this Court or of any related cases pending before any other court.

This case was not previously before this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statements filed by Petitioners on January 25, 2018 remain current. Specifically:

(1) Petitioner NaLA is the leading national trade association representing service providers and vendors serving low-income households participating in the FCC's Lifeline program. NaLA is a not-for-profit corporation and has not issued shares or debt securities to the public. NaLA does not have any parent companies, subsidiaries, or affiliates whose listing is required by Rule 26.1.

(2) Petitioner Assist is 32.86% owned by Flagship Equity LLC, which is not a publicly held company. Assist is 32.86% owned by BBBY, Ltd., which is not a publicly held company. Assist is 32.86% owned by SXCS Investments LLC, which is not a publicly held company. There are no publicly held companies that have a 10% or greater ownership interest in Assist. Assist is an eligible telecommunications carrier ("ETC") that provides Lifeline services to customers eligible for Tribal Lifeline benefits.

(3) Petitioner Boomerang states that it is 100% owned by HH Ventures, LLC. Boomerang is neither owned nor controlled by a publicly traded company. Boomerang is an ETC that provides Lifeline services to customers eligible for Tribal Lifeline benefits.

(4) Petitioner Easy Wireless has no parent company and is neither owned nor controlled by a publicly traded company. Easy is an ETC that provides Lifeline services to customers eligible for Tribal Lifeline benefits.

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GLOSSARY

The Act – The Communications Act of 1934, as amended, 47 U.S.C. §151, *et seq*.

Basic Lifeline Support – A federal subsidy of $9.25 made available each month to an eligible telecommunications carrier providing Lifeline service to a qualifying low-income consumer pursuant to the Lifeline program.

Commission – Federal Communications Commission.

Enhanced Tribal Lifeline Support – An additional federal subsidy of up to $25 made available each month to an eligible telecommunications carrier providing Lifeline service to qualified residents of Tribal Lands.

FCC – Federal Communications Commission.

Lifeline – The Commission's Lifeline Program for Low-Income Consumers.

Lifeline Rules – The rules set forth at 47 C.F.R. § 54.400 *et seq*.

Universal Service Administrative Company (USAC) – An independent not-for-profit company designated by the FCC to administer the Universal Service Fund and its associated programs, including Lifeline.

Tribal Lands – As defined in 47 C.F.R. § 54.400(e), "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); Indian allotments; Hawaiian Home Lands -

areas held in trust for Native Hawaiians by the state of Hawaii, pursuant to the Hawaiian Homes Commission Act, 1920 July 9, 1921, 42 Stat. 108, et. seq., as amended; and any land designated as such by the Commission for purposes of this subpart pursuant to the designation process in § 54.412."

STATEMENT OF JURISDICTION

This Court has jurisdiction over the petitions pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). On December 1, 2017, the Commission released the *Fourth Report and Order*, which was subsequently published in the Federal Register on January 16, 2018 (83 Fed. Reg. 2104). The *Fourth Report and Order* is a final order. Petitioners timely filed their petition for review on January 25, 2018. *See* 28 U.S.C. § 2344.

RELEVANT STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the Addendum to this Brief.

STATEMENT OF THE ISSUES

1. Whether it was unlawful for the Commission's adoption of the Tribal Facilities Requirement and the Tribal Rural Limitation in to adopt the *Fourth Report and Order* without first opening a new notice and comment rulemaking violated the Administrative Procedure Act ("APA");

2. Whether the Commission violated the APA or the Communications Act of 1934, as amended (the "Act") or otherwise exceeded its authority by adopting the Tribal Facilities Requirement in the *Fourth Report and Order*;

3. Whether the Commission violated the APA or otherwise exceeded its authority by adopting the Tribal Rural Limitation in the *Fourth Report and Order*.

STANDING

Petitioners each have standing to bring the petition.

NaLA is an industry association dedicated to preserving and effectuating the Lifeline program and serving the interests of Lifeline eligible telecommunications carriers ("ETCs"), distributors, and low-income consumers, including low-income consumers on federally recognized Tribal lands.

An association has standing to act on behalf of its members if (1) at least one of the members has standing to sue in his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the individual member to participate in the lawsuit. *See Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). A member has standing to sue if (1) he suffered a concrete and particularized injury in fact, (2) there is a causal connection between the injury and the conduct complained of, and (3) it is likely that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Petitioners' members, including Assist, Easy, and Ready ("ETC Petitioners"), have standing through their concrete injury suffered by the rule changes in the *Fourth Report and Order*. Specifically, the *Fourth Report and Order* directly injured Petitioners' members by (1) eliminating enhanced Tribal

Lifeline support for non-facilities-based ETCs and (2) eliminating enhanced Tribal Lifeline support for their subscribers living on urban Tribal lands.

Petitioners each participated in the underlying proceeding that culminated in the *Fourth Report and Order*.

STATEMENT OF FACTS

I. The Lifeline Program

The FCC created the Lifeline program in 1985 "to ensure that low-income consumers had access to affordable, landline telephone service in the wake of the divestiture of AT&T."[1] A decade later, in the Telecommunications Act of 1996, Congress codified a commitment to advancing access to affordable telecommunications and information service for all Americans, which included as central principles that "[q]uality services should be available at just, reasonable, and affordable rates" and that "[c]onsumers in all regions of the Nation, including low-income consumers . . . should have access to telecommunications and information services."[2]

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[1] *See Lifeline and Link Up Reform and Modernization et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656, 6662-63, ¶ 12 (2012) (*2012 Lifeline Reform Order*) (citing *MTS and WATS Market Structure, and Amendment of Parts 67 & 69 of the Commission's Rules and Establishment of a Joint Board*, Report and Order, 50 Fed. Reg. 939 (Jan. 8, 1985)).

[2] *See* 47 U.S.C. §§ 254(b)(1), (3).

In its *1997 USF First Report and Order*, the FCC adopted rules implementing Section 254 and formally establishing its universal service program, which revised and expanded the Lifeline program as a stand-alone program "designed to make residential service more affordable for low-income consumers," finding that the lack of affordable service, even where facilities were available, "r[an] counter to" the Commission's statutory obligations under 47 U.S.C. § 151.[3] The Order also established a "high-cost" program designed to provide direct support for infrastructure deployment in unserved and underserved areas.

Today, the Lifeline program offers each eligible low-income household one basic monthly discount of $9.25—and up to an additional $25 per month for residents of Tribal lands, *see infra*—to offset the costs of a wireline or wireless voice and broadband service plan.[4] By statute, Lifeline service may only be provided by ETCs, which are certified by state public service commissions unless the state has forborne from its authority to designate ETCs.[5] Where a state has abdicated its ETC-designation role, the Act provides that the FCC shall designate ETCs.[6] Upon designation, an ETC must offer and market Lifeline service, defined

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[3] *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8960, 8993, ¶¶ 346, 406 (1997) (*1997 USF First Report and Order*).

[4] *See* 47 C.F.R. §§ 54.403(a)(1), (3); 54.409.

[5] *See* 47 U.S.C. § 254(b).

[6] *See* 47 U.S.C. § 214(e)(6).

as "a non-transferable retail service offering provided directly to qualifying low-income consumers . . . [f]or which qualifying low-income consumers pay reduced charges as a result of application of the Lifeline support amount."[7] ETCs may allow eligible consumers to apply their benefit to any service plan meeting certain minimum service standards.[8]

II. Facilities Forbearance

Under Section 214(e)(1) of the Act, an ETC "shall, throughout the service area for which the designation is received—(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of [Title 47], either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and (B) advertise the availability of such services and the charges therefor using media of general distribution."[9] The requirement to "offer the services . . . either using its own facilities or a combination of its own facilities and resale of another carrier's services" is known as the "own facilities" requirement.

In the *2005 TracFone Forbearance Order*, the Commission found not only that the "own facilities" requirement was unnecessary to achieve the purposes of

[7] *See* 47 C.F.R. § 54.401(a)(1).

[8] *See* 47 C.F.R. § 54.401(b).

[9] 47 U.S.C. § 214(e)(1).

the Lifeline program, but also that "the facilities requirement impedes greater utilization of Lifeline-supported services provided by a pure wireless reseller."[10] Specifically, the Commission explained that the facilities requirement was unnecessary because the justification in the *1997 USF First Report and Order* for prohibiting pure resellers—preventing double recovery from the USF—did not apply to wireless resellers.[11] Instead, the Commission found that allowing TracFone to provide Lifeline service on a resale basis would spur competition, innovation, and consumer choice for low-income Americans.[12] Further, the Commission found that the facilities requirement was unnecessary to protect consumers, and that "forbearance . . . will actually benefit consumers" by increasing consumer choice.[13] Moreover, the Commission found that granting forbearance was in the public interest because the Lifeline program remained under-utilized (at the time, only one-third of eligible households subscribed and

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[10] *See Petition of TracFone Wireless, Inc. for Forbearance*, CC Docket No. 96-45, Order, 20 FCC Rcd 15095, 15100 ¶ 9 (2005) (*2005 TracFone Forbearance Order*).

[11] At the time of the *1997 USF First Report and Order*, the Commission found that forbearing from the facilities requirement to allow pure resellers to receive universal service support was not in the public interest because it would allow the resellers to recover twice from the fund, once based on the discounted wholesale price from USF-supported underlying carriers and again from the fund directly. *See id.* ¶ 5; *1997 USF First Report and Order* ¶ 180.

[12] *See 2005 TracFone Forbearance Order* ¶ 13.

[13] *See id.* ¶ 15.

that number—for other reasons—holds true today), and that granting forbearance would advance "the goal of expanding eligible participation in the program."[14]

In subsequent orders, the Commission adopted the same underlying rationale to extend facilities forbearance to other ETCs. One of those orders explained the benefit of wireless resellers as follows:

> The additional choice and service options of another wireless reseller offering a service for low-income consumers represents a significant benefit for consumers and is in the public interest. A new entrant should incent existing wireless reseller ETCs to offer better service and terms to their customers, which provides additional evidence that forbearance in the context of the Lifeline program outweighs the potential costs.[15]

Then, in the *2012 Lifeline Reform Order*, the Commission adopted blanket forbearance from the facilities requirement for reseller ETCs, reaffirming that the "own facilities" requirement is unnecessary to meet the statutory goals of the Lifeline program, to protect consumers, or to protect the public interest.[16]

With respect to the first prong of the section 10 analysis, the Commission explained that Lifeline resellers would necessarily face competition from their underlying carriers as well as other facilities-based carriers, finding that "the

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[14] *See id.* ¶ 24.

[15] *Federal-State Joint Board on Universal Service et al.*, CC Docket. No. 96-45 *et al.*, WC Docket No. 09-197, Order, 25 FCC Rcd 8784, 8787, ¶ 10 (2010) (*i-wireless Forbearance Order*); *see also Virgin Mobile USA, L.P. Petition for Forbearance from 47 U.S.C. § 214(e)(1)(A) et al.*, CC Docket No. 96-45, Order, 24 FCC Rcd 3381, 3389-90 ¶¶ 19-21 (2009) (*Virgin Mobile Forbearance Order*).

[16] *See 2012 Lifeline Reform Order* ¶ 368.

additional competition that [resellers] provide would do more to ensure just and reasonable rates and terms than a requirement to use their own facilities."[17] With respect to the second prong of the analysis, consumer protection, the Commission found that the "own facilities" requirement was not necessary to protect consumers so long as resellers complied with the Commission's 911 and E911 requirements.[18] As for the third factor, the public interest, the Commission found that enforcement of the "own facilities" requirement was not in the public interest because forbearance would "enhance competition among retail providers that service low-income consumers" and would "offer eligible consumers an additional choice of providers."[19] Reaffirming the view of the earlier facilities forbearance orders, the Commission also noted "that the Commission's traditional concern with a carrier doubling its recovery by reselling facilities that are already supported by the high cost fund does not apply in the low-income context."[20]

Since the *2012 Lifeline Reform Order*, wireless resellers have continued to play a central role in the Lifeline program, driving adoption, competition, and service-level innovation. Today, approximately two-thirds of eligible low-income consumers on Tribal lands have chosen non-facilities-based ETCs as their Lifeline

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[17] *See id.* ¶ 371.

[18] *See id.* ¶ 372.

[19] *See id.* ¶ 378.

[20] *See id.* ¶ 377 n. 95.

provider, demonstrating the overwhelming success of the model and the wisdom underlying blanket forbearance.[21]

III. Enhanced Support for Residents of Tribal Lands

In the *2000 Tribal Lifeline Order*, the FCC formally established an enhanced subsidy for residents of federally recognized Tribal lands, with equal application to urban and rural Tribal lands. The Commission explained that its "primary goal" in adopting the enhanced Tribal benefit was to "reduce the monthly cost of telecommunications services for qualifying low-income individuals on tribal lands, so as to encourage those without service to initiate service and better enable those currently subscribed to maintain service."[22] The Commission noted that "a substantial additional amount of support is needed to have an impact on *subscribership*," and set the enhanced benefit at $25 per month "[i]n view of (1) the extraordinary low average per capita and household incomes in tribal areas, (2) the excessive toll charges that many subscribers incur as a result of limited local calling areas on tribal lands, (3) the disproportionately low subscribership levels in

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[21] *See Bridging the Digital Divide for Low-Income Consumers et al.*, WC Docket No. 17-287 et al., Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, 32 FCC Rcd. 10475, 10484 ¶ 23 (2017) (JA __).

[22] *Federal-State Joint Board on Universal Service et al.*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12231-32 ¶ 44 (2000) (*2000 Tribal Lifeline Order*).

tribal areas, and (4) the apparent limited awareness of, and participation in, the existing Lifeline program."[23] The Commission found that its decision was consistent with similar state-level actions, with specific reference to two jurisdictions with large, predominantly or exclusively urban low-income populations—New York and the District of Columbia—that had adopted substantial rate reductions to "stimulate interest among the low-income population generally" and to "raise the visibility of Lifeline."[24] Moreover, the Commission found that an enhanced Tribal benefit "should eliminate or diminish the effect of unaffordability for those low-income individuals for whom it may be difficult to maintain telephone service even where facilities are present."[25]

In the *2000 Tribal Order*, the Commission also highlighted three secondary goals of the enhanced Tribal program, namely, encouraging infrastructure deployment, competition from new entrants, and reduction of barriers to increased penetration caused by limited local calling areas.[26] In three short paragraphs addressing infrastructure deployment, the Commission noted that the combination of an enhanced Tribal benefit and the Link Up program—which provides a $100 connection charge reimbursement for facilities-based carriers—is designed,

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[23] *See id.* (emphasis added).

[24] *See id.* ¶ 45.

[25] *See id.* ¶ 46.

[26] *See id.* ¶¶ 52-58.

collectively, to incent infrastructure deployment in unserved areas by reducing the risk and increasing the potential profitability of deploying in and serving those areas.[27]

In 2011, the Commission adopted an order comprehensively transforming its high-cost program for the broadband era, including on remote and Tribal lands.[28] Among other things, the Order created the Connect America Fund ("CAF") to support the deployment and maintenance of voice-and-broadband-capable networks throughout the country.[29] The Order also created two specific funds—the CAF Mobility Fund and the Remote Areas Fund designed to facilitate investment and ensure the availability of wireless networks on Tribal and remote lands.[30]

Having created two programs specifically designed to fund facilities deployment on rural and Tribal lands, the Commission next explored ways to focus its low-income program on its primary purpose: affordability. Specifically, in the *2012 Lifeline Reform Order*, the Commission limited enhanced Tribal Link Up to ETCs receiving high-cost support,[31] and asked whether it should modify or

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[27] *See id.* ¶ 53.

[28] *See generally Connect America Fund et al., WC Docket. No. 10-90 et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011).

[29] *See id.* ¶ 20.

[30] *See id.* ¶¶ 28, 295-538.

[31] *See 2012 Lifeline Reform Order* ¶ 254.

eliminate the enhanced Link Up benefit, the structure of which was "inconsistent" with its infrastructure-focused high-cost programs, which unlike Link Up only supported a single provider in a geographic area.[32] Moreover, the Commission sought comment on "ways any savings [from eliminating enhanced Link Up] might be used to more efficiently serve the purposes of the program, the specific needs of low-income consumers on Tribal lands, or both."[33]

By limiting Tribal Link Up only to providers already receiving high-cost support and distinguishing the "purposes" and "needs" that Lifeline serves from those of its infrastructure-deployment programs, the *2012 Lifeline Reform Order* reaffirmed that the enhanced Tribal Lifeline program was primarily an affordability program, not an infrastructure program.

IV. This Proceeding

On June 22, 2015, the FCC released its *2015 Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order*, which initiated a proceeding to modernize the Lifeline program.[34] As a part of the proceeding, the Commission sought comment

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[32] *See id.* ¶ 482.

[33] *See id.*

[34] *See generally Lifeline and Link Up Reform and Modernization et al.*, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818 (2015) (*2015 Lifeline Second FNPRM*).

on a proposal to "limit enhanced Tribal Lifeline and Link Up support only to those Lifeline providers who have facilities."[35] The Commission also solicited comment on several proposed options, asked about the "impact of such limitations" on the provision of Lifeline-supported service, and asked how the Commission could "best accomplish the objective of encouraging build out to Tribal lands."[36] The FCC also sought comment on "whether [it] should focus enhanced Tribal support to those Tribal areas with lower population densities."[37]

In April 2016, the Commission released the *2016 Lifeline Modernization Order*.[38] In the Order, the Commission made substantial changes to the Lifeline program as a whole, but did not adopt any specific changes to its Tribal Lifeline program. Specifically, the Commission declined to modify its Tribal-specific Lifeline eligibility programs, and clarified that other issues it had raised in the *2015 Lifeline Second FNPRM*, including the enhanced subsidy level and "whether to restrict Lifeline and/or Link Up support to certain carriers operating on Tribal lands or carriers serving certain portions of Tribal lands" would "remain open for

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[35] *See id.*

[36] *See id.* ¶¶ 167-68.

[37] *See id.* ¶¶ 169-70.

[38] *See generally Lifeline and Link Up Reform and Modernization et al.*, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962 (2016) (*2016 Lifeline Modernization Order*).

consideration in a future proceeding more comprehensively focused on advancing broadband deployment on Tribal lands."[39]

On October 26, 2017, the Commission released a Fact Sheet providing a draft of its *2017 Lifeline Digital Divide Order*, including a Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry.[40] The release of the Draft Order set off a torrent of ex parte activity at the Commission, including from NaLA/ETC Petitioners, which challenged many aspects of the draft *Fourth Report and Order*, among other issues.[41] On November 9, 2017, the Commission released a public

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[39] *See id.* ¶¶ 205, 211.

[40] *See* FCC FACT SHEET: Bridging the Digital Divide for Low-Income Consumers, Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry – WC Docket Numbers 17-287, 11-42, and 09-197, and attachment, FCC-CIRC1711-05 (Oct. 26, 2017) (*Draft Order*) (JA__-__).

[41] *See, e.g.*, Letter from John Heitmann, Counsel to Assist Wireless, LLC, Boomerang Wireless, LLC and Easy Telephone Services Company, to Marlene Dortch, Secretary, FCC, WC Docket Nos. 17-287, 11-42, 09-197, Exhibit A, 2 (Nov. 9, 2017) (*Tribal ETC November 9 Ex Parte*) (JA__-__); Letter from John Heitmann, Counsel to Lifeline Connects Coalition, Assist Wireless, LLC, Boomerang Wireless, LLC and Easy Telephone Services Company, to Marlene Dortch, Secretary, FCC, WC Docket Nos. 17-287, 11-42, 09-197, Exhibit A, 2 (Nov. 9, 2017) (*ETC November 9 Ex Parte*) (JA__); See Letter from Norina T. Moy, Director, Government Relations, Sprint Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 17-287 et al., 1 (Nov. 9, 2017) (JA __); Letter from Julie A. Veach, Counsel to General Communication, Inc., to Marlene H. Dortch, WC Docket Nos. 17-287, 11-42, 09-197, 1-2 (JA __-__); Letter from Geoffrey Blackwell, Chair, Native Public Media, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 17-287, 11-42, 09-197, 2 (Nov. 7, 2017) (JA __); Letter

notice announcing the beginning of the Sunshine Period, during which parties were prohibited from lobbying the Commission.[42] On November 16, 2017, the Commission voted 3-2 in favor of the *2017 Lifeline Digital Divide Order*, with several modifications from the Draft Order.

On December 1, 2017, the Commission released the *2017 Lifeline Digital Divide Order*, which included the *Fourth Report and Order*.[43] The *Fourth Report and Order* dramatically changes the Lifeline program for residents of Tribal lands and the ETCs serving them.

At issue in this appeal are two changes implemented in the *Fourth Report and Order*. First, Petitioners challenge the *Fourth Report and Order*'s adoption of a rule limiting enhanced Tribal Lifeline support to "facilities-based service providers" (hereinafter the "Tribal Facilities Requirement"). As relevant here,

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from John Heitmann, Counsel to the Lifeline Connects Coalition, Boomerang Wireless, LLC and Easy Wireless, to Marlene Dortch, Secretary, FCC, WC Docket Nos. 17-287, 11-42, 09-197, 2-4 (Nov. 2, 2017) (*ETC November 2 Ex Parte*) (JA __-__); Letter from John T. Nakahata, Counsel to General Communication, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 17-287, 11-42, 09-197, 1-2 (Nov. 2, 2017) (*GCI November 2 Ex Parte*) (JA __-__).

[42] *See* Commission Meeting Agenda, FCC to Hold Open Commission Meeting Thursday, November 16, 2017, 1-4 (Nov. 9, 2017) (*Sunshine Notice*) (JA__-__); *see also* 47 C.F.R. § 1.1203.

[43] *See Bridging the Digital Divide for Low-Income Consumers et al.*, WC Docket No. 17-287 et al., Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, 32 FCC Rcd. 10475 (2017) (*2017 Lifeline Digital Divide Order*); *id.* ¶¶ 2-31 (*Fourth Report and Order*).

Tribal Facilities Requirement limits enhanced Tribal support to "fixed or mobile wireless facilities-based Lifeline service provided on Tribal lands with wireless network facilities covering all or a portion of the relevant Lifeline ETC's service area on Tribal lands."[44] The Commission further defines "facilities" for "fixed wireless," "mobile wireless," and "wireline" providers. As relevant here, "a mobile wireless provider must hold usage rights under a spectrum license or a long-term spectrum leasing arrangement along with wireless network facilities that that can be used to provide wireless voice and broadband services."[45] The Commission further found that "[i]f an ETC offers service using its own as well as others' facilities in its service area on rural Tribal lands, it may only receive enhanced support for the customers it serves using its own last-mile facilities."[46]

Second, Petitioners challenge the *Fourth Report and Order* because it limits enhanced Tribal Lifeline support to residents of "rural" areas on Tribal lands. In so doing, the Commission adopts a definition of "rural" used in the Commission's Schools and Libraries Program ("E-Rate"), which defines "rural" as areas that are not "urban," i.e., those areas that do not meet the definition of "urban" which is, under the E-Rate rules, "an urbanized area or urban cluster area with a population

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[44] *See Fourth Report and Order* ¶ 24 (JA__).

[45] *See id.*

[46] *See id.* ¶ 26 (JA__).

equal to or greater than 25,000."[47] This definition, as the Commission recognized in the *Fourth Report and Order*, was not proposed in either the *2015 Lifeline Second FNPRM* or by commenters in response to the request for comment.[48]

Two Commissioners strongly dissented from the *2017 Lifeline Digital Divide Order*. Commissioner Mignon Clyburn called the item "absurd," "severe," and "heartless"; lamented that the item contained "no analysis of any sort" with respect to the Tribal Facilities Requirement or its proposed blanket facilities requirement; explained that the Commission in 2000 stated that the "primary goal" of the enhanced Tribal benefit is affordability, not deployment; and described unsuccessful efforts she took to persuade the FCC Chairman's office "to build a record on the major . . . changes to Tribal Lifeline" rather than issue an order that "would be devastating" for Tribal residents "because very few wireless ETCs actually provide Lifeline service on Tribal lands," other ETCs are seeking to leave the program, and the item contains no transition plan for subscribers.[49]

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[47] *See* 47 C.F.R. § 54.505(b)(3).

[48] The *Fourth Report and Order* also enacts other changes, such as identifying mapping resources to locate Tribal lands and eliminating a rule allowing Tribal residence to self-certify their residency. These provisions are not at issue in Petitioners' appeal.

[49] *See 2017 Lifeline Digital Divide Order*, Dissenting Statement of Commissioner Mignon L. Clyburn at 10555-58 (*Clyburn Dissent*) (JA__-__).

Commissioner Jessica Rosenworcel described the item as "cruel[]" and "at odds with our statutory duty."[50]

SUMMARY OF ARGUMENT

The Court should set aside the Tribal Facilities Requirement and its limitation of Tribal Lifeline support to "rural" areas, as adopted in the *Fourth Report and Order*, because they violate the Administrative Procedure Act ("APA") and the Act. Moreover, the FCC's decision would exclude many ETCs—including NaLA/ETC Petitioners—from serving eligible low-income consumers on Tribal lands, thereby reducing the availability and affordability of supported services for low-income residents of federally recognized Tribal lands by reducing competition, consumer choice, and service quality within the Lifeline market in those areas.

As a general matter, the *Fourth Report and Order* violates the APA because the Commission itself indicated in its *2016 Lifeline Modernization Order* that it would not address the Tribal issues in this proceeding, addressing them instead in a "future proceeding" focused more comprehensively on "advancing broadband deployment on Tribal lands."[51] Instead of opening the future proceeding of which it had put the public on notice, the Commission adopted a new set of rule changes

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[50] *See id.*, Dissenting Statement of Commissioner Jessica Rosenworcel at 10564 (*Rosenworcel Dissent*) (JA__).

[51] *See 2016 Lifeline Modernization Order* ¶ 211.

in an order that departed significantly from the Commission's long-standing policies without providing adequate notice of the changes and an opportunity to comment. For that reason alone, the Commission should set aside and hold unlawful the *Fourth Report and Order*.

Even if it was proper for the Commission to adopt the *Fourth Report and Order* in the proceeding in which it had indicated it would not take such action, specific elements of the *Fourth Report and Order* violate the APA and the Act. First, the Commission's decision to adopt the Tribal Facilities Requirement violates the notice and comment requirements of the APA because the adopted rule materially departs from the Commission's earlier proposal and the Commission failed to seek comment on the definition of "facilities" that it adopted. Moreover, the Tribal Facilities Requirement violates Sections 10 and 214(e) of the Act. In addition, the Tribal Facilities Requirement is arbitrary and capricious because it is not supported in the record and unreasonably departs from over a decade of Commission precedent that repeatedly and routinely found—ultimately in a blanket manner—that a facilities requirement contravenes the purposes of the Lifeline program.

The Tribal Facilities Requirement will have dramatic consequences for low-income consumers on Tribal lands by reducing the affordability and availability of services supported by the enhanced Tribal benefit, undermining the primary

purpose of the enhanced benefit. Such a decision will force ETC Petitioners out of the market by making it impossible to comply with their obligations under the Act or to compete with those facilities-based providers that continue to receive the full enhanced Tribal benefit.

Second, the Commission's limitation of enhanced Tribal support to rural areas (the "Tribal Rural Limitation") should be held unlawful and set aside because its definition of "rural" is not a logical outgrowth of the Commission's proposal in the *2015 Lifeline Second FNPRM* and the rural limitation is arbitrary and capricious. By adopting the Tribal Rural Limitation, the Commission arbitrarily and capriciously reduces the affordability and availability of supported telecommunications and broadband services for residents of urban areas within federally recognized Tribal lands in contravention of the "primary purpose" of the enhanced Tribal Lifeline benefit.

Accordingly, this Court should find that the Tribal Facilities Requirement and Tribal Rural Limitation are unlawful and should set aside the *Fourth Report and Order*.

ARGUMENT

I. The Commission Violated The APA When It Indicated To Commenters That It Would Not Decide The Tribal Issues In This Proceeding And Then Did So Without Further Notice And Comment

The *Fourth Report and Order* should be set aside and held unlawful because the Commission had closed the record developed in its *2015 Lifeline Second FNPRM* and failed to initiate a new notice and comment rulemaking before adopting the *Fourth Report and Order*, and in so doing violated the APA.

The Tribal Facilities Requirement and the Tribal Rural Limitation are substantive rules that require notice and comment under Section 553 of the APA.[52] Under the APA, if an agency adopts a "substantive change" to a regulation, notice and comment are required before the modified rule can take effect.[53] A rule modification is "substantive" when it has an "adverse impact" on an affected party.[54] Furthermore, when an agency "gives a rule a sufficiently definite interpretation," the agency must engage in "notice and comment rulemaking" as prescribed by "Section 553 of the APA . . . ."[55] The Commission's Tribal Facilities Requirement and Tribal Rural Limitation in the *Fourth Report and Order*

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[52] *See* 5 U.S.C. § 553.

[53] *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995).

[54] *See Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 255 (3d Cir. 2011), *as amended* (Mar. 7, 2012) (internal citations omitted).

[55] *See Torch Operating Co. v. Babbitt*, 172 F. Supp. 2d 113, 124-25 (D.D.C. 2001) (citing *Alaska Prof'l Hunters Ass'n v. F.A.A.*, 177 F.3d 1030, 1036 (D.C. Cir. 1999)).

represent substantive changes to its rules that adversely affect Petitioners—who rely on enhanced Tribal subsidies to serve Lifeline-eligible subscribers on urban and rural Tribal lands—and as such require notice and comment.

The Commission failed to engage in the required notice and comment process here. In the *2016 Lifeline Modernization Order*, the Commission declined to address issues of whether only facilities-based Lifeline providers may receive enhanced Tribal Lifeline reimbursement or whether to limit enhanced Tribal Lifeline support to "rural" Tribal lands.[56] Instead, the Commission emphasized that "these and other issues for which the Commission has sought comment and which are not addressed in this order, remain open for consideration in a *future proceeding more comprehensively focused on advancing broadband deployment on Tribal lands*."[57]

By indicating to interested parties that it would decide Tribal issues in a "future proceeding," the Commission closed the record initiated in its *2015 Second Further Notice of Proposed Rulemaking* with respect to those issues and committed to opening a new notice and comment proceeding rather than proceeding directly to an order adopting new rules. The notice provided to the public and all affected parties was plain: cased closed. In previous cases where the

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[56] *See 2016 Lifeline Modernization Order* ¶ 211.

[57] *See id.* (emphasis added).

Commission has deferred issues to a "future proceeding," it has meant a new notice and comment rulemaking. For example, in a Report and Order issued in 2016 related to its hearing aid compatibility rules, the Commission distinguished issues it was leaving open in "this proceeding" from issues it was deferring until a "future proceeding," which would be opened after the Commission received a report addressing certain issues the Commission needed to make its decision.[58] In 2008, the Commission similarly distinguished the proceeding in front of it from "a future proceeding" in which it would "solicit comment on possible . . . rule changes."[59]

The fact that the Commission stated in the *Fourth Report and Order* it was leaving the "issues" open for consideration in a future proceeding does not cure the notice-and-comment violation here. Had the Commission intended to leave the record open in this proceeding, it could have said so, as it has in the past. For example, in an analogous situation in the Commission's recent modernization of its

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[58] *See Improvements to Benchmarks and Related Requirements Governing Hearing Aid-Compatible Mobile Handsets*, WT Docket No. 15-285, 31 FCC Rcd 9336, 9353-54 ¶¶ 42-43 (2016).

[59] *See An Inquiry Into the Commission's Policies and Rules Regarding AM Radio Service Directional Antenna Performance Verification*, MM Docket No. 93-177, Second Report and Order and Second Further Notice of Proposed Rulemaking, 23 FCC Rcd 14267, 14286 ¶ 11 (2008). In 2013, Commission launched a new notice and comment rulemaking to modernize its AM Radio rules. *See* Revitalization of the AM Radio Service, MB Docket No. 13-249, Notice of Proposed Rule Making, 28 FCC Rcd 15221 (2013).

E-Rate program, the Commission indicated in a *First Report and Order* that it was "leav[ing] the record open in this proceeding to allow [the Commission] to address in the future those issues raised in the E-rate Modernization NPRM that we do not address today," and subsequently decided those issues in a *Second Report and Order* in the same docket.[60]

Nor does the fact that the Commission opened a new docket—WC Docket No. 17-287—in conjunction with the *Lifeline Digital Divide Order* cure the APA violation. The title of the proceeding gives no indication that it is "more comprehensively focused" on Tribal deployment, nor does the Commission state that the goal of the new proceeding is for that purpose. Moreover, the *Fourth Report and Order* represents the end of a proceeding, not the start of a future proceeding. Indeed, the record upon which the Commission relied for the *Fourth Report and Order* (two years old at the time of adoption) was from the existing proceeding, not the new proceeding.

The Commission's notice violation is not harmless. By telling parties that it was effectively closing the record with respect to the issues it ultimately decided in the *Fourth Report and Order*, NaLA/ETC Petitioners were left with the impression

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[60] *Modernizing the E-rate Program for Schools and Libraries, et al*., WC Docket No. 13-183, et al., 29 FCC Rcd 15538, 15559-60 ¶ 55 n.119 (2014) (citing Modernizing the E-rate Program for Schools and Libraries, WC Docket No. 13-184, Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870, 8875 ¶ 9 (2014)).

that the Commission would provide a new opportunity to comment, and as such stood down on their advocacy until the draft *Fourth Report and Order* took all parties by surprise.

The Commission's own actions further suggest that the proceeding required a refresh of the record. For example, at least one Commissioner requested that the Commission "at a minimum" seek further comment, conduct a cost-benefit analysis, and consult with Tribes before adopting an order.[61] Perhaps most tellingly, in the *Notice of Proposed Rulemaking* accompanying the *Fourth Report and Order* in the *2017 Lifeline Digital Divide Order*, the Commission seeks comment on many of the issues addressed in the *Fourth Report and Order*, demonstrating the Commission lacked a complete record in this proceeding. For example, the FCC seeks comment on how it should define the terms "facilities" and "rural," and asks whether to apply those definitions to Tribal lands, even though the *Fourth Report and Order* includes its own restrictive definitions of "facilities" and "rural" for the Tribal lands, both of which were adopted without proper notice and comment.[62] Had the Commission in 2015 proposed a definition

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[61] *See 2017 Lifeline Digital Divide Order*, Clyburn Dissent at 10558.

[62] *See 2017 Lifeline Digital Divide Order* ¶ 67 ("Should the Commission adopt the same definition of facilities that the Fourth Report and Order uses for enhanced support on rural Tribal lands? If the Commission adopts different facilities-based criteria for Lifeline generally, should we also use that definition of "facilities" for purposes of enhanced Tribal support?") (JA __); *id.* ¶ 126 ("Is the E-rate program's

of "facilities" for purposes of receiving enhanced Tribal Lifeline support or proposed a definition of "rural" areas based on the E-Rate program, NaLA/ETC Petitioners would have vigorously opposed them.

By issuing the *Fourth Report and Order* without opening a new proceeding and providing an opportunity interested parties to be heard, as the Commission itself admitted was required, the Commission violated the notice and comment requirements of the APA. This violation, standing alone, requires grant of Petitioners' appeal.

II. This Court Should Hold Unlawful And Set Aside The Tribal Facilities Requirement

In the *Fourth Report and Order*, the Commission adopts the Tribal Facilities Requirement, under which, in order to receive enhanced Tribal Lifeline benefits, an ETC must provide the supported Tribal Lifeline services over its own last-mile facilities.[63] The Tribal Facilities Requirement is unlawful because: (1) it is based on an extremely restrictive definition of mobile wireless "facilities" that was not proposed in its initial notice; (2) it contravenes Sections 10 and 214(e) of the Act; and (3) it is arbitrary and capricious, insofar as its benefits are entirely speculative

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definition of "rural" the best option for identifying rural areas in the Lifeline program, or should the Commission consider some other definition to identify rural areas?") (JA __).

[63] *See Fourth Report and Order* ¶¶ 21-30 (JA__-__).

and it unreasonably departs from over a decade of Commission policy finding that requiring facilities undermines the goals of the Lifeline program.

A. The Tribal Facilities Requirement Is Not A Logical Outgrowth Of The Proposal Set Forth In The NPRM

Even if the Commission could have issued its Tribal Facilities Requirement without opening a new proceeding, its decision to limit enhanced Tribal benefits to services provided over an ETC's own last-mile facilities violates the APA's notice and comment requirements because it is not a logical outgrowth of its initial proposal in the *2015 Lifeline Second FNPRM*.

As stated above in Section I, the APA requires an agency to provide notice of a proposed substantive rule change and to seek comment from interested parties. While the final rule "need not be the one proposed in the NPRM,"[64] it must be a "logical outgrowth" of the proposal.[65] An NPRM satisfies the logical outgrowth test if it "expressly ask[s] for comments on a particular issue or otherwise ma[kes] clear that the agency [is] contemplating a particular change."[66]

Here, the Commission failed to provide sufficient notice of and an opportunity to comment on the Tribal Facilities Requirement. In the *2015 Lifeline Second FNPRM*, the Commission proposed that recipients of enhanced Tribal

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[64] *See Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013).

[65] *See Covad Communications Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006).

[66] *See CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076, 1081 (D.C. Cir. 2009).

Lifeline benefits "have" some facilities in order to be eligible to receive enhanced Tribal benefits.[67] At the same time, the Commission did not seek comment on a new definition of "facilities" or contemplate limiting support to Lifeline services provided solely over the ETC's own last-mile facilities. Moreover, the Commission did not make clear that it was contemplating a requirement that wireless ETCs provide service over spectrum for which they would need to hold a license or long-term lease.[68]

Interested parties could not have anticipated that the Commission would impose such a restrictive definition of facilities.[69] There is a material difference between a requirement to "have" facilities—as the Commission proposed—and a requirement that ETCs may only receive enhanced Lifeline support for services provided over bottleneck last-mile facilities, including its own spectrum licenses or long-term spectrum leases. Indeed, obtaining spectrum licenses or approvals to lease spectrum within the timeframe between the Commission's adoption of the rule and the effective date of the rule is a functional impossibility for all but the largest providers that already own the available spectrum.

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[67] *See 2015 Lifeline Second FNPRM* ¶ 167.

[68] *See id.*

[69] *See Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (per curiam) (internal quotation marks omitted).

Further, interested parties could not have reasonably concluded that the Commission was proposing the Tribal Facilities Requirement, with no opportunity to provide service in part through resold facilities, because such a requirement would violate the Act and long-standing Commission policy, and the *2015 Lifeline Second FNPRM* provides no indication that the Commission was intending such a radical departure.[70] Specifically, the Act provides that supported services may be provided either over an ETC's own facilities or a combination of an ETC's own facilities and resold facilities, as explained in more detail in Section II.B *infra*.[71] Moreover, for the past decade the Commission routinely has found that the "own facilities" requirement was contrary to the public interest and undermines the purpose of the Lifeline program.[72] Additionally, for twenty years the Commission has used a broad definition of facilities, rejecting narrower definitions that would "unduly restrict" competition among ETCs.[73] The *2015 Lifeline Second FNPRM*

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[70] *See Allina Health Services v. Sebelius*, 746 F.3d 1102, 1109 (D.C. Cir. 2014) (holding that an agency rule was not a logical outgrowth of a proposed rule where "a reasonable member of the regulated class – even a good lawyer – [could not] anticipate that such a volte-face with enormous financial implications would follow the [agency]'s proposed rule.").

[71] *See* 47 U.S.C. § 214(e)(1)(A).

[72] *See 2012 Lifeline Reform Order* ¶¶ 361-381.

[73] *See* 47 C.F.R. § 54.201(e); *1997 USF First Report and Order* ¶¶ 151, 153; *2012 Lifeline Reform Order* ¶ 501.

did not propose to modify this long-standing definition and the *Fourth Report and Order* entirely ignores it.

The fact that the Commission issued a draft order with its Tribal Facilities Requirement a mere two weeks before its final vote does not cure the APA violation here. Interested parties were not "sufficiently alerted to likely alternatives" to know their interests were at stake,[74] nor did they have adequate time to analyze and oppose the proposal, or to counter any support the proposal may have received (had parties supported it).[75] In *Prometheus*, the Third Circuit held that notice was insufficient where the FCC Chairman issued a press release announcing a new approach to broadcast cross-ownership rules with only 28 days for interested parties to respond.[76] The Court noted that "[a]fter the FCC began to formulate an approach to this important and complex rule, the public was entitled to 'a new opportunity to comment' in which 'commenters would . . . have their first occasion to offer new and different criticisms which the Agency might find convincing.'"[77] Here, the FCC issued a Fact Sheet and draft on October 26, 2017

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[74] *See Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 170 (2d Cir. 2013).

[75] *See Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011).

[76] *See id.*

[77] *Id.* (quoting *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979); *Natural Res. Def. Council v. EPA*, 279 F. 3d 1180, 1186 (9th Cir. 2002)).

and initiated the Sunshine Period on November 9, 2017,[78] providing 14 days (or nine business days) for parties to respond, or half the time that the *Prometheus* court found insufficient.

In fact, it appears that the proposal derives from an ex parte meeting that Smith Bagley, Inc.—the primary proponent of the Tribal Facilities Requirement—held with the Commission's Wireline Competition Bureau and the three Republican FCC Commissioners a mere six days before the Commission issued the draft Order.[79] However, the Commission may not "bootstrap notice" from an ex parte, which this Court has long found insufficient for APA notice-and-comment purposes.[80]

Moreover, the Commission—in a companion *Notice of Proposed Rulemaking* in the *2017 Lifeline Digital Divide Order* seeking new notice and comment—effectively proclaimed that it is unsure about whether the Commission's adopted definition is the appropriate one. In the *Notice of Proposed Rulemaking* that accompanied the *Fourth Report and Order*, the Commission sought comment on the appropriate definition of "facilities" for purposes of

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[78] *See Draft Order* at 1 (JA__); *Sunshine Notice* at 1 (JA__).

[79] *See* Letter from David LaFuria to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-42, GN Docket No. 17-199, 1-2 (Oct. 20, 2017) (JA__-__).

[80] *See, e.g.*, *Agape Church*, 738 F. 3d at 412 (citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983); *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991)).

Lifeline support, and whether that definition should supersede *the Tribal facilities definition it just adopted* for "facilities" on Tribal lands.[81] (Here, as above in Section I, the Commission appears to adopt a rule before seeking comment on it, which is impermissible under the APA.) For these reasons, the Commission's Tribal Facilities Requirement is not a logical outgrowth of the Commission's 2015 proposal and should be held unlawful and set aside.

B. The Tribal Facilities Requirement Contravenes The Act

The Commission's Tribal Facilities Requirement violates its obligation to forbear from applying a facilities requirement to the provision of Lifeline services under Section 10 of the Act and its obligation to permit ETCs to offer services using a combination of their own and resold services under Section 214(e)(1)(A) of the Act. As a practical impact, the Commission's violations of the Act reduce the affordability and availability of services supported by the enhanced Tribal Lifeline benefit, undermining the primary purpose of the benefit. For Petitioners, the decision will force many providers out of the Tribal Lifeline business by making it impossible to comply with their obligations under the Act or to compete with those facilities-based providers that continue to receive the full enhanced Tribal benefit.

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[81] *See 2017 Lifeline Digital Divide Order* ¶ 77 (JA__).

1. The Tribal Facilities Requirement Contravenes Section 10 Of The Act

In the *Fourth Report and Order*, the Commission prohibits non-facilities-based ETCs from receiving enhanced Tribal Lifeline support, declaring without explanation that its decision has no impact on the forbearance that the Commission granted under Section 10 of the Act.[82] However, as explained below, for the past thirteen years, the FCC has consistently found that Section 10 mandates forbearance from the Commission's "own facilities" requirement for the provision of Lifeline service. The FCC's failure to conduct a Section 10 analysis showing what has changed and why Section 10 no longer mandates forbearance violates Section 10.

Section 10 of the Act provides that "the Commission shall forbear from applying any regulation" that meets a three part test:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
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> (3) forbearance from applying such provision or regulation is consistent with the public interest.[83]

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[82] *See Fourth Report and Order* ¶ 30 (JA__).

[83] *See* 47 U.S.C. § 160.

Beginning in 2005, the Commission has found that, with respect to Lifeline-only ETCs, Section 10 requires forbearance from Section 214(e)(1)(a) of the Act, which provides that "a common carrier designated as an eligible telecommunications carrier" must "offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier)."[84] In so doing, the Commission has permitted non-facilities-based ETCs (i.e., "pure resellers") "to participate in the federal Lifeline program *and* receive Lifeline-only support."[85] By nullifying forbearance for Tribal Lifeline service without first determining that Section 214(e) no longer met the three-part test for facilities forbearance, the Commission violated its statutory obligation under Section 10 of the Act. (In the alternative, the Commission's failure to explain its decision to effectively reinstate Section 214(e)(1)(A)'s "own facilities" requirement without performing the necessary Section 10 analysis is unlawful in violation of the APA, as argued *infra* Section II.C.2.).

Indeed, had the Commission performed the analysis, it would have had to uphold forbearance. With respect to the first factor—whether the regulation is

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[84] *See* 47 U.S.C. § 214(e)(1)(a).

[85] *See 2012 Lifeline Reform Order* ¶ 362 (citing *2005 TracFone Forbearance Order*).

necessary to ensure telecommunications services are just and reasonable and not unjustly or unreasonably discriminatory—Section 214(e)(1)(A) still does not achieve the statutory goal because double USF recovery from resellers does not apply in the Lifeline context. The benefit is customer-specific and can only be claimed once. Moreover, as ETC Petitioners commented in the record, a return to the "own facilities" requirement would decrease wireless service provider options and in some cases eliminate Lifeline-supported wireless service on Tribal lands, thereby making voice and broadband service less available and affordable for low-income residents of Tribal lands.[86] Today, just as in 2012, "the additional competition that [resellers] provide" on Tribal lands does more to ensure just and reasonable rates and terms than the Tribal Facilities Requirement.[87]

As for the second factor of Section 10 regarding consumer protection, requiring facilities is not necessary to protect consumers, two-thirds of whom have chosen resellers as their preferred provider on Tribal lands.[88] In fact, reinstating the facilities requirement would harm consumers by reducing competition in the

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[86] *See, e.g.*, *ETC November 9 Ex Parte* at Exh. A, 2 (JA__); *Tribal ETC November 9 Ex Parte* at 1-10 (JA __-__).

[87] *See 2012 Lifeline Reform Order* ¶ 371.

[88] *See Fourth Report and Order* ¶ 23 (JA__).

marketplace, eliminating innovative service offerings, and taking away consumers' own preferred service plans through regulatory fiat.[89]

The third factor—the public interest—continues to support forbearance from the facilities requirement of Section 214(e)(1)(A). Since the Commission granted blanket facilities forbearance in 2012, wireless resellers have driven vigorous competition among Lifeline providers on Tribal lands, leading to improved and varied service offerings for consumers. Wireless resellers remain best positioned to close the persistent adoption gap, especially with respect to the provision of broadband services on Tribal lands because they have developed expertise in serving the low-income market segment, a segment that underlying facilities-based providers typically are uninterested in serving directly or cannot effectively serve directly. Further, Lifeline resellers have been tremendously effective at leveraging niche marketing, enrollment events within the community, online enrollments, and partnerships with local social service agencies and community institutions to reach low-income consumers. These strategies distinguish wireless resellers from facilities-based wireless providers and increase the chance that low-income consumers on Tribal lands will adopt voice and broadband service. In addition, wireless resellers provide convenience and mobility that low-income consumers require and that wireline providers—facilities-based or otherwise—cannot provide.

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[89] *See Clyburn Dissent* at 10557 (JA__).

The Tribal Facilities Requirement should be held unlawful and set aside because the Commission violated its statutory obligation under Section 10 of the Act when it nullified forbearance for Tribal Lifeline service without first determining that Section 214(e) no longer met the three-part test for facilities forbearance.

2. The Tribal Facilities Requirement Contravenes Section 214 Of The Act

Even if the Commission did not need to reverse its previous grant of forbearance to non-facilities-based ETCs, its Tribal Facilities Requirement independently violates Section 214(e) of the Act, which specifically contemplates resale as an option for providing Lifeline service.

Under Section 214(e), carriers designated as ETCs "must" offer the services supported by the universal service mechanism.[90] The Commission's rules define Lifeline as a "service offering provided directly to qualifying low-income consumers . . . [f]or which qualifying low-income consumers pay reduced charges as a result of application of the Lifeline support amount described in § 54.403."[91] Section 54.403(b) provides that an ETC "must apply the federal Lifeline support amount, *plus any additional support amount* [e.g., enhanced Tribal support], to

[90] *See* 47 U.S.C. § 214(e).

[91] *See* 47 C.F.R. § 54.401(a)(1).

reduce the cost of any generally available residential service plan or package . . . and charge Lifeline subscribers the resulting amount."[92]

The Act offers an ETC two options for providing Lifeline service: (1) using all its own facilities; or (2) using a combination of its own facilities and resale of another carrier's services.[93] Since 1997, and before the Commission granted individual and then blanket forbearance from the "own facilities" requirement, Commission precedent has provided flexibility in the amount of facilities required to meet the statutory requirement. In the *1997 USF First Report and Order*, the Commission found that "a carrier need not offer universal service wholly over its own facilities in order to be designated as eligible because the statute allows an eligible carrier to offer the supported services through a combination of its own facilities and resale."[94] Further, the Commission recognized that "the statute does not dictate that a carrier use a specific level of its 'own facilities' in providing the services designated for universal service support given that the statute provides only that a carrier may use a 'combination of its own facilities and resale' and does not qualify the term 'own facilities.'"[95]

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[92] *See* 47 C.F.R. § 54.403(b) (emphasis added).

[93] *See* 47 U.S.C. § 214(e)(1)(A).

[94] *See 1997 USF First Report and Order* ¶ 370.

[95] *See id.* ¶ 169.

In the *2015 Lifeline Second FNPRM*, the Commission was careful not to propose a complete ban on non-facilities-based Lifeline service when it proposed limiting enhanced Tribal support to ETCs that "have facilities," rather than services provided solely over facilities, as the Commission did in the *Fourth Report and Order*.[96] And while the Commission asked whether there should be "different approaches to enhanced support provided to non-facilities-based Lifeline providers serving Tribal lands," the Commission did not propose or contemplate limiting enhanced support solely to services provided on Tribal lands over an ETC's owned last-mile facilities (spectrum, in the case of mobile wireless service). By proposing that providers merely "have facilities" to be eligible to receive enhanced Tribal Lifeline support, the Commission recognized its statutory obligation to permit the provision of Lifeline services using a combination of facilities and non-facilities service.

In the *Fourth Report and Order*, however, the Commission contravenes its statutory obligation under Section 214(e) by imposing a complete ban on providing non-facilities-based Lifeline service, even in combination with facilities-based service. By limiting enhanced Tribal Lifeline support to ETCs providing service over their own facilities, the Commission effectively and improperly reads the resale option out of the statute, contravening Congressional intent and foreclosing

[96] *See 2015 Lifeline Second FNPRM* ¶ 167.

non-facilities-based ETCs' ability to provide Lifeline services—i.e., services discounted by the applicable enhanced Lifeline discount—using "a combination of [their] own facilities and resale of another carrier's services." Therefore, the Commission's Tribal Facilities Requirement violates Section 214(e)(1)(A) of the Act and should be held unlawful.

C. The FCC Acted Arbitrarily And Capriciously In Limiting Enhanced Tribal Lifeline Support To Facilities-Based Service

In the *Fourth Report and Order*, the Commission limits enhanced Tribal Lifeline support to facilities-based service purportedly to direct funds to the deployment of facilities in rural Tribal areas. The Commission argues that "Lifeline funds disbursed to non-facilities-based providers . . . cannot directly support the provider's network because the provider does not have one."[97] The Commission's justification is not supported in the record and unreasonably departs from over a decade of findings that a facilities requirement contravenes the purposes of the Lifeline program.

[97] *See Fourth Report and Order* ¶ 23 (JA__).

1. The Record Does Not Support The Commission's Speculation That Removing Enhanced Subsidies For Non-Facilities Based Providers Would Promote Facilities Deployment On Tribal Lands

Under the APA, agency orders are subject to reversal if they are arbitrary and capricious.[98] To survive arbitrary and capricious review, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[99] An agency's judgment must be based on some logic and evidence, not sheer speculation.[100] Specifically, there must be "a rational connection between the facts found and the choice made."[101] "Normally, an agency rule would be arbitrary or capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[102] Importantly, "the APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that

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[98] *See* 5 U.S.C. § 706(2)(A).

[99] *See NTCH, Inc. v. FCC*, 841 F. 3d 497, 502 (D.C. Cir. 2016) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotes and citation removed)).

[100] *See State Farm*, 463 U.S. at 43.

[101] *See id.* (internal quotation marks omitted).

[102] *Id.*

contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters.'"[103]

Here, the record does not support the Commission's Tribal Facilities Requirement. First, the FCC fails to provide evidence for its speculation that a Tribal Facilities Requirement would make supported services more affordable or competitive for low-income consumers on Tribal lands.[104] The Commission points to no evidence that the Tribal Facilities Requirement would cause facilities-based providers to reduce prices or offer service plans for consumers in a manner different or better than those carriers have done previously under the rules that permit their participation in the Tribal Lifeline program. Nor has the Commission presented evidence that additional facilities-based providers will enter the market to increase competitive pressure with more compelling service offerings. Rather, the Commission's justification is nothing more than bare speculation.

Second, the Commission's decision ignores and runs counter to specific evidence in the record that the Tribal Facilities Requirement would reduce competition and affordability. For example, the Commission ignored an ex parte letter from ETC Petitioners explaining the impact that its Tribal Facilities

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[103] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. at 515 (citation omitted); *see also id.*, at 535 (Kennedy, J., concurring in part and concurring in judgment).

[104] *See Fourth Report and Order* ¶ 27 (JA__).

Requirement would have on the availability and affordability of Lifeline-supported service on Tribal lands.[105] Moreover, the Commission ignores comments from the Navajo Nation Telecommunications Regulatory Commission (Navajo Nation), which explained that without enhanced Tribal Lifeline support, "wireless resellers would simply stop providing Lifeline service to the Navajo Nation," and that "[r]educing carrier competition will only lead to worse service and more limited service offerings, and ultimately, fewer Navajos who have phones."[106] Further, the record reflects that without non-facilities-based providers, there will be few *if any* providers to fulfill the need of Tribal subscribers. Navajo Nation also explains that "***none*** of the major facilities-based wireless carriers (AT&T, Sprint and Verizon) provide Lifeline service on the Navajo Nation."[107] Moreover, at the time it issued the *Fourth Report and Order*, the Commission itself was aware that many large facilities-based providers were actively relinquishing their ETC designations or seeking forbearance from the requirement to provide Lifeline service, further

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[105] *See Tribal ETC November 9 Ex Parte* at 5-7 (JA __-__).

[106] *See Lifeline and Link Up Reform and Modernization, et al.*, WC Docket No. 11-42, et al, Comments of Navajo Nation Telecommunications Regulatory Commission, 10 (Aug. 28, 2015) (*Navajo Nation Comments*) (JA__).

[107] *See id.* (emphasis in original).

reducing competition and service options for low-income residents of Tribal lands.[108]

Third, the Commission improperly disregards comments demonstrating that enhanced Tribal support does get passed through to underlying carriers who in turn deploy infrastructure.[109] Specifically, the Commission entirely ignores the comments of Navajo Nation, which explained that because resellers purchase "large blocks of minutes from the major carriers and then resell[] those minutes as Lifeline packages[,] . . . ultimately, the facilities-based carriers ***do*** end up with a significant percentage of that support, which allows them to expand infrastructure deeper into the Navajo Nation."[110] Moreover, the Commission improperly disregards—without countervailing evidence—the comments of telecommunications service providers such as ETC Petitioners, who serve Tribal lands and have an intimate knowledge of their underlying carriers' service territory, and therefore are in a position to know the extent to which their wholesale costs create incentives for infrastructure deployment.[111]

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[108] *See 2017 Lifeline Digital Divide Order*, Dissenting Statement of Commissioner Mignon L. Clyburn, at 10555-58.

[109] *See Fourth Report and Order* ¶ 28 (JA__).

[110] *See Navajo Nation Comments* at 10 (JA__).

[111] *See, e.g., Tribal ETC November 9 Ex Parte* at 8-9 (JA__-__). Subsequent comments included economic evidence demonstrating that resellers support network investment. *See, e.g., See Bridging the Digital Divide for Low-Income*

Fourth, the Commission's assertion that "resellers cannot explain how passing only a fraction of funds through to facilities-based carriers will mean more investment in rural Tribal areas than ensuring that facilities-based carriers receive 100 percent of the support"[112] ignores record evidence that the four nationwide facilities-based wireless carriers do not participate in the Lifeline program on Tribal lands, and wireline carriers are seeking ways to leave the program. In many rural Tribal areas, the only way to direct Lifeline funds to facilities investment on Tribal lands is indirectly through wireless reseller ETCs.[113]

Fifth, the Commission fails to seriously consider the reliance interests that its policy has engendered, both for carriers and their subscribers. In its *2000 Tribal Lifeline Order*, the Commission found that an enhanced Tribal benefit "should eliminate or diminish the effect of unaffordability for those low-income individuals for whom it may be difficult to maintain telephone service even where facilities are present."[114] The Commission's decision to impose the Tribal Facilities Requirement will have the opposite effect: forcing out of business many providers

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Consumers, et al., WC Docket Nos. 17-287, 11-42, 09-197, Comments of CTIA, 15 and Exhibit A., Declaration of Dr. John Mayo (JA__, __-__).

[112] *See Fourth Report and Order* ¶ 28 (JA__).

[113] *See Navajo Nation Comments* at 10 (JA __); *Clyburn Dissent* at 10558 (JA __); *ETC November 9 Ex Parte*, Exh. A, 2 (JA__); *Tribal ETC November 9 Ex Parte* at 5, 8-9 (JA __, __-__).

[114] *See 2000 Tribal Lifeline Order* ¶ 46.

who have developed business models in order to serve Tribal subscribers, reducing competition, consumer choice, and affordability of service.[115] Moreover, the Commission fails to consider what will happen to subscribers who end up with no affordable options, or subscribers who must forego a wireless option for a wireline option and who are thereby deprived of the mobility they have relied upon. The *Fourth Report and Order* entirely fails to analyze the number of consumers who stand to lose their service from its change and does not include any cost-benefit analysis of the effect of the Tribal Facilities Requirement on low-income residents of Tribal lands.[116]

While this Court has found that the predictive judgments of agencies are due deference,[117] the agency is not entitled to deference where substantial evidence does not support its claim.[118] Here, the Commission provides no meaningful data to support its conjecture that the Tribal Facilities Requirement will incent greater broadband investment on Tribal lands, or that banning resellers from receiving enhanced Tribal support will better achieve Lifeline program goals. Moreover, the Commission's prediction here fails to meaningfully address evidence in the record

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[115] *See Navajo Nation Comments* at 10 (JA__).

[116] *See Clyburn Dissent* at 10557-58 (JA__-__).

[117] *See Nuvio Corp. v. FCC*, 473 F.3d 302, 306-07 (D.C. Cir. 2006) (citing *Int'l Ladies Garment Workers' Union v. Donovan*, 722 F2d 795, 821 (D.C. Cir. 1983); *Charter Commc'ns, Inc. v. FCC*, 460 F.3d 31, 44 (D.C. Cir. 2006)).

[118] *See Time Warner Ent. Co., LP. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001).

that undermines its viewpoint.[119] In sum, the lack of evidence here provides no basis for the Commission to make a predictive judgment, and as a result the Tribal Facilities Requirement cannot be justified on that ground.

2. The Commission Unreasonably Departs From Over A Decade Of Findings That A Facilities Requirement Contravenes The Purposes Of The Lifeline Program

In addition to overlooking evidence in the record, the Commission also departs from over a decade of policy finding that the presence of resellers advances the goals of the Lifeline program and that prohibiting resellers from participating in the program impedes those goals. In the *2005 TracFone Forbearance Order*, the Commission found not only that the own facilities requirement was unnecessary to achieve the purposes of the Lifeline program, but also that "the facilities requirement impedes greater utilization of Lifeline-supported services provided by a pure wireless reseller."[120] As a result, the Commission found that Section 10 of the Act *required* it to forbear from the facilities requirement of Section 214(e)(1)(A). Since then, the Commission has extended facilities forbearance on a blanket basis to all non-facilities-based carriers seeking to

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[119] *See, e.g.*, *Navajo Nation Comments* at 10 (JA __); *Tribal ETC November 9 Ex Parte* at 7-9 (JA __-__).

[120] *See TracFone Forbearance Order* ¶ 9. *See also i-wireless Forbearance Order* ¶ 10; *Virgin Mobile Forbearance Order* ¶¶ 19-21.

participate in the Lifeline program.[121] The *Fourth Report and Order* fails to offer a satisfactory explanation or reasoned analysis why its long-standing policy (and robust Section 10 analysis) no longer applies, is not required here, or should be modified.

Indeed, the Commission's arguments in favor of facilities forbearance apply with equal force to basic Lifeline support and enhanced Tribal Lifeline support. The presence of resellers in the market has increased competition for Lifeline-supported services on Tribal lands, has improved service offerings and consumer choice, has provided significant revenue to resellers' underlying carriers (each of which has deployed network facilities on Tribal lands, but does not provide Lifeline service directly on Tribal lands), and has advanced the "primary goal" of the enhanced Tribal Lifeline benefit: "reduc[ing] the monthly cost of telecommunications services for qualifying low-income individuals on tribal lands, so as to encourage those without service to initiate service and better enable those currently subscribed to maintain service."[122] As ETC Petitioners and other commenters stated in the record, the Tribal Facilities Requirement would undermine the "primary goal" of the enhanced Tribal benefit by reducing competition among providers, consumer choice, affordability, and wholesale

[121] *See* 2012 *Lifeline Reform Order* ¶ 368.

[122] *See 2000 Tribal Lifeline Order* ¶ 44.

revenues for underlying facilities-based providers.[123] The Commission fails to conduct any meaningful analysis of the impact of its facilities requirement on Tribal consumers, competition, or the affordability of service.

Departing from over a decade of policy without a meaningful analysis of the impact that such a change would have on the beneficiaries of the program would upend the Commission's bi-partisan, successful framework in favor of a framework that is at best uncertain, and at worst would shatter the compact between the Commission and low-income residents of Tribal lands. Therefore, this Court should set aside and hold unlawful the Tribal Facilities Requirement.

III. This Court Should Hold Unlawful and Set Aside the Tribal Rural Limitation

In the *Fourth Report and Order*, the Commission limits enhanced Tribal Lifeline support to "rural" areas, adopting a definition of the term "rural" from the Commission's E-Rate program.[124] This Court should hold the Tribal Rural Limitation unlawful and set it aside because: (1) the definition of "rural" adopted in the *Fourth Report and Order* is not a logical outgrowth of the Commission's proposal in the *2015 Lifeline Second FNPRM* and (2) the Tribal Rural Limitation is arbitrary and capricious.

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[123] *See, e.g.*, *Tribal ETC November 9 Ex Parte* at 7-8 (JA __-__).

[124] *See Fourth Report and Order* ¶¶ 7-8 (JA __-__).

A. The Commission Adopted A Definition Of "Rural" Without Adequate Notice And Comment

The Commission's definition of "rural" for purposes of receiving enhanced Tribal Lifeline support should be held unlawful and set aside because it violates the notice and comment requirements of the APA. Section 553(b)(3) of the APA requires agencies to issue a notice to interested parties including "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[125] Moreover, this Court has held that a final rule must be a "logical outgrowth" of the proposal—i.e., the Commission must "expressly ask for comments on a particular issue or otherwise make clear that the agency is contemplating a particular change."[126] Further, "it is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency."[127]

Here, while the FCC sought comment on several population-density-based definitions for "rural" lands for purposes of receiving enhanced Tribal Lifeline support, it rejected both of its own suggestions and others proposed in the record in favor of a definition used in the E-Rate program.[128] This E-Rate definition of

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[125] *See* 47 U.S.C. § 553(b)(3).

[126] *See CSX Transportation*, 584 F.3d at 1081.

[127] *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974)

[128] *See Fourth Report and Order* ¶¶ 7-8 (JA __-__).

"rural" lands was not proposed in the NPRM, was not discussed in the comments, and was only revealed in the draft order three weeks before the Commission's vote. Further, the Commission failed to provide any data—including searchable maps or digital "shape files"—to enable interested parties to adequately determine how the E-Rate definition would impact current subscribers or the enhanced Tribal Lifeline program. Instead, the Commission placed the cart before the horse, imposing a definition of "rural" (with a postcard-sized non-searchable map) and only then directing the Universal Service Administrative Company (USAC) to create searchable maps so that ETCs and consumers may see how the proposal would impact them.[129] For this reason, the various options the Commission listed in the *2015 Lifeline Second FNPRM* did not provide adequate notice of the Trial Rural Limitation.

The fact that the Commission publicly released the draft of the *Fourth Report and Order* three weeks before voting on its definition of "rural" does not save the lack of notice here. Interested parties did not have adequate data or time to understand the impact of the new definition on their subscribers and service territory, or to effectively challenge the proposal.[130] This is particularly true for ETC Petitioners, which do not provide E-Rate-supported services and as a result

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[129] *See id.* ¶ 15 (JA __); *id.* at App'x E (JA __); *see also Tribal ETC November 9 Ex Parte* at 7 n.22.

[130] *See Prometheus Radio Project*, 652 F.3d at 453.

had no experience or data from which to assess the impact. Even if Petitioners did have experience or data from which to work, the APA requires the Commission to provide a meaningful opportunity for interested parties to review and respond to its proposals, and the Commission failed to provide that opportunity here.

Further, the Commission's failure to seek adequate comment is only highlighted by the fact that, in the *Notice of Inquiry* issued in conjunction with the *Fourth Report and Order*, it asked whether "the E-rate program's definition of 'rural' [is] the best option for identifying rural areas in the Lifeline program, or should the Commission consider some other definition to identify rural areas?"[131] This request for further comment underscores the complete lack of APA mandated notice and comment process here.

B. The Commission Adopted A Rural Tribal Limitation In An Arbitrary And Capricious Manner

The Tribal Rural Limitation is also arbitrary and capricious and should be overturned on that independent ground. In the *Fourth Report and Order*, the Commission argues that the Tribal Rural Limitation it is consistent with the intent of the *2000 Tribal Order* and that including urban Tribal areas would be "inconsistent with the Commission's primary purpose of the enhanced support."[132] The Tribal Rural Limitation is arbitrary and capricious because it improperly

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[131] *See 2017 Lifeline Digital Divide Order* ¶ 126 (citations omitted) (JA __).

[132] *See Fourth Report and Order* ¶ 9 (JA __).

redefines the purpose of the Tribal Lifeline program in contravention of long-standing Commission policy and is speculative, irrational, and fails to consider important aspects of the problem, including the nature and role of mobile service in the Tribal Lifeline program and the impact of its rule on Tribal subscribers.

First, the Commission in the *Fourth Report and Order* improperly reframes the Tribal Lifeline program as an infrastructure program rather than an affordability and adoption program. In the *2000 Tribal Order*, the Commission specifically stated that the "primary goal" of the enhanced Tribal benefit was to "reduce the monthly cost of telecommunications services for qualifying low-income individuals on tribal lands, so as to encourage those without service to initiate service and better enable those currently subscribed to maintain service."[133] The Commission reiterated this primary purpose in the *2012 Lifeline Reform Order*.[134] This purpose applies irrespective of whether the subscriber lives in an urban or rural area or whether there already are facilities available where the consumer lives. Indeed, because the Lifeline program—including the enhanced Lifeline program—supports services rather than facilities, it presumes that facilities are already available to provide the services.

[133] *See 2000 Tribal Order* ¶ 44.

[134] *See 2012 Lifeline Reform Order* ¶ 150.

And yet, despite the fact that the "primary goal" of the enhanced benefit is increasing Tribal subscribership, the Commission in the *Fourth Report and Order* provides no analysis of the impact of its proposal on subscribership, including the ability of Tribal Lifeline subscribers to maintain service after the new rule goes into effect or on the affordability of service on Tribal lands. Based on the record, however, the result of the Tribal Rural Limitation is clear: voice and broadband services for Tribal residents who choose to live in urban areas will be less affordable and less available for current and prospective subscribers, negatively affecting subscribership for low-income Tribal residents in contravention of the primary purpose of the enhanced Tribal Lifeline benefit.

Second, even if the Commission was correct that the primary goal of the enhanced Tribal Lifeline benefit was to incent increased deployment in remote and unserved areas, its adopted rule is speculative, irrational, and fails to consider the role and nature of mobile service in the Tribal Lifeline program. Indeed, the rationale is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[135] The Commission provides absolutely no record support for its conclusion that directing enhanced support solely to rural Tribal areas will create incentives for deployment, or for its conclusion that providing support for urban Tribal lands is unlikely to support deployment.

[135] *See State Farm*, 463 U.S. at 43.

Instead, the Commission assumes that because fixed broadband service is less available on rural Tribal lands, limiting support to rural lands will somehow increase deployment, and that because fixed broadband service is more available in urban areas, providing enhanced Tribal Lifeline support to subscribers in those areas will not incent greater deployment. This assumption lacks any foundation in the record or in real-life experience. The ability of an ETC to invest in deployment on rural Tribal lands is dependent on consumer demand (e.g., network usage), the ability of consumers to pay, and the revenues an ETC has available to invest in new facilities. Here, the Commission provides no additional incentives for consumers that would increase demand or affordability[136] and effectively cuts off the ability for ETCs to use revenues earned from urban Tribal subscribers to support deployment for rural subscribers.[137] Consequently, the Commission's

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[136] In fact, the Commission will undermine competition, consumer choice, and innovation, depressing demand and affordability. *See Navajo Nation Comments* at 10 (JA __); *ETC November 9 Ex Parte*, Exh. A at 2 (JA __).

[137] The Commission has recognized the value of maximizing subscribership to drive deployment on Tribal lands, finding that:

> [T]he availability of enhanced federal support for all low-income individuals living on tribal lands will maximize the number of subscribers in such a community who can afford service and, therefore, make it a more attractive community for carrier investment and deployment of telecommunications infrastructure. As the number of potential subscribers grows in tribal communities, carriers may achieve greater economies of scale and scope when deploying facilities and providing service within a particular community.

proposal is more likely to decrease the incentive and ability of ETCs to deploy services on rural Tribal lands.

Third, the Commission entirely fails to consider a critical aspect of the problem: the effect of its proposal on the deployment, upgrade, and use of mobile telecommunications and broadband service on Tribal lands. The majority of Lifeline subscribers on Tribal lands subscribe to mobile voice and broadband service.[138] And yet, the *Fourth Report and Order* only cites fixed broadband deployment data to support its Trial Rural Limitation, entirely ignoring mobile broadband deployment or usage data.[139] The Commission provides no justification for its failure to include mobile broadband service in its analysis. Compounding its error, the Commission ignores the fact that, unlike fixed service, mobile service is not tied to a particular address, such that an urban resident may in fact primarily be a "rural" user, or vice versa. The Commission's failure to analyze the extent to which depriving urban Tribal residents of enhanced benefits will suppress usage of rural Tribal networks, and by extension the incentives to deploy rural networks, renders its rule arbitrary and capricious.

See 2000 Tribal Lifeline Order ¶ 30. While the Commission there was discussing the value of including non-Native Americans, the same principle applies when including both urban and rural areas on Tribal lands.

[138] *See Fourth Report and Order* ¶ 23 (citing *2015 Lifeline Second FNPRM* ¶ 167 n.320) (JA __).

[139] *See id.* ¶ 9 (JA __).

Fourth, the Commission similarly fails to consider the impact of its proposal on program participants and relevant submission in the record from affected Tribes.[140] For example, several tribes, including the Cheyenne River Sioux Tribe, Cherokee Nation, and the Susanville Indian Rancheria emphasized the impact of a rural limitation on infrastructure deployment, noting that "[l]imiting the enhanced Tribal Lifeline subsidy to sparsely populated areas on tribal lands would only create another incentive for carriers to overlook the provision of these services for *all* low-income residents of tribal lands," and that "low-income tribal members may reside in an economic hub that has advanced telecommunications services, but that does not always mean they will be able to afford such services."[141] The Commission neglects to cite, consider, or respond to any of the arguments that those Tribes set forth in the record.

The Commission's Tribal Rural Limitation is arbitrary and capricious and should be set aside because it improperly reframes the Tribal Lifeline program as

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[140] *See, e.g.*, *GCI November 2 Ex Parte* at 1 (JA __).

[141] *See* Letter from Harold C. Frazier, Chairman, Cheyenne River Sioux Tribe, to Marlene Dortch, Secretary, FCC, WC Docket Nos. 11-42, 09-197, 10-90, 3-4 (Sept. 28, 2015) (JA __-__); Bill John Baker, Principal Chief of the Cherokee Nation, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 11-42, 09-197, 10-90, Reply Comments, 5 (Oct. 21, 2015) (JA __); Letter from Chief J. Allan, Chairman, Coeur d'Alene Tribe, to Marlene Dortch, Secretary, FCC, WC Docket Nos. 11-42, 09-197, 10-90, Reply Comments, 3 (Sept. 30, 2015) (JA __); Letter from Stacy Dixon, Tribal Chairman, Susanville Indian Rancheria, to Marlene Dortch, Secretary, FCC, WC Docket Nos. 11-42, 09-197, 10-90, Reply Comments, 4 (Sept. 28, 2015) (JA __).

an infrastructure-deployment program and is speculative, irrational, and fails to consider the role of mobile service in the Tribal Lifeline program.

CONCLUSION

The Court should vacate the Commission's *Fourth Report and Order* to the extent it was adopted without proper notice, unlawfully adopts the Tribal Facilities Requirement for enhanced Tribal Lifeline benefits, and unlawfully establishes the Tribal Rural Limitation.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B), as amended per the Court order entered December 1, 2016 to not exceed 13,000 words for the Petitioner's Brief, because it contains 12,999 words excluding the part of the brief exempted by Fed.R.App.P.32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman.

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ADDENDUM

STATUTES AND REGULATIONS

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STATUTES

5. U.S.C. § 553

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the

record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S. Code § 706(2)(a). Scope of review

(2) hold unlawful and set aside agency actions, findings, and conclusions found to be—

(a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;

28 U.S. Code § 2342(1). Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

> (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

47 U.S. Code § 151. Jurisdiction of court of appeals

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S. Code § 160. Competition in provision of telecommunications service

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S. Code § 214(e)

(e) Provision of universal service

(1) Eligible telecommunications carriers

A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received—

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

(2) Designation of eligible telecommunications carriers

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

(3) Designation of eligible telecommunications carriers for unserved areas

If no common carrier will provide the services that are supported by Federal universal service support mechanisms under section 254(c) of this title to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services or an area served by a

common carrier to which paragraph (6) applies, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof. Any carrier or carriers ordered to provide such service under this paragraph shall meet the requirements of paragraph (1) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.

(4) Relinquishment of universal service

A State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier. An eligible telecommunications carrier that seeks to relinquish its eligible telecommunications carrier designation for an area served by more than one eligible telecommunications carrier shall give advance notice to the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) of such relinquishment. Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an area served by more than one eligible telecommunications carrier, the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier. The State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall establish a time, not to exceed one year after the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) approves such relinquishment under this paragraph, within which such purchase or construction shall be completed.

(5) "Service area" defined

The term "service area" means a geographic area established by a State commission (or the Commission under paragraph (6)) for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, "service area" means

such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c) of this title, establish a different definition of service area for such company.

(6) Common carriers not subject to State commission jurisdiction

In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the Commission consistent with applicable Federal and State law. Upon request and consistent with the public interest, convenience and necessity, the Commission may, with respect to an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated under this paragraph, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the Commission shall find that the designation is in the public interest

47 U.S. Code § 254(b)

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(1) Quality and rates

Quality services should be available at just, reasonable, and affordable rates.

(2) Access to advanced services

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) Specific and predictable support mechanisms

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).

(7) Additional principles

Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.

REGULATIONS

47 C.F.R. § 54.201(e)

For the purposes of this section, the term facilities means any physical components of the telecommunications network that are used in the transmission or routing of the services that are designated for support pursuant to subpart B of this part.

47 C.F.R. § 54.400 Terms and definitions.

As used in this subpart, the following terms shall be defined as follows:

(a) Qualifying low-income consumer. A "qualifying low-income consumer" is a consumer who meets the qualifications for Lifeline, as specified in § 54.409.

(b) Toll blocking service. "Toll blocking service" is a service provided by an eligible telecommunications carrier that lets subscribers elect not to allow the completion of outgoing toll calls from their telecommunications channel.

(c) Toll control service. "Toll control service" is a service provided by an eligible telecommunications carrier that allows subscribers to specify a certain amount of toll usage that may be incurred on their telecommunications channel per month or per billing cycle.

(d) Toll limitation service. "Toll limitation service" denotes either toll blocking service or toll control service for eligible telecommunications carriers that are incapable of providing both services. For eligible telecommunications carriers that are capable of providing both services, "toll limitation service" denotes both toll blocking service and toll control service.

(e) Eligible resident of Tribal lands. An "eligible resident of Tribal lands" is a "qualifying low-income consumer," as defined in paragraph (a) of this section, living on Tribal lands. For purposes of this subpart, "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); Indian allotments; Hawaiian Home Lands - areas held in trust for Native Hawaiians by the state of Hawaii, pursuant to the Hawaiian Homes Commission Act, 1920 July 9, 1921, 42 Stat. 108, et. seq., as amended; and any land designated as such by the Commission for purposes of this subpart pursuant to the designation process in § 54.412.

(f) Income. "Income" means gross income as defined under section 61 of the Internal Revenue Code, 26 U.S.C. 61, for all members of the household. This means all income actually received by all members of the household from whatever source derived, unless specifically excluded by the Internal Revenue Code, Part III of Title 26, 26 U.S.C. 101et seq.

(g) Duplicative support. "Duplicative support" exists when a Lifeline subscriber is receiving two or more Lifeline services concurrently or two or more subscribers in ahousehold are receiving Lifeline services or Tribal Link Up support concurrently.

(h) Household. A "household" is any individual or group of individuals who are living together at the same address as one economic unit.
A household may include related and unrelated persons. An "economic unit" consists of all adult individuals contributing to and sharing in the income and expenses of a household. An adult is any person eighteen years or older. If an adult has no or minimal income, and lives with someone who provides financial support to him/her, both people shall be considered part of the samehousehold. Children under the age of eighteen living with their parents or guardians are considered to be part of the same household as their parents or guardians.

(i) National Lifeline Accountability Database or Database. The "National Lifeline Accountability Database" or "Database" is an electronic system, with associated functions, processes, policies and procedures, to facilitate the detection and elimination of duplicative support, as directed by the Commission.

(j) Qualifying assistance program. A "qualifying assistance program" means any of the federal or Tribal assistance programs the participation in which, pursuant to § 54.409(a) or (b), qualifies a consumer for Lifeline service, including Medicaid; Supplemental Nutrition Assistance Program; Supplemental Security Income; Federal Public Housing Assistance; Veterans and Survivors Pension Benefit; Bureau of Indian Affairs general assistance; Tribally administered Temporary Assistance for Needy Families (Tribal TANF); Head Start (only those households meeting its income qualifying standard); or the Food Distribution Program on Indian Reservations (FDPIR).

(k) Direct service. As used in this subpart, direct service means the provision of service directly to the qualifying low-income consumer.

(l) Broadband Internet access service. "Broadband Internet access service" is defined as a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and

enable the operation of the communications service, but excluding dial-up service.

(m) Voice telephony service. "Voice telephony service" is defined as voice grade access to the public switched network or its functional equivalent; minutes of use for local service provided at no additional charge to end users; access to the emergency services provided by local government or other public safety organizations, such as 911 and enhanced 911, to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems; and toll limitation services to qualifying low-income consumers as provided in subpart E of this part.

(n) Supported services. Voice Telephony services and broadband Internet access services are supported services for the Lifeline program.

(o) National Lifeline Eligibility Verifier. The "National Lifeline Eligibility Verifier" or "National Verifier" is an electronic and manual system with associated functions, processes, policies and procedures, to facilitate the determination of consumer eligibility for the Lifeline program, as directed by the Commission.

47 C.F.R. § 54.401

(a) As used in this subpart, Lifeline means a non-transferable retail service offering provided directly to qualifying low-income consumers:

(1) For which qualifying low-income consumers pay reduced charges as a result of application of the Lifeline support amount described in § 54.403; and

(2) That provides qualifying low-income consumers with voice telephony service or broadband Internet access service as defined in § 54.400. Toll limitation service does not need to be offered for any Lifeline service that does not distinguish between toll and non-toll calls in the pricing of the service. If an eligible telecommunications carrier charges Lifeline subscribers a fee for toll calls that is in addition to the per month or per billing cycle price of the subscribers' Lifeline service, the carrier must offer toll limitation service at no charge to its subscribers as part of its Lifeline service offering.

(b) Eligible telecommunications carriers may allow qualifying low-income consumers to apply Lifeline discounts to any residential service plan with the minimum service levels set forth in § 54.408 that includes fixed or mobile voice telephony service, broadband Internet access service, or a bundle of broadband Internet access service and fixed or mobile voice telephony service; and plans that include optional calling features such as, but not limited to, caller identification, call waiting, voicemail, and three-way calling.

(1) Eligible telecommunications carriers may permit qualifying low-income consumers to apply their Lifeline discount to family shared data plans.

(2) Eligible telecommunications carriers may allow qualifying low-income consumers to apply Lifeline discounts to any residential service plan that includes voice telephony service without qualifying broadband Internet access service prior to December 1, 2021.

(3) Beginning December 1, 2016, eligible telecommunications carriers must provide the minimum service levels for each offering of mobile voice service as defined in § 54.408.

(4) Beginning December 1, 2021, eligible telecommunications carriers must provide the minimum service levels for broadband Internet access service in every Lifeline offering.

(c) Eligible telecommunications carriers may not collect a service deposit in order to initiate Lifeline for voice-only service plans that:

(1) Do not charge subscribers additional fees for toll calls; or

(2) That charge additional fees for toll calls, but the subscriber voluntarily elects toll limitation service.

(d) When an eligible telecommunications carrier is designated by a state commission, the state commission shall file or require the eligible telecommunications carrier to file information with the Administrator demonstrating that the carrier's Lifeline plan meets the criteria set forth in this subpart and describing the terms and conditions of any voice telephony service plans offered to Lifeline subscribers, including details on the number of minutes provided as part of the plan, additional charges, if any, for toll calls, and rates for each such plan. To the extent the eligible telecommunications carrier offers plans to Lifeline subscribers that are generally available to the public, it may provide summary information regarding such plans, such as a link to a public Web site outlining the terms and conditions of such plans. Lifeline assistance shall be made available to qualifying low-income consumers as soon as the Administrator certifies that the carrier's Lifeline plan satisfies the criteria set out in this subpart.

(e) Consistent with § 52.33(a)(1)(i)(C) of this chapter, eligible telecommunications carriers may not charge Lifeline customers a monthly number-portability charge.

(f) Eligible telecommunications carriers may aggregate eligible subscribers' benefits to provide a collective service to a group of subscribers, provided that each qualifying low-income consumer subscribed to the collective service receives residential service that meets the requirements of paragraph (a) of this section and § 54.408.

47 C.F.R. § 54.403 (as amended by the *Fourth Report and Order*)

(a) The federal Lifeline support amount for all eligible telecommunications carriers shall equal:

(1) **Basic support amount.** Federal Lifeline support in the amount of $9.25 per month will be made available to an eligible telecommunications carrier providing Lifeline service to a qualifying low-income consumer, except as provided in paragraph (a)(2) of this section, if that carrier certifies to the Administrator that it will pass through the full amount of support to the qualifying low-income consumer and that it has received any non-federal regulatory approvals necessary to implement the rate reduction.

(2) For a Lifeline provider offering either standalone voice service, subject to the minimum service standards set forth in § 54.408, or voice service with broadband below the minimum standards set forth in § 54.408, the support levels will be as follows:

(i) Until December 1, 2019, the support amount will be $9.25 per month.

(ii) From December 1, 2019 until November 30, 2020, the support amount will be $7.25 per month.

(iii) From December 1, 2020 until November 30, 2021, the support amount will be $5.25 per month.

(iv) On December 1, 2021, standalone voice service, or voice service not bundled with broadband which meets the minimum standards set forth in § 54.408, will not be eligible for Lifeline support unless the Commission has previously determined otherwise.

(v) Notwithstanding paragraph (a)(2)(iv) of this section, on December 1, 2021, the support amount for standalone voice service, or voice service not bundled with broadband which meets the minimum standards set forth in § 54.408, provided by a provider that is the only Lifeline provider in a Census block will be the support amount specified in paragraph (a)(2)(iii) of this section.

(3) **Tribal lands support amount.** Additional federal Lifeline support of up to $25 per month will be made available to a eligible telecommunications carrier providing facilities-based Lifeline service to an eligible resident of Tribal lands, as defined in § 54.400(e), if the subscriber's residential location is rural, as defined in § 54.505(b)(3)(i) and (ii), and the eligible telecommunications carrier certifies to the Administrator that it will pass through the full Tribal lands support amount to the qualifying eligible resident of Tribal lands and that it has received any non-federal regulatory approvals necessary to implement the required rate reduction.

(b) Application of Lifeline discount amount.

(1) Eligible telecommunications carriers that charge federal End User Common Line charges or equivalent federal charges must apply federal Lifeline support to waive the federal End User Common Line charges for Lifeline subscribers if the carrier is seeking Lifeline reimbursement for eligible voice telephony service provided to those subscribers. Such carriers must apply any additional federal support amount to a qualifying low-income consumer's intrastate rate, if the carrier has received the non-federal regulatory approvals necessary to implement the required rate reduction. Other eligible telecommunications carriers must apply the federal Lifeline support amount, plus any additional support amount, to reduce the cost of any generally available residential service plan or package offered by such carriers that provides at least one supported service as described in § 54.101(a), and charge Lifeline subscribers the resulting amount.

(2) [Reserved]

47 C.F.R. § 54.403 Lifeline support amount. (in effect prior to *Fourth Report and Order* amendments)

(a) The federal Lifeline support amount for all eligible telecommunications carriers shall equal:

(1) Basic support amount. Federal Lifeline support in the amount of $9.25 per month will be made available to an eligible telecommunications carrier providing Lifeline service to a qualifying low-income consumer, except as provided in paragraph (a)(2) of this section, if that carrier certifies to the Administrator that it will pass through the full amount of support to the qualifying low-income consumer and that it has received any non-federal regulatory approvals necessary to implement the rate reduction.

(2) For a Lifeline provider offering either standalone voice service, subject to the minimum service standards set forth in §54.408, or voice service with broadband below the minimum standards set forth in §54.408, the support levels will be as follows:

(i) Until December 1, 2019, the support amount will be $9.25 per month.

(ii) From December 1, 2019 until November 30, 2020, the support amount will be $7.25 per month.

(iii) From December 1, 2020 until November 30, 2021, the support amount will be $5.25 per month.

(iv) On December 1, 2021, standalone voice service, or voice service not bundled with broadband which meets the minimum standards set forth in §54.408, will not be eligible for Lifeline support unless the Commission has previously determined otherwise.

(v) Notwithstanding paragraph (a)(2)(iv) of this section, on December 1, 2021, the support amount for standalone voice service, or voice service not bundled with broadband which meets the minimum standards set forth in §54.408, provided by a provider that is the only Lifeline provider in a Census block will be the support amount specified in paragraph (a)(2)(iii) of this section.

(3) **Tribal lands support amount.** Additional federal Lifeline support of up to $25 per month will be made available to an eligible telecommunications carrier providing Lifeline service to an eligible resident of Tribal lands, as defined in §54.400 (e), to the extent that the eligible telecommunications carrier certifies to the Administrator that it will pass through the full Tribal lands support amount to the qualifying eligible resident of Tribal lands and that it has received any non-federal regulatory approvals necessary to implement the required rate reduction.

(b) Application of Lifeline discount amount. (1) Eligible telecommunications carriers that charge federal End User Common Line charges or equivalent federal charges must apply federal Lifeline support to waive the federal End User Common Line charges for Lifeline subscribers. Such carriers must apply any additional federal support amount to a qualifying low-income consumer's intrastate rate, if the carrier has received the non-federal regulatory approvals necessary to implement the required rate reduction. Other eligible telecommunications carriers must apply the federal Lifeline support amount, plus any additional support amount, to reduce the cost of any generally available residential service plan or package offered by such carriers that provides voice telephony service as described in §54.101, and charge Lifeline subscribers the resulting amount.

(2) [Reserved]

47 C.F.R. § 54.409 Consumer qualification for Lifeline.

(a) To constitute a qualifying low-income consumer:

(1) A consumer's household income as defined in § 54.400(f) must be at or below 135% of the Federal Poverty Guidelines for a household of that size; or

(2) The consumer, one or more of the consumer's dependents, or the consumer's household must receive benefits from one of the following federal assistance programs: Medicaid; Supplemental Nutrition Assistance Program; Supplemental Security Income; Federal Public Housing Assistance; or Veterans and Survivors Pension Benefit.

(b) A consumer who lives on Tribal lands is eligible for Lifeline service as a "qualifying low-income consumer" as defined by § 54.400(a) and as an "eligible resident of Tribal lands" as defined by § 54.400(e) if that consumer meets the qualifications for Lifeline specified in paragraph (a) of this section or if the consumer, one or more of the consumer's dependents, or the consumer's household participates in one of the following Tribal-specific federal assistance programs: Bureau of Indian Affairs general assistance; Tribally administered Temporary Assistance for Needy Families; Head Start (only those households meeting its income qualifying standard); or the Food Distribution Program on Indian Reservations.

(c) In addition to meeting the qualifications provided in paragraph (a) or (b) of this section, in order to constitute a qualifying low-income consumer, a consumer must not already be receiving a Lifeline service, and there must not be anyone else in the subscriber's household subscribed to a Lifeline service.

47 C.F.R. § 54.505(b)(3)

> (b) Discount percentages. Except as provided in paragraph (f), the discounts available to eligible schools and libraries shall range from 20 percent to 90 percent of the pre-discount price for all eligible services provided by eligible providers, as defined in this subpart. The discounts available to a particular school, library, or consortium of only such entities shall be determined by indicators of poverty and high cost.
>
> > (3) The Administrator shall classify schools and libraries as "urban" or "rural" according to the following designations.

(i) The Administrator shall designate a school or library as "urban" if the school or library is located in an urbanized area or urban cluster area with a population equal to or greater than 25,000, as determined by the most recent rural-urban classification by the Bureau of the Census. The Administrator shall designate all other schools and libraries as "rural.

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2018, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, which will send notification of the filing to all parties or their counsel of record.

/s/ John J. Heitmann

John J. Heitmann