

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Bridging the Digital Divide for Low-Income Consumers)	WC Docket No. 17-287
)	
Lifeline and Link Up Reform and Modernization)	WC Docket No. 11-42
)	
Telecommunications Carriers Eligible for Universal Service Support)	WC Docket No. 09-197
)	

PETITION FOR RECONSIDERATION

The Oceti Sakowin Tribal Utility Authority (“OSTUA”) hereby respectfully requests that the Federal Communications Commission (“FCC”) reconsider its Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry (“December 2017 Lifeline Order”).¹ This Petition is being filed pursuant to Section 405 of the Communications Act of 1934, as amended (the “Act”) (47 U.S.C. § 405), and Section 1.429 of the FCC’s Rules (47 C.F.R. § 1.429).

SUMMARY

The *December 2017 Lifeline Order* is fundamentally and legally flawed in that, among other things, it (i) adopts significant changes to the Tribal Lifeline program without proper notice and comment, (ii) establishes a facilities-based requirement for the provision of Lifeline service on Tribal lands that is arbitrary and capricious, and (iii) contravenes the well-established Tribal Consultation process for gathering facts and engaging with Tribal Nations prior to adopting rules and orders significantly impacting residents of Tribal lands. The OSTUA respectfully requests

¹ *Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support*, Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, FCC 17-155, December 1, 2017 (“*December 2017 Lifeline Order*”). The *December 2017 Lifeline Order* was published in the Federal Register on January 8, 2018.

that the FCC (i) reconsider its adoption of rules impacting Tribal Lands, such as eliminating Tribal Lifeline support for wireless resellers, which are the primary and preferred providers of Lifeline service on Tribal lands, and (ii) formally consult with Tribal Nations on these and other proposed changes to Lifeline requirements *prior* to adopting any rules significantly impacting residents of Tribal lands.

STATEMENT OF INTEREST

Under the FCC rules, “any interested person” may petition the FCC for reconsideration of a final order, such as the *December 2017 Lifeline Order*.² The OSTUA is an interested person in that it represents the interests of Tribal Nations, whose members rely on Lifeline service for their basic communications needs. OSTUA represents a coalition of Indian Tribes that support the advancement of Tribal sovereignty by protecting the rights of Tribal Nations through inter-government coordination and enforcement of laws and requirements on Tribal lands. The OSTUA was formed to provide a coordinated and united approach to addressing common utility and economic development issues of importance to Indian Tribes, including the Tribal Consultation process with federal government agencies, such as the FCC. Recognizing the important role of the OSTUA, on September 5, 2014, the Great Plains Tribal Chairman’s Association passed Resolution No. 1-9-5-14, Support for Oceti Sakowin Utility Authority to “assist tribal governments through a multi-tribal collaborative effort on (i) addressing jurisdiction and sovereignty issues, (ii) establishing tribal utility commissions, and (iii) resolving conflicts, disputes and issues with entities providing service on Tribal lands.”³ The OSTUA’s sole interest in this proceeding is the interests of Tribes and residents of Tribal lands. The OSTUA supports efforts to increase high cost funding on Tribal lands through the Connect America Fund and the

² 47 C.F.R. § 1.429(a).

³ All nine members of the GPTCA that were present at the meeting approved the Resolution. The GPTCA is comprised of the Cheyenne River Sioux Tribe, Crow Creek Sioux Tribe, Flandreau Santee Sioux Tribe, Lower Brule Sioux Tribe, Mandan, Hidatsa & Anikara Nation, Oglala Sioux Tribe, Omaha Tribe of Nebraska, Ponca Tribe of Nebraska, Rosebud Sioux Tribe, Sac & Fox Tribe, Santee Sioux Tribe of Nebraska, Sisseton-Wahpeton Oyate, Spirit Lake Tribe, Standing Rock Sioux Tribe, Trenton Indian Service Area, Turtle Mountain Band of Chippewa Indians, Winnebago Tribe of Nebraska, Yand ankton Sioux Tribe.

Mobility Fund, and also supports increasing the availability of Tribal Lifeline service for low-income consumers residing on Tribal lands.

RELEVANT FACTS

In its *2015 Lifeline Order and FNPRM*, the FCC sought data and comment on proposed changes to Tribal Lifeline support:⁴

In particular, we seek data and comment on where and what types of infrastructure deployments have occurred on Tribal lands in the last 14 years. What drives the successful build-out of telecommunications infrastructure on Tribal lands? Specifically, we seek comment on what measurable benefits the additional \$25 per month in Lifeline support and the \$100 in Link Up support provide towards infrastructure deployment and the decisions about where and how to build infrastructure on and to Tribal lands. For example, has enhanced support resulted in additional deployment in areas that may have been regarded as “high risk and unprofitable,” or has it attracted needed financing of facilities on unserved Tribal lands, as the Commission originally intended?

In its *2016 Lifeline Order*, the FCC stated that it would address Tribal Lifeline support in a “future proceeding more comprehensively focused on advancing broadband deployment on Tribal lands.”⁵ The FCC never initiated such a proceeding, instead issuing its *December 2017 Lifeline Order* without any further input or consideration of Tribal deployment issues.

In its *December 2017 Lifeline Order*, the FCC eliminates critically important Tribal Lifeline support on 562 Tribal lands across the United States.⁶ Notwithstanding the lack of evidence on the use of Tribal Lifeline support to build out network facilities, the FCC concludes that:⁷

“last-mile facilities are critical to deploying, maintaining, and building voice- and broadband-capable networks on Tribal lands and Lifeline funds are more efficiently spent when supporting such networks. When the Lifeline discount is applied to a consumer’s bill for a facilities based service, those funds go directly toward the cost of providing that

⁴ *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 at para. 166 (2015) (“*2015 Lifeline Order and FNPRM*”).

⁵ See *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, 4038, para. 211 (2016) (“*2016 Lifeline Order*”).

⁶ In support for its actions, the FCC appears to be relying on the advocacy of a single non-tribally owned facilities based carrier, who stands to individually benefit from the exclusion of competitive providers of Lifeline service. See *December 2017 Lifeline Order* at footnote 56.

⁷ *December 2017 Lifeline Order* at para. 22.

service, including provisioning, maintaining, and upgrading that provider's facilities. Since the introduction of enhanced Tribal and Link Up support in 2000, facilities-based providers have used that support to construct and upgrade networks on Tribal lands."

The facts, however, do not support the FCC's apparent public policy objective of eliminating Lifeline support for wireless resellers, initially by eliminating Tribal Lifeline support and then all Lifeline support as proposed in the rulemaking adopted simultaneously with the *December 2017 Lifeline Order*. Instead, the facts conclusively demonstrate that:

1. Wireless resellers are the primary providers of Lifeline service on Tribal lands;⁸
2. Only a very small percentage of Tribal lands are served by facilities-based wireless carriers providing Lifeline service;⁹
3. The purpose of the Lifeline program, including the additional support for providing Lifeline service on Tribal lands, is to allow qualifying low-income consumers to pay reduced charges of services;¹⁰
4. Under the Lifeline program, an eligible carrier must certify that it will use Lifeline support to reduce the price for service, whereas, under the high-cost program, an eligible carrier must certify that it will use high cost support for the construction and operation of network facilities;¹¹
5. Residents of Tribal lands will no longer have access to affordable Lifeline service after August 1, 2018 when wireless resellers are no longer eligible for Tribal Lifeline support;
6. Tribes have not been consulted on changes to the Tribal Lifeline program; and
7. The factual record does not support the changes in the Tribal Lifeline program adopted in the *December 2017 Lifeline Order*.

OSTUA URGES THE FCC TO RECONSIDER THE *DECEMBER 2017 LIFELINE ORDER*

The OSTUA respectfully asks the FCC to (i) reconsider its adoption of rules impacting Tribal Lands, such as eliminating Tribal Lifeline support for wireless resellers, which are the primary and preferred providers of Lifeline service on Tribal lands, and (ii) formally consult with Tribal Nations on these and other proposed changes to the Lifeline program *prior* to

⁸ See <http://www.usac.org/about/tools/fcc/filings/2018/q2.aspx> for the support received by wireless resellers on Tribal lands compared to facilities-based carriers.

⁹ Based upon USAC reports and ETC designations, there appear to be very few facilities-based wireless carriers eligible to provide Lifeline service on Tribal lands.

¹⁰ See 47 C.F.R. § 54.401.

¹¹ For Lifeline support, see 47 C.F.R. § 54.403; for high cost support, see 47 C.F.R. § 54.7.

adopting any rules significantly impacting residents of Tribal lands. The *December 2017 Lifeline Order* warrants reconsideration under Section 1.429 because it was adopted in an arbitrary and capricious manner in violation of Section 706 of the Administrative Procedure Act (“APA”), ignoring record evidence, contravening the purpose of the Lifeline program, and abandoning the FCC’s Tribal Consultation policy.¹²

A. The *December 2017 Lifeline Order* Failed to Provide Adequate Notice and Comment in Violation of Section 553 of the Administrative Procedure Act.

The FCC should also reconsider the Tribal components of the *December 2017 Lifeline Order* because they were adopted without adequate notice and comment as required under the APA.¹³ Under the APA, notice and comment is required if a rule (1) “alter[s] the rights or interests of parties,” (2) makes a “substantive change” to the statutory or regulatory regime, and (3) has a “present binding effect.”¹⁴

It’s inarguable that the facilities requirement adopted in the *December 2017 Lifeline Order* represents a substantive change to the rules that alters the rights of interested parties and will be binding upon the effective date, and therefore required notice and comment. And yet, the Commission failed to provide it. In fact, in its *2016 Lifeline Order*, the FCC signaled that it would open a new proceeding to address these issues, rather than move directly to an order in this proceeding. Specifically, the FCC declined to address the issue of whether only facilities-based Lifeline providers may receive Lifeline reimbursement or whether to limit Lifeline support to “rural” Tribal lands, emphasizing 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.*”¹⁵

For example, we are not at this time modifying the enhanced support amount or deciding whether to restrict Lifeline and/or Link Up support to certain carriers operating on Tribal lands or carriers serving certain portions of Tribal lands. These and other issues for

¹² See 47 C.F.R. § 1.429(l)(1) (petition for reconsideration must identify a “material error, omission, or reason warranting reconsideration”).

¹³ See 5 U.S.C. § 553.

¹⁴ See *Electronic Privacy Information Center v. U.S. Department of Homeland Security*, 653 F.3d 1, 5-7 (D.C. Cir. 2011).

¹⁵ *2016 Lifeline Order* at ¶ 211.

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.

Now, without the benefit of a “future proceeding more comprehensively focused on advancing broadband deployment on Tribal lands,” the FCC unilaterally, and without notice and comment as required by the APA, adopts a drastic change to the Tribal Lifeline program that will eliminate Lifeline service for residents of Tribal lands across the United States. Clearly, this draconian action by the FCC violates the APA. As such, the FCC must reconsider the elimination of Tribal Lifeline support for wireless resellers and consider this issue in a “future proceeding more comprehensively focused on advancing broadband deployment on Tribal lands.”

Further, the FCC’s narrow definition of “facilities-based” service was not adopted with appropriate notice and comment. The DC Circuit has held that a final rule “need not be the one proposed in the NPRM.”¹⁶ Instead, it “need only be a ‘logical outgrowth’ of the notice.”¹⁷ 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.”¹⁸ In the *December 2017 Lifeline Order*, the Commission found that 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.”¹⁹ The Commission did not propose or otherwise seek comment on a spectrum requirement in its *2015 Lifeline Order and FNPRM* or *2016 Lifeline Order* and does not cite to the record in support of a spectrum requirement in the *December 2017 Lifeline Order*. For these reasons, the Commission’s narrow definition of “facilities” violates the APA’s notice and comment requirement.

By issuing the Tribal facilities-based requirement in the *December 2017 Lifeline Order* without opening a new proceeding and providing an opportunity to refresh the record and seek

¹⁶ See *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013).

¹⁷ See *Covad Communications Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006).

¹⁸ *CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076, 1081 (D.C. Cir. 2009).

¹⁹ See *December 2017 Lifeline Order* at ¶ 24.

comment on issues such as the definition of facilities, the Commission violated the notice and comment requirements of the APA. The Commission should initiate a new proceeding to develop a refreshed record on these issues before adopting any new rules.

B. The *December 2017 Lifeline Order* Establishes A Facilities-Based Requirement That Is Arbitrary And Capricious.

The FCC should reconsider its decision to eliminate wireless resellers from the Tribal Lifeline program because it is arbitrary and capricious in violation of Section 706 of the APA.²⁰ As the Supreme Court explained in the leading case on the arbitrary and capricious standard, "[n]ormally, 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."²¹ This standard is heightened where, as here, the agency's "new policy rests upon factual findings that 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." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (citation omitted). The *December 2017 Lifeline Order* fails this well-established standard.

First, contrary to the FCC's assertions, the record in this proceeding does not support a finding that facilities-based carriers are using Tribal Lifeline support for the deployment of facilities on Tribal Lands. Instead, the facts indicate that all Lifeline providers – resellers and facilities-based carriers – are using Tribal Lifeline support as intended: to further discount the price for service paid by residents of Tribal lands.²² The record also demonstrates that the majority of residents of Tribal lands receive Lifeline service from resellers. In fact, many Tribal lands are only served by wireless resellers and not by facilities-based wireless Lifeline providers. In North and South Dakota, for example, of the 13 federally recognized Tribal lands in these states, only two – Standing Rock and Pine Ridge – are served by a facilities based wireless

²⁰ See 5 U.S.C. § 706(2)(A); *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (internal quotation marks omitted).

²¹ See *id.*

²² See 47 C.F.R. § 54.403.

Lifeline provider.²³ Upon implementation of the *December 2017 Lifeline Order*, 11 of 13 Tribal lands in North Dakota and South Dakota will no longer have access to wireless Lifeline service. Nationally, if North and South Dakota are representative of all areas in the United States, then, upon elimination of Tribal Lifeline support for wireless resellers, 84% of Tribal lands may no longer have access to wireless Lifeline service.

The Lifeline program was established to provide discounted service for qualifying low-income consumers, and the additional Lifeline support available on Tribal lands was specifically made available to make telephone service more affordable on Tribal lands:²⁴

Our primary goal, in taking this action, is 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. In view of (1) the extraordinarily 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 tribal areas, and (4) the apparent limited awareness of, and participation in, the existing Lifeline program, we conclude that a substantial additional amount of support is needed to have an impact on subscribership. Our conclusion to provide up to an additional \$25 for all qualifying low-income individuals living on tribal lands is consistent with the actions of state commissions that have instituted substantial rate reductions for their low-income residents. In each of these cases, substantial additional state funds have been made available to promote subscribership among qualifying low-income consumers in those jurisdictions. Our determination is informed by the experience of these jurisdictions and the increased subscribership levels achieved following their implementation of substantial Lifeline rate reductions.

In support of this overarching objective, FCC rules specifically require Lifeline providers to “pass through the full Tribal lands support amount to the qualifying eligible resident of Tribal lands.”²⁵ As such, the program is designed so that the ETC is a steward, rather than a beneficiary, of the Lifeline benefit. This stands in stark contrast to other universal service programs, where funds are provided to the carrier for the express purpose of building

²³ A review of carriers designated as Eligible Telecommunications Carriers (“ETCs”) in North Dakota and South Dakota indicate that there are only two reservations with facilities based wireless ETCs providing Lifeline service.

²⁴ *In the Matter of Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, et al.*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, FCC 00-208 at para. 44.

²⁵ 47 C.F.R. § 54.403(a)(3).

infrastructure. Notwithstanding the Lifeline objective of providing access to affordable service and the FCC rule requiring Lifeline providers to pass through the entire Lifeline discount to qualifying low-income consumers, the FCC now argues that Tribal Lifeline support should be used to achieve the public policy goal of building out network facilities on Tribal lands. By limiting Tribal Lifeline support to facilities based wireless carriers, the FCC apparently hopes that such support will be used for “deploying, building and maintaining critical last mile infrastructure” on Tribal lands.²⁶ There is, however, no requirement that facilities based wireless carriers use Tribal Lifeline support to deploy, build and maintain facilities on Tribal lands, just an apparent “hope” that they will do so. In fact, unlike the high cost program, where recipients of high cost support are required to certify use of support to deploy, build, and maintain facilities on Tribal lands, recipients of Tribal Lifeline support have no such requirement. Instead, recipients of Tribal Lifeline support must certify use of support to reduce the *cost of service* to qualifying low-income consumers.

It is clearly arbitrary and capricious, and an abuse of discretion, for the FCC to (i) limit Tribal Lifeline support to a subset of eligible carriers (*e.g.*, facilities based carriers), (ii) impose a facilities-based requirement for the receipt of Tribal Lifeline support without evidence to support such a limitation, (iii) apply a high cost service requirement (*e.g.*, use of support to deploy, build and maintain facilities) for the receipt of Lifeline support, and (iv) unilaterally eliminate the primary providers of Lifeline service on Tribal lands. For all of these reasons, the OSTUA respectfully requests that the FCC reconsider its *December 2017 Lifeline Order* and reinstate wireless resellers’ eligibility for Tribal Lifeline support while undertaking consultation with Tribes to determine the best path forward.

C. The *December 2017 Lifeline Order* Contravenes The Well-Established Tribal Consultation Process For Gathering Facts And Engaging With Tribal Nations Prior To Adopting Rules And Orders Impacting Residents Of Tribal lands.

The FCC should also reconsider the *December 2017 Lifeline Order* because it failed to conduct a consultation with Indian Tribes before adopting its decision, as required in its *Tribal*

²⁶ *December 2017 Lifeline Order* at para. 28.

*Policy Statement.*²⁷ The FCC “direct[ed] ONAP, in coordination with the Wireline Competition Bureau, and other Bureaus and Offices as appropriate, to engage in government-to-government consultation with Tribal Nations to develop the record and obtain the perspective of Tribal governments on this question.”²⁸ Notwithstanding this directive, there is no record of consultations with Tribal Nations on the issue of limiting Tribal Lifeline support to facilities-based carriers. While a small group of Tribal entities²⁹ may have expressed, at one time, support for the general concept of encouraging deployment of facilities on Tribal lands, this is not indicative of Tribal support in general and certainly is no substitute for a formal Tribal Consultation process.

In its *Tribal Policy Statement*, the FCC “recognizes its own general trust relationship with, and responsibility to, federally-recognized Indian Tribes” and “reaffirms its commitment” to “consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources.”³⁰ In its *December 2017 Lifeline Order*, the FCC adopted changes to the Tribe Lifeline program that “significantly and uniquely affect Tribal governments, their land, and resources” without consultation with Tribes.

OSTUA respectfully requests that the FCC reconsider its *December 2017 Lifeline Order* and reinstate wireless resellers’ eligibility for Tribal Lifeline support while undertaking consultation with Tribes to determine the best path forward.

CONCLUSION

The OSTUA recognizes and appreciates the important federal trust relationship between the FCC and Indian Tribes. Lifeline service is one of the most important services provided on Tribal lands because it enables Tribal members to obtain essential telecommunications services, including access to emergency 911 service, basic telephone service, and Internet service. For

²⁷ See *In the Matter of Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, June 23, 2000, FCC 00-207 at p. 4 (“*Tribal Policy Statement*”).

²⁸ *In the Matter of 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, FCC 15-71 at para. 170.

²⁹ *December 2017 Lifeline Order* at footnote 67.

³⁰ *Tribal Policy Statement* at 4.

many Tribal residents, wireless service is the primary and only means of communications, but, on most Tribal lands, facilities-based wireless carriers do not participate in the Lifeline program. Wireless resellers have filled this void and have become the primary providers of Lifeline service on Tribal lands.

For the reasons identified herein, OSTUA respectfully requests that the FCC reconsider its *December 2017 Lifeline Order* and reinstate wireless resellers' eligibility for Tribal Lifeline support while undertaking consultation with Tribes to determine the best path forward for Lifeline service on Tribal lands.

Respectfully submitted,

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