

REDACTED FOR PUBLIC INSPECTION

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

WASHINGTON HARBOUR, SUITE 400

3050 K STREET, NW

WASHINGTON, D.C. 20007-5108

(202) 342-8400

NEW YORK, NY
LOS ANGELES, CA
HOUSTON, TX
AUSTIN, TX
CHICAGO, IL
PARSIPPANY, NJ
BRUSSELS, BELGIUM

FACSIMILE
(202) 342-8451
www.kelleydrye.com

AFFILIATE OFFICES
MUMBAI, INDIA

JOHN J. HEITMANN
DIRECT LINE: (202) 342-8544
EMAIL: jheitmann@kelleydrye.com

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June 22, 2018

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JUN 22 2018

**Federal Communications Commission
Office of the Secretary**

BY HAND DELIVERY

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Joint Petition for Stay of Fourth Report and Order Pending Judicial Review; WC
Docket Nos. 17-287, 11-42, 09-197

Dear Ms. Dortch:

Assist Wireless, LLC (Assist), Boomerang Wireless, LLC d/b/a enTouch Wireless (Boomerang), and Easy Telephone Services Company d/b/a Easy Wireless (Easy) (collectively, ETC Petitioners); the National Lifeline Association (NaLA) (a trade association representing the interests of Lifeline providers, including ETC Petitioners, and their customers); the Crow Creek Sioux Tribe (Crow Creek); and the Oceti Sakowin Tribal Utility Authority (Oceti) (collectively, Petitioners), hereby submit a Petition for Stay Pending Judicial Review (Petition) seeking a stay pending judicial review of the rules adopted on December 1, 2017 in the Fourth Report and Order contained within the 2017 Lifeline Digital Divide Order in the above-captioned proceeding.¹ This filing consists of an original and four (4) copies of the confidential version of the Petition and an original and four (4) copies of the redacted version of the Petition.

Under separate cover, Petitioners are requesting confidential treatment of the non-public information in the Petition.

¹ *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 (rel. Dec. 1, 2017).

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Should you have any questions, please contact the undersigned.

Respectfully submitted,

s/ Christopher J. Wright

Christopher J. Wright
John T. Nakahata
V. Shiva Goel
Harris, Wiltshire & Grannis LLP
1919 M St., N.W., 8th Floor
Washington, D.C. 20036
(202) 730-1300
cwright@hwglaw.com

*Counsel for Petitioner Crow Creek
Sioux Tribe and Intervenor Oceti
Sakowin Tribal Utility Authority*

/s/ John J. Heitmann

John J. Heitmann
Jameson J. Dempsey
Jennifer R. Wainwright
Kelley Drye & Warren LLP
Washington Harbour
3050 K Street, NW, Suite 400
Washington, DC 20007
(202) 342-8544
jheitmann@kelleydrye.com

*Counsel for National Lifeline Association,
Assist Wireless, LLC; Boomerang
Wireless, LLC d/b/a enTouch Wireless;
and Easy Telephone Services Company
d/b/a Easy Wireless*

Enclosures

cc: Kris Anne Monteith
Trent Harkrader
Ryan Palmer
Jodie Griffin
Rashann Duvall
Thaila Sundaresan

REDACTED FOR PUBLIC INSPECTION

KELLEY DRYE & WARREN LLP

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JOHN J. HEITMANN
DIRECT LINE: (202) 342-8544
EMAIL: jheitmann@kelleydrye.com

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**Federal Communications Commission
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BY HAND DELIVERY

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Request for Confidential Treatment of Declarations in Support of Joint Petition
for Stay of Fourth Report and Order Pending Judicial Review; WC Docket Nos.
17-287, 11-42, 09-197

Dear Ms. Dortch:

Assist Wireless, LLC (Assist) and Easy Telephone Services Company d/b/a Easy Wireless (Easy), by their undersigned attorneys, hereby request confidential treatment of certain information included in each of Assist's and Easy's declarations that are attached to the enclosed Joint Petition for Stay of Fourth Report and Order Pending Judicial Review (Petition).¹

The declarations attached to the Petition contain proprietary and confidential information. Such competitively sensitive information is exempted from mandatory disclosure under "Exemption 4" of the Freedom of Information Act ("FOIA"),² and Section 0.457(d) of the Commission's rules.³ Exemption 4 allows the withholding of commercial or financial

¹ See 47 C.F.R. § 0.459(b)(1), (2).

² See 5 U.S.C. § 552(b)(4). Public disclosure is not required for "trade secrets, commercial or financial information obtained from a person and privileged and confidential." *Id.*

³ 7 C.F.R. § 0.457(d). See *National Parks and Conservation Ass'n. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) ("National Parks"); *Southern Company Request for Waiver of Section 90.629 of the Commission's Rules*, 14 FCC Rcd 1851, 1860 (1998) ("Southern Company").

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information that is privileged or confidential.⁴ The confidentiality requirement is satisfied if substantial competitive injury would likely result from disclosure.⁵ Accordingly, pursuant to Section 0.459 of the Commission's rules,⁶ Petitioners request that the confidential information in the declarations be withheld from public inspection.

The information for which Petitioners request confidential treatment is proprietary and competitively sensitive information.⁷ The market for Lifeline services, including the wireless services provided by Petitioners, is highly competitive.⁸ The non-public information in the declarations reveals details about Petitioners' subscribers, business practices, and finances, the disclosure of which would cause great harm to Petitioners.⁹ Petitioners derive independent economic value from the fact that significant, detailed proprietary information regarding Petitioners' business practices is unknown to its competitors.¹⁰ Moreover, failure to treat Petitioners' business information as confidential would provide competitors with an unfair competitive advantage by being granted access to Petitioners' proprietary information.¹¹ The non-public subscriber and financial information contained in the declarations is provided only to those employees and contractors that require such information to perform the requirements of their duties to Petitioners¹² and is not ordinarily made available to the public by Petitioners.¹³ The information that is the subject of this confidential treatment request is not part of the public record in any jurisdiction. Petitioners request that the confidential portions of the declarations not be made routinely available for public inspection at any time.¹⁴

⁴ 5 U.S.C. § 552(b)(4).

⁵ *Public Citizen Research Group v. FDA*, 704 F. 2d 1280, 1290-91 (D.C. Cir. 1983) ("*Public Citizen*").

⁶ See 47 C.F.R. § 0.457 and 47 C.F.R. § 0.459.

⁷ See 47 C.F.R. § 0.459(b)(3).

⁸ See 47 C.F.R. § 0.459(b)(4).

⁹ See 47 C.F.R. § 0.459(b)(5).

¹⁰ *Id.*

¹¹ *Id.*

¹² See 47 C.F.R. § 0.459(b)(6).

¹³ See 47 C.F.R. § 0.459(b)(7).

¹⁴ See 47 C.F.R. § 0.459(b)(8).

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Marlene Dortch
June 22, 2018
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Please direct any questions as to this matter, including the request for confidential treatment, to the undersigned.

/s/ John J. Heitmann

John J. Heitmann
Jameson J. Dempsey
Jennifer R. Wainwright
Kelley Drye & Warren LLP
Washington Harbour
3050 K Street, NW, Suite 400
Washington, DC 20007
Telephone: (202) 342-8544
jheitmann@kelleydrye.com

*Counsel for Assist Wireless, LLC and
Easy Telephone Services Company d/b/a
Easy Wireless*

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

Accepted / Filed

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Federal Communications Commission
Office of the Secretary

In the Matter of)	
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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
)	

**JOINT PETITION FOR STAY OF FOURTH REPORT AND ORDER PENDING
JUDICIAL REVIEW**

Christopher J. Wright
John T. Nakahata
V. Shiva Goel
Harris, Wiltshire & Grannis LLP
1919 M St., N.W., 8th Floor
Washington, D.C. 20036
(202) 730-1300
cwright@hwglaw.com

*Counsel for Petitioner Crow Creek
Sioux Tribe and Intervenor Oceti
Sakowin Tribal Utility Authority*

John J. Heitmann
Jameson J. Dempsey
Jennifer R. Wainwright
Kelley Drye & Warren LLP
Washington Harbour
3050 K Street, NW, Suite 400
Washington, DC 20007
(202) 342-8544
jheitmann@kelleydrye.com

*Counsel for National Lifeline Association,
Assist Wireless, LLC; Boomerang
Wireless, LLC d/b/a enTouch Wireless;
and Easy Telephone Services Company
d/b/a Easy Wireless*

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JUN 22 2018

Federal Communications Commission
Office of the Secretary

Before the
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Washington, D.C. 20544

In the Matter of)	
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JOINT PETITION FOR STAY OF FOURTH REPORT AND ORDER PENDING JUDICIAL REVIEW

Assist Wireless, LLC (Assist), Boomerang Wireless, LLC d/b/a enTouch Wireless (Boomerang), and Easy Telephone Services Company d/b/a Easy Wireless (Easy) (collectively, ETC Petitioners); the National Lifeline Association (NaLA) (a trade association representing the interests of Lifeline providers, including ETC Petitioners, and their customers); the Crow Creek Sioux Tribe (Crow Creek); and the Oceti Sakowin Tribal Utility Authority (Oceti) (collectively, Petitioners) respectfully request that the Federal Communications Commission (FCC or Commission) stay pending judicial review the rules adopted on December 1, 2017 in the *Fourth Report and Order* contained within the *2017 Lifeline Digital Divide Order* in the above-captioned proceeding.¹

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, 32 FCC Rcd 10475, ¶¶ 2-31, 142, 145, (rel. Dec. 1,

I. INTRODUCTION

In the *Fourth Report and Order*, the Commission unlawfully (1) limits the types of eligible telecommunications carriers (ETCs) eligible to receive enhanced Tribal Lifeline support and (2) narrows the geographic scope of Tribal lands in which individuals are eligible for the Tribal Lifeline benefit. The *Fourth Report and Order* is scheduled to take effect 90 days after the Wireline Competition Bureau (the “Bureau”) releases a public notice announcing approval of the information collection requirements of the *Fourth Report and Order* pursuant to the Paperwork Reduction Act (PRA).

Petitioners have sought review in the United States Court of Appeals for the D.C. Circuit of the *Fourth Report and Order*.² While Petitioners pursue their legal challenge to the *Fourth Report and Order* in the D.C. Circuit, Petitioners seek temporary relief from the Commission. Specifically, Petitioners request that the Commission immediately grant a stay of the *Fourth Report and Order*. This limited relief is necessary to prevent irreparable harm to ETCs and consumers, including Tribal communities. As set forth below, Petitioners are likely to succeed on the merits of their claims before the D.C. Circuit; they will suffer irreparable harm absent a stay; and the balance of harms and public interests weigh in favor of a stay.

To allow adequate time to seek a judicial stay, if necessary, Petitioners respectfully request that the Commission act on this petition by July 5, 2018.

2017) (*Fourth Report and Order* or the *Order*, or the 2017 *Lifeline Digital Divide Order* when referencing the item generally).

² See Petition for Review, *National Lifeline Association v. FCC*, No. 18-1026 (D.C. Cir. filed Jan. 25, 2018) (*NaLA/ETC Petitioners Opening Brief*); Petition for Review, *Crow Creek Sioux Tribe v. FCC*, No. 18-1080 (D.C. Cir. filed Mar. 16, 2018) (*Tribal Opening Brief*). The D.C. Circuit has consolidated the cases.

II. BACKGROUND

A. 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.”³ A decade later, in the Telecommunications Act of 1996, Congress codified a commitment to advancing access to affordable telecommunications and information services for all Americans, and instructed the Commission to “base policies for the preservation and advancement of universal service” on central principles enumerated in Section 254 of the Act.⁴ Those principles provide 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.”⁵

In its *1997 USF First Report and Order*, the FCC adopted rules implementing Section 254 and formally establishing its universal service program.⁶ The Commission 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

³ 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)).

⁴ 47 U.S.C. § 254(b).

⁵ See 47 U.S.C. §§ 254(b)(1), (3).

⁶ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8960 (1997) (*1997 USF First Report and Order*).

47 U.S.C. § 151.⁷ The 1997 *USF First Report and 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.⁸ 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.⁹ Where a state has abdicated its ETC-designation role, the Act provides that the FCC shall designate ETCs.¹⁰ Upon designation, an ETC must offer and market Lifeline service, defined 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.”¹¹ ETCs may allow eligible consumers to apply their benefit to any service plan meeting certain minimum service standards.¹²

B. Facilities Forbearance for Wireless Resellers and Facilities-Based Carrier Retreat

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

⁷ *Id.* at 8993 ¶¶ 346, 406.

⁸ *See* 47 C.F.R. §§ 54.403(a)(1), (3); 54.409.

⁹ *See* 47 U.S.C. § 254(b).

¹⁰ *See id.* § 214(e)(6).

¹¹ *See* 47 C.F.R. § 54.401(a)(1).

¹² *See id.* § 54.401(b).

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.”¹³ 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 granted a request from TracFone, a wireless reseller, to forbear from applying the “own facilities” requirement to TracFone to enable the company to provide Lifeline-supported service.¹⁴ In reaching its decision, the Commission found not only that the “own facilities” requirement was unnecessary

¹³ 47 U.S.C. § 214(e)(1).

¹⁴ 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*). A wireless reseller is a telecommunications carrier that does not operate its own radio access network, but rather purchases wholesale wireless service at unregulated market rates from facilities-based carriers and resells that service to its own consumers. Wireless resellers often specialize in serving distinct corners of the marketplace – such as low-income consumers – that facilities-based carriers have “traditionally ignored,” and thereby allow facilities-based carriers to profit from an expanded use of their networks. *Id.* ¶ 28; see also *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Twentieth Report, 32 FCC Rcd. 8968 ¶ 15 (2017) (*Twentieth Report on Wireless Competition*) (“Agreements between a [wireless reseller] and a facilities-based service provider may occur when the [wireless reseller] has better access to some market segments than the host facilities-based service provider and can better target specific market segments, such as low-income consumers or consumers with lower data-usage needs”). Facilities-based carriers may be unable to efficiently serve the market segments targeted by wireless resellers for any number of reasons, including the risk of brand dilution, the lower available revenues per consumer, and the need to establish specialized operations in marketing, customer support, and regulatory compliance. See Letter Meredith Attwell Baker, President & CEO, CTIA to Hon. Ajit Pai, Chairman, FCC *et al.*, at 3-4, WC Docket Nos. 17-287 *et al.* (filed Nov. 8, 2017) (*CTIA Nov. 8, 2017 Ex Parte*) (noting the “important role that wireless resellers play in the U.S. wireless market to tailor service plans and offerings to low-income consumers’ needs”).

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.”¹⁵

Specifically, applying the three-part forbearance test under section 10 of the Communications Act, the Commission found under the first prong of the test 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.¹⁶

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.¹⁷

With respect to the second prong, the Commission found that the facilities requirement was unnecessary to protect consumers, and that “forbearance . . . will actually benefit consumers” by increasing consumer choice.¹⁸ As for the third prong, 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 that number—for other reasons—holds true today), and that granting forbearance would advance “the goal of expanding eligible participation in the program.”¹⁹

¹⁵ See *id.* ¶ 9 (2005).

¹⁶ 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 *2005 Tracfone Forbearance Order* ¶ 5; *1997 USF First Report and Order* ¶ 180.

¹⁷ See *2005 TracFone Forbearance Order* ¶ 13.

¹⁸ See *id.* ¶ 15.

¹⁹ See *id.* ¶ 24.

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.²⁰

Then, in the *2012 Lifeline Reform Order*, the Commission adopted blanket forbearance from the facilities requirement for wireless reseller ETCs, reaffirming under section 10 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.²¹

With respect to the first prong of the section 10 analysis, the Commission explained that wireless reseller ETCs would necessarily face competition from their underlying carriers as well as other facilities-based carriers, finding that “the additional competition that [wireless resellers] provide would do more to ensure just and reasonable rates and terms than a requirement to use their own facilities.”²² 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

²⁰ *Federal-State Joint Board on Universal Service et al.*, CC Docket. No. 96-45 *et al.*, 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.*, Order, 24 FCC Rcd 3381, 3389-90 ¶¶ 19-21 (2009) (*Virgin Mobile Forbearance Order*).

²¹ *See 2012 Lifeline Reform Order* ¶ 368.

²² *See id.* ¶ 371.

so long as wireless reseller ETCs complied with the Commission's 911 and E911 requirements.²³

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."²⁴ 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."²⁵

Since the *2012 Lifeline Reform Order*, wireless reseller ETCs 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 provider, demonstrating the overwhelming success of the model and the wisdom underlying blanket forbearance.²⁶

At the same time, facilities-based wireless carriers have retreated from the Lifeline program across the country, including in many states home to American Indian tribes like Crow Creek.²⁷ In more than a dozen states, AT&T and Verizon relinquished their status as ETCs.

²³ See *id.* ¶ 372.

²⁴ See *id.* ¶ 378.

²⁵ See *id.* ¶ 377 n. 95.

²⁶ See *Fourth Report and Order* ¶ 23.

²⁷ See, e.g., Crow Creek Sioux Tribal Resolution, WC Docket No. 11-42 (filed June 30, 2017) (*Crow Creek Sioux Tribal Resolution*); Letter from Boomerang Wireless to FCC, WC Docket Nos. 11-42 et al. at p.7 of Attachment (filed Aug. 14, 2012); Comments of the Navajo Nation Telecommunications Regulatory Commission WC Docket No. 11-42 et al. at 10 (filed Aug. 28, 2015) (*Navajo Nation Comments*); Comments of the Oglala Sioux Tribe Utility Commission,

AT&T and Verizon continue to apply for and receive permission to relinquish their ETC status in additional states, and stopped applying for ETC status in new states long ago. T-Mobile, a nationwide facilities-based wireless carrier, also largely phased out Lifeline service, explaining that Lifeline was not a “valuable or sustainable product for [its] base” of subscribers.²⁸ In fact, among the country’s four nationwide facilities-based wireless carriers, Sprint is the only one that still participates meaningfully as a retail provider in the Lifeline program,²⁹ but Sprint does not provide Lifeline service on Tribal lands.

C. 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

WC Docket Nos. 11-42 et al. at p.3 of Attachment (filed Aug. 31, 2015) (*Oglala Sioux Comments*); Reply Comments of Assist Wireless, LLC et al. WC Docket Nos. 11-42 et al. at 10-11 (filed Sept. 30, 2015).

²⁸ Joan Engebretson, “CFO: ‘Non-sustainable’ T-Mobile Lifeline Business to be Phased Out,” Tele-competitor (June 8, 2017), <http://www.telecompetitor.com/cfo-non-sustainable-t-mobile-lifeline-business-to-be-phased-out/>; *see also* Comments of Assist Wireless, et al., WC Docket Nos. 11-42, et al. at 19 n.36 (filed Aug. 31, 2015) (*Comments of Assist Wireless*).

²⁹ *See id.* at 18-19; Universal Service Administrative Co., Lifeline Funding Disbursement Search, <http://www.usac.org/li/tools/disbursements/default.aspx> (showing that Sprint, through its Assurance brand, serves 94 percent of all Lifeline subscribers served by a facilities-based wireless provider).

and better enable those currently subscribed to maintain service.”³⁰ 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 Tribal areas, and (4) the apparent limited awareness of, and participation in, the existing Lifeline program.”³¹ 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.”³² 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*.”³³

In the *2000 Tribal Lifeline 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

³⁰ *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*).

³¹ *See id.* (emphasis added).

³² *See id.* ¶ 45.

³³ *See id.* ¶ 46 (emphasis added).

calling areas.³⁴ 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, collectively, to incent infrastructure deployment in unserved areas by reducing the risk and increasing the potential profitability of deploying in and serving those areas.³⁵

In 2011, the Commission adopted the *2011 USF/ICC Transformation Order*, which comprehensively transformed its high-cost program for the broadband era, including on remote and Tribal lands.³⁶ Among other things, the *2011 USF/ICC Transformation Order* created the Connect America Fund (CAF) to support the deployment and maintenance of voice-and-broadband-capable networks throughout the country.³⁷ The *2011 USF/ICC Transformation 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.³⁸

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

³⁴ See *id.* ¶¶ 52-58.

³⁵ See *id.* ¶ 53.

³⁶ See generally *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*2011 USF/ICC Transformation Order*).

³⁷ See *id.* ¶ 20.

³⁸ See *id.* ¶¶ 28, 295-538.

limited enhanced Tribal Link Up to ETCs receiving high-cost support,³⁹ and asked whether it should modify or 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.⁴⁰ 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.”⁴¹

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.

D. 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.⁴² As a part of the proceeding, the Commission sought comment on a proposal to “limit enhanced Tribal Lifeline and Link Up support only to those Lifeline providers who have facilities.”⁴³ The Commission

³⁹ See *2012 Lifeline Reform Order* ¶ 254.

⁴⁰ See *id.* ¶ 482.

⁴¹ See *id.*

⁴² 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*).

⁴³ See *id.*

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.”⁴⁴ The FCC also sought comment on “whether [it] should focus enhanced Tribal support to those Tribal areas with lower population densities.”⁴⁵

In April 2016, the Commission released the *2016 Lifeline Modernization Order*.⁴⁶ In that 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 consideration in a future proceeding more comprehensively focused on advancing broadband deployment on Tribal lands.”⁴⁷

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,

⁴⁴ See *id.* ¶¶ 167-68.

⁴⁵ See *id.* ¶¶ 169-70.

⁴⁶ 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*).

⁴⁷ See *id.* ¶¶ 205, 211.

Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry.⁴⁸ 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.⁴⁹ On November 9, 2017, the Commission released a public notice announcing the beginning of the Sunshine Period, during which parties were prohibited from lobbying the Commission.⁵⁰ 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.

⁴⁸ 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*).

⁴⁹ 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*); 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*); 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); 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; 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); Letter 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*); 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*).

⁵⁰ See Commission Meeting Agenda, FCC to Hold Open Commission Meeting Thursday, November 16, 2017, 1-4 (Nov. 9, 2017) (*Sunshine Notice*); see also 47 C.F.R. § 1.1203.

On December 1, 2017, the Commission released the *2017 Lifeline Digital Divide Order*, which included the *Fourth Report and Order*.⁵¹ The *Fourth Report and Order* dramatically changes the Lifeline program for residents of Tribal lands and the ETCs serving them.

First, the *Fourth Report and Order* adopted a rule limiting enhanced Tribal Lifeline support to “facilities-based service providers” (hereinafter the Tribal Facilities Requirement). As relevant here, 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.”⁵² 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.”⁵³ 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.”⁵⁴

Second, the *Fourth Report and Order* 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 do not meet the definition of “urban” which is, under the E-Rate rules, “an urbanized area or

⁵¹ See *2017 Lifeline Digital Divide Order*; *Fourth Report and Order* ¶¶ 2-31.

⁵² See *id.* ¶ 24.

⁵³ See *id.*

⁵⁴ See *id.* ¶ 26.

urban cluster area with a population equal to or greater than 25,000.”⁵⁵ 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.⁵⁶

Critically, despite concern that the Tribal Facilities Requirement would disconnect many American Indians from telecommunications service, the Commission did not meaningfully consult with affected Tribes about its proposal. The Commission did not dispute its obligation to conduct such consultations, but rather claimed that it had complied by holding meetings with certain tribes in Oklahoma to discuss an entirely separate issue of how to map former reservation boundaries in Oklahoma.⁵⁷ Neither Tribal Petitioners nor many other tribes affected by the Tribal Facilities Requirement are located in Oklahoma, and thus were not part of those consultations.

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

⁵⁵ See 47 C.F.R. § 54.505(b)(3).

⁵⁶ 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.

⁵⁷ *Fourth Report and Order* ¶¶ 5 n.13, 17 n.47.

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.⁵⁸ Commissioner Jessica Rosenworcel described the item as “cruel[.]” and “at odds with our statutory duty.”⁵⁹ Both dissenting commissioners also criticized the lack of a Tribal consultation.⁶⁰

The *2017 Lifeline Digital Divide Order* was published in the Federal Register on January 16, 2018.⁶¹ On January 25, 2018, NaLA and ETC Petitioners filed a petition for review of the *Fourth Report and Order* in the D.C. Circuit. On March 16, 2018, Crow Creek Sioux Tribe filed a petition for review. The court consolidated the two appeals on April 17, 2018, and on May 2, 2018, it granted a motion permitting Oceti to intervene in the consolidated proceeding. On March 29, 2018, Commission sought comment on the information collection requirements needing PRA approval from the Office of Management and Budget (OMB), and NaLA filed comments in opposition to the information collection on May 29, 2018.⁶² The Commission has now submitted the request to OMB for approval, triggering a 30 day comment period, after

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

⁵⁹ See *id.*, Dissenting Statement of Commissioner Jessica Rosenworcel at 10564 (*Rosenworcel Dissent*).

⁶⁰ See *Clyburn Dissent* at 2 (“Making radical changes without engaging Tribes is contrary to our own best practices.”); Rosenworcel Dissent at 3 (“Instead of consulting with Tribal authorities about changes to Lifeline that impact native communities, we hang up on the least connected.”).

⁶¹ See Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support, 83 Fed. Reg. 2075 (Jan. 16, 2018).

⁶² See Comments of the National Lifeline Association, WC Docket Nos. 17-287, 11-42, 09-197, OMB Control Number 3060-0819 (May 29, 2018).

which OMB could approve the information collection within days. As such, the *Fourth Report and Order* may go into effect as early as October 2018, with notice requirements going into effect as early as August 2018.

III. DISCUSSION

In determining whether to stay the effectiveness of one of its orders, the Commission applies the familiar four-factor test developed by the courts. Under this test, a petitioner must show that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be substantially harmed if the stay is granted; and (4) the public interest favors granting a stay.⁶³ All four factors are met here.

A. Petitioners Are Likely to Succeed on the Merits

Petitioners are likely to prevail on the merits in light of the *Fourth Report and Order*'s many procedural and substantive violations. First, the Commission failed to comply with its Tribal consultation requirements as required by law.⁶⁴ Second, the Commission violated APA notice-and-comment requirements, and law requiring federal agencies to deal fairly with American Indian tribes, when it failed to open a "future proceeding" more comprehensively focused on Tribal broadband before adopting the *Fourth Report and Order* as it had promised to do.⁶⁵ Third, the Tribal Facilities Requirement is also unlawful because: (1) it is based on an extremely restrictive definition of mobile wireless "facilities" that was not proposed in its initial

⁶³ See *Amendment of Parts 73 and 76 of the Commission's Rules et al.*, Order Denying Stay Requests, 4 FCC Rcd 6476, ¶ 6 (1989) (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

⁶⁴ See Tribal Opening Brief at 22-35.

⁶⁵ See *id.* at 32-35; NaLA/ETC Petitioners Opening Brief at 21-26.

notice; (2) it contravenes Sections 10 and 214(e) of the Act and relies on an unreasonable interpretation of Section 254(e) of the Act previously rejected by the Commission; and (3) its claimed benefits are entirely speculative, contradict the record in this proceeding, fail to account for the willingness of facilities-based wireless providers to provide wireless Lifeline service on Tribal lands or the relative efficiency of resellers that specialize in serving these difficult markets, and reflect an unreasonable departure from over a decade of Commission policy finding that requiring ETCs to have facilities would undermine the goals of the Lifeline program.⁶⁶ Fourth, the Tribal Rural Limitation is unlawful 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.⁶⁷ The arguments below restate—with minor changes to promote consistency of terminology and usage—those made in Petitioners’ opening briefs before the D.C. Circuit.

- 1. The Commission Failed to Comply With Tribal Consultation Requirements**
 - a. The Commission Was Required to Consult With Affected Tribal Governments About the Tribal Facilities Requirement**

Under the APA, an agency must “follow [its] own procedures . . . even where the internal procedures are possibly more rigorous than otherwise would be required.”⁶⁸ The same

⁶⁶ See *id.* at 26-49; Tribal Opening Brief at 35-48.

⁶⁷ See NaLA/ETC Petitioners Opening Brief at 49-58.

⁶⁸ *Morton v. Ruiz*, 94 S. Ct. 1055, 1074 (1994); see also, e.g., *U.S. v. Caceres*, 440 U.S. 741, 760 (1979); *Massachusetts Fair Share v. Law Enforcement Assistance Admin.*, 758 F.2d 708, 711 (D.C. Cir. 1985); *Nat’l Small Shipments Traffic Conference v. ICC*, 725 F.2d 1442, 1449 (D.C. Cir 1984).

requirement applies pursuant to the federal trust doctrine with respect to agency decisions that affect the interests of federally recognized American Indian tribes.⁶⁹

For example, in *Morton v. Ruiz*, the Bureau of Indian Affairs (BIA) denied federal assistance to an American Indian couple based on the fact that the couple lived too far away from a reservation.⁷⁰ The Supreme Court reversed, finding that the BIA failed to publish its residency limitation in the Federal Register as required by a provision of the BIA's internal procedures manual.⁷¹ The Court determined that the failure of the publication violated notice requirements under the APA *and* the separate "overriding duty of our Federal Government to deal fairly with Indians wherever located[.]"⁷² As the Court explained, the "denial of benefits" without observance of the agency's "own procedures" was "inconsistent with the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people."⁷³

Applying the principles announced in *Morton*, the Eighth Circuit held that where an agency "has established a policy requiring prior consultation with a tribe, and thereby created a justified expectation on the part of the Indian people that they will be given a meaningful opportunity to express their views before Bureau policy is made, that opportunity must be

⁶⁹ *Morton*, 94 S. Ct. at 1075; *see also Seminole Nation v. U.S.*, 62 S. Ct. 1049, 1054 (1942) (describing the "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people").

⁷⁰ *Morton*, 94 S. Ct. at 1070-1072.

⁷¹ *Id.* at 1074 (the BIA manual "declared that all directives that 'inform the public of privileges and benefits available' and of 'eligibility requirements' are among those to be published") (quoting the BIA manual).

⁷² *Id.* at 1075.

⁷³ *Id.* (quotation marks omitted).

afforded.”⁷⁴ The court explained that an agency’s “failure . . . to make any real attempt to comply with its own policy of consultation not only violates those general principles which govern administrative decisionmaking, but also . . . the distinctive obligation of trust incumbent upon the Government in its dealings” with American Indian tribes.⁷⁵ Accordingly, the court reversed a district court’s denial of relief that would have prevented the BIA from reassigning an agency superintendent, finding that the “two meetings” held between “tribal delegates” and “Washington officials” did not meet the “meaningful consultation” promised under BIA guidelines.⁷⁶

The FCC has a long-established procedure of engaging in government-to-government consultations with federally recognized American Indian tribes before reaching decisions that affect Tribal nations. In 2000, the Commission adopted its *American Indian Policy Statement*, in which it committed to “consult with” federally recognized American Indian tribes “prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources.”⁷⁷ The Commission similarly committed to avoid “administrative and organizational impediments” that limit the ability of American Indian governments to engage with the FCC on “decisions and actions” that may affect American Indian Tribes.⁷⁸

⁷⁴ *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979).

⁷⁵ *Id.* (internal quotation marks omitted).

⁷⁶ *Id.* at 720.

⁷⁷ *American Indian Policy Statement*, 16 FCC Rcd. at 4080-81.

⁷⁸ *Id.* at 4082.

In practice, the Commission has at least attempted to follow the consultation procedure it adopted. For example, prior to adopting enhanced Lifeline support for Tribal areas, and the *American Indian Policy Statement* itself, the Commission held “two Commissioner-level meetings with Indian Tribal leaders,” “formal field hearings” in several states with American “Indian leaders, telecommunications service providers, local public officials, and consumer advocates,” and “numerous other informal meetings and conversations with Tribal members, officials, and advocacy organizations.”⁷⁹ Moreover, in the *2015 Lifeline Second FNPRM*, the Commission directed various FCC bureaus and offices to “engage in government-to-government consultation with Tribal Nations” on certain specific Lifeline reform proposals then under serious consideration.⁸⁰

In light of the procedure established in *American Indian Policy Statement* and by the agency’s subsequent actions, Tribal governments have a “legitimate expectation” that the FCC will consult with them before adopting a decision that could substantially affect their interests, and that opportunity must be afforded under the APA and federal trust doctrine.⁸¹ Because the Tribal Facilities Requirement would affect the availability of essential services like Lifeline for

⁷⁹ *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd. 4078, 4079 (2000) (*American Indian Policy Statement*).

⁸⁰ *2015 Lifeline Second FNPRM*, 30 FCC Rcd. at 7818 ¶¶ 170, 171, 257, 265-66; see also Letter from Bill John Baker Cherokee Nation Principal Chief, to Marlene H. Dortch, Secretary, FCC, at 2, WC Docket Nos. 17-287 et al. (filed Nov. 9, 2017) (*Cherokee Nation Nov. 9, 2017 Ex Parte*) (“The Commission has conducted a number of tribal consultations on other pending issues, but not regarding” the *Fourth Report and Order* on review).

⁸¹ *Morton*, 94 S. Ct. at 1075; *Oglala Sioux Tribe of Indians*, 603 F.2d at 721.

residents on Tribal lands, the Commission was required to consult with affected Tribal governments prior to adopting such a rule.⁸²

b. The Commission Failed to Comply With Tribal Consultation Requirements

In the *Fourth Report and Order*, the Commission made no claim that the consultation requirements do not apply. The Commission merely suggested that certain meetings held after the *2015 Lifeline Second FNPRM* was released satisfied its Tribal consultation requirements.⁸³ As explained below, however, the record demonstrates that the Commission, at most, consulted with a narrow set of Tribes about a narrow, separate issue. It does not show that the Commission consulted with *affected tribes about the Tribal Facilities Requirement*.

The Commission proposed the Tribal Facilities Requirement in the *2015 Lifeline Second FNPRM*.⁸⁴ In the *Fourth Report and Order*, the Commission claims that “it began consultations” with tribes “[s]hortly thereafter.”⁸⁵ In support, the *Fourth Report and Order* cites to a paragraph of the *Oklahoma Map Order*, a 2016 Commission decision that followed the *2015 Lifeline Second FNPRM*, in which the Commission documents certain meetings that it

⁸² See *National Lifeline Association Nov. 13, 2017 Ex Parte*, at 2-3 (62 percent of wireless Lifeline subscribers in Tribal areas are served by a wireless reseller); see generally *infra* Section III.A.1.b.

⁸³ See *Fourth Report and Order* ¶¶ 5, 17.

⁸⁴ *2015 Lifeline Second FNPRM*, ¶¶ 166-67.

⁸⁵ *Fourth Report and Order* ¶ 5 & n.13.

held with tribal officials in August 2015 and January 2016.⁸⁶ But the *Oklahoma Map Order* does not concern the question of whether wireless resellers should continue to receive enhanced Lifeline support. It instead concerns the separate issue of how the Commission should draw boundaries of tribal lands in Oklahoma, and the related issue of how long affected parties should have before the Commission transitions to the new boundaries.⁸⁷

Unsurprisingly, in describing the meetings upon which the Commission now relies, the relevant paragraph of the *Oklahoma Map Order* suggests that the discussions focused on the unrelated mapping issue, and not the Tribal Facilities Requirement. It states that FCC staff met exclusively with “Oklahoma Tribal Nations” in cities in Oklahoma, even though the Tribal Facilities Requirement affects tribes all across the country.⁸⁸ It describes follow-up to the consultations as having involved the Commission’s release of “a digital version of the adopted Oklahoma Historical Map”⁸⁹; the Commission’s issuance of a letter “to Oklahoma Tribal leaders” seeking feedback on the map and no other issues⁹⁰; and a second round of meetings held again in Oklahoma “to discuss the use of the Oklahoma Historical Map as well as other

⁸⁶ See *id.* (citing *Lifeline and Link Up Reform and Modernization*, Order, 31 FCC Rcd 895, ¶ 4 (2016) (*Oklahoma Map Order*)).

⁸⁷ See *Oklahoma Map Order* ¶ 1.

⁸⁸ *Id.* ¶ 4.

⁸⁹ *Id.*

⁹⁰ *Id.* ¶ 4 & n.10 (citing Letter from Irene M. Flannery, Acting Chief, Office of Native Affairs and Policy, FCC Consumer and Governmental Affairs Bureau, and Ryan B. Palmer, Division Chief, Telecommunications Access Policy Division, FCC Wireline Competition Bureau, to Tribal Nations Leaders, WC Docket No. 11-42 (Nov. 2, 2015) (filed Dec. 31, 2015) (inviting “technical comments, data, and other information about the specifications of the map”)).

issues.”⁹¹ Perhaps most importantly, it made no specific reference to the Tribal Facilities Requirement whatsoever.⁹² At most, it stated that these meetings, which clearly focused on the narrow issue of the Oklahoma map, also touched on some of “the proposed changes in the *2015 Lifeline Reform Order*.”⁹³

The Commission claimed that these meetings around maps in Oklahoma nevertheless satisfy its Tribal consultation requirements, because they included some discussion about “proposals that the Commission sought comment on in the 2015 Lifeline FNPRM.”⁹⁴ The Commission’s contention must be rejected.

As an initial matter, the Commission did not and cannot explain how consulting exclusively with tribes in Oklahoma provided a valuable exchange of ideas between the Commission and tribes actually affected by the rule in question.⁹⁵ Indian reservations are located in many more states than just Oklahoma, and the interest of any particular tribe in the Tribal Facilities Requirement may depend on a number of factors, such as income attainment, that vary from one to the other. The Commission cannot place a nationwide issue on the agenda for meetings about an Oklahoma issue and reasonably claim compliance.

Moreover, the Commission made no claim that *the Tribal Facilities Requirement* was among the proposals in the *2015 Lifeline Second FNPRM* discussed during the Oklahoma

⁹¹ *Oklahoma Map Order* ¶ 4.

⁹² *See generally id.*

⁹³ *Id.* ¶ 4.

⁹⁴ *Fourth Report and Order* ¶ 17 n.47.

⁹⁵ *See American Indian Policy Statement*, 16 FCC Rcd. at 4081 (consultations are intended to gain meaningful input from Tribal governments affected by regulatory action).

mapping consultations, let alone that the issue was discussed with the preparation, depth, and modicum of exchange required to satisfy even a minimal standard for compliance with Tribal consultation requirements.

The record belies any such conclusion. First, the *2015 Lifeline Second FNPRM* sought comment on a very large number of proposals spanning more than two hundred paragraphs, of which just two discussed eliminating enhanced support for wireless resellers.⁹⁶ The other proposals included foundational changes to the Lifeline program, such as the introduction of broadband internet access as a Lifeline-supported service and the adoption of minimum service standards. It is implausible that all of these weighty proposals were discussed meaningfully at meetings convened with the primary objective of implementing a new map of Tribal areas in Oklahoma.

Moreover, to the extent any proposals raised in the *2015 Lifeline Second FNPRM* were meaningfully discussed in the Oklahoma meetings, there is no reason to believe that the Tribal Facilities Requirement was one of them. The *2015 Lifeline Second FNPRM* specifically directed FCC staff to engage in Tribal consultations about some proposals but not others, and the Tribal Facilities Requirement was among the proposals that staff had *not* been directed to discuss.⁹⁷ In addition, days before the *Fourth Report and Order* on review was adopted, several tribes or groups representing their interests warned the Commission that it had not

⁹⁶ See *2015 Lifeline Second FNPRM* ¶¶ 14-223 (proposing various Lifeline reforms); *id.* ¶¶ 167-68 (proposing the Tribal Facilities Requirement).

⁹⁷ Compare *id.* ¶ 170 (directing consultations on proposal to exclude urban areas from enhanced support); see also *id.* ¶ 171 (directing consultations on proposal to modify a self-certification requirement); *id.* ¶¶ 257, 265-66 (directing consultations on implementation of the new Oklahoma map) with *id.* ¶¶ 166-67 (proposing the Tribal Facilities Requirement without directing any immediate consultations on the issue).

conducted meaningful consultations, and urged it to do so prior to a vote.⁹⁸ These parties included a very large tribe in Oklahoma that participated in the discussions around the Oklahoma map, which strongly suggests that the *Fourth Report and Order*'s decision to exclude wireless resellers from enhanced Lifeline support was not adequately discussed during those meetings.⁹⁹ In a footnote, the Commission also noted that it "held additional meetings with the Affiliated Tribes of Northwest Indians on February 1-4, 2016 in Suquamish, WA, and on August 12-13, 2015 in Portland, OR where the 2015 Lifeline FNPRM proposals were discussed."¹⁰⁰ It is unclear whether the Commission actually considered these meetings to qualify as Tribal consultations that met its obligations under the *American Indian Policy Statement* and the federal trust doctrine. To the extent it did, that

⁹⁸ See *Cherokee Nation Nov. 9, 2017 Ex Parte* at 2 ("The Cherokee Nation respectfully urges the FCC to ensure that timely and meaningful government-to-government consultation is executed prior to the adoption of any changes regarding the Tribal Lifeline subsidy program."); Letter from Jefferson Keel, President, National Congress of American Indians to Marlene Dortch, Secretary, FCC, WC Docket Nos. 17-287 et al. (filed Nov. 8, 2017) (urging the Commission to "convert the [Order on review] to a Notice of Proposed Rulemaking" and "engage in consultation with Tribal Nations prior to adopting rules") (emphasis in original); Letter from Loris A. Taylor, President and CEO, Native Public Media to Marlene Dortch, Secretary, FCC, WC Docket Nos. 17-287 et al. (filed Nov. 7, 2017) ("urg[ing] the Commission not to approve the [Order on review]" before it "engage[s] in meaningful Tribal consultation, consistent with the Commission's 2000 commitment"); Letter from 18MillionRising.org et al. to Hon. Ajit Pai, Chairman, FCC, et al., WC Docket No. 17-287 et al (filed Nov. 8, 2017) (urging the Commission to "meaningfully engage with Tribal governments before it takes any further action on any portion" of the *Order*).

⁹⁹ See *Cherokee Nation Nov. 9, 2017 Ex Parte* at 1; see also *Oklahoma Map Order* ¶ 5 (discussing the input provided by the Cherokee Nation on the map issue).

¹⁰⁰ *Fourth Report and Order* ¶ 17 n.47.

assertion must be rejected, because the Commission failed to describe even the basics about the meetings.¹⁰¹

2. The Commission Violated the APA When It Failed to Open a “Future Proceeding” as It Had Promised to Do

The *Fourth Report and Order* is 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 and its obligation to deal fairly with American Indian tribes.

The Tribal Facilities Requirement and the Tribal Rural Limitation are substantive rules that require notice and comment under Section 553 of the APA.¹⁰² 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.¹⁰³ A rule modification is “substantive” when it has an “adverse impact” on an affected party.¹⁰⁴ 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”¹⁰⁵ The Commission’s Tribal Facilities

¹⁰¹ See *id.*; see also *Sorenson Commc’ns, Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014) (unsupported assertions are insufficient to demonstrate that procedural obligations were observed); *Sierra Club v. EPA*, 167 F.3d 658, 665 (D.C. Cir. 1999) (the “rulemaking record” must provide “enough clarity for . . . the agency’s path [to] reasonably be discerned”) (internal quotation marks omitted); *U.S. Telecom Ass’n v. FCC*, 227 F.3d 450, 462 (D.C. Cir. 2000) (same).

¹⁰² See 5 U.S.C. § 553.

¹⁰³ See *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100 (1995).

¹⁰⁴ 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).

¹⁰⁵ 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)).

Requirement and Tribal Rural Limitation in the *Fourth Report and Order* 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.¹⁰⁶ 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*.”¹⁰⁷

By indicating to interested parties that it would decide Tribal issues in a “future proceeding,” the Commission closed the record initiated in its *2015 Lifeline Second FNPRM* 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: case closed. In previous cases where the 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

¹⁰⁶ See *2016 Lifeline Modernization Order* ¶ 211.

¹⁰⁷ See *id.* (emphasis added).

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.¹⁰⁸ 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.”¹⁰⁹ Here, the Commission did not initiate the “future proceeding” it promised, and did not consider the Tribal Facilities Requirement on a comprehensive basis alongside proposals to advance broadband deployment. By surprise, it simply entered the *Fourth Report and Order* in proceedings that it had commenced long ago.

The Commission’s handling of the Tribal Facilities Requirement in the *2016 Lifeline Modernization Order* also created a “legitimate expectation” among ETCs and Tribal nations that the Commission would not adopt the Tribal Facilities Requirement until after it commenced a future proceeding, and that it would only consider the Tribal Facilities Requirement together with policy initiatives that address broadband access on a comprehensive basis.¹¹⁰ In light of the federal government’s “distinctive obligation of trust . . . in its dealings with” American Indians, the Commission had a duty to honor the expectations it had created.¹¹¹

¹⁰⁸ See *Improvements to Benchmarks and Related Requirements Governing Hearing Aid-Compatible Mobile Handsets*, Report and Order, 31 FCC Rcd 9336 ¶¶ 42-43 (2016).

¹⁰⁹ See *An Inquiry Into the Commission's Policies and Rules Regarding AM Radio Service Directional Antenna Performance Verification*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 23 FCC Rcd 14267 ¶ 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*, Notice of Proposed Rule Making, 28 FCC Rcd 15221 (2013).

¹¹⁰ *Morton*, 415 U.S. at 236, 94 S. Ct. at 1055.

¹¹¹ *Id.*; see also *Oglala Sioux Tribe of Indians*, 603 F.2d at 721.

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 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.¹¹²

Nor does the fact that the Commission opened a new docket—WC Docket No. 17-287—in conjunction with the *2017 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*

¹¹² *Modernizing the E-rate Program for Schools and Libraries, et al.*, Second Report and Order and Order on Reconsideration, 29 FCC Rcd 15538, ¶ 55 n.119 (2014) (citing *Modernizing the E-rate Program for Schools and Libraries*, Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870, ¶ 9 (2014)).

and Order, NaLA/ETC Petitioners were left with the impression 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—at a minimum—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.¹¹³ 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.¹¹⁴ Had the Commission in 2015 proposed a definition 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.

¹¹³ See Clyburn Dissent.

¹¹⁴ 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?”); *id.* ¶ 126 (“Is the E-rate program’s 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?”).

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, demonstrates a strong likelihood of success on the merits.

3. The Commission's Tribal Facilities Requirement Is Not a Logical Outgrowth, Is Arbitrary and Capricious, and Violates the Communications Act

The D.C. Circuit is likely to find that the Tribal Facilities Requirement¹¹⁵ is unlawful for the additional reasons discussed below.

a. The Tribal Facilities Requirement Is Not a Logical Outgrowth of the Commission's Proposal

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 III.A.2, 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,"¹¹⁶ it must be a "logical outgrowth" of the proposal.¹¹⁷ An NPRM satisfies the logical outgrowth test if it "expressly ask[s] for comments

¹¹⁵ See *Fourth Report and Order* ¶¶ 21-30 (adopting the Tribal Facilities Requirement).

¹¹⁶ See *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013).

¹¹⁷ See *Covad Communications Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006).

on a particular issue or otherwise ma[kes] clear that the agency [is] contemplating a particular change.”¹¹⁸

With the Tribal Facilities Requirement, the Commission adopted a rule that fails the logical outgrowth test. In the *2015 Lifeline Second FNPRM*, the Commission proposed that recipients of enhanced Tribal Lifeline benefits “have facilities” in order to be eligible to receive enhanced Tribal benefits.¹¹⁹ 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.¹²⁰

Interested parties could not have anticipated that the Commission would impose such a restrictive definition of facilities.¹²¹ There is a material difference between a requirement to “have facilities” of some kind—as the Commission proposed—and a requirement that an ETC 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.

¹¹⁸ See *CSX Transportation, Inc. v. Surface Transportation Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009).

¹¹⁹ See *2015 Lifeline Second FNPRM* ¶ 167.

¹²⁰ See *id.*

¹²¹ 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* provided no indication that the Commission was intending such a radical departure.¹²² 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 III.A.3(b) *infra*.¹²³ 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.¹²⁴ Additionally, for twenty years the Commission has used a broad definition of facilities, rejecting narrower definitions that would "unduly restrict" competition among ETCs.¹²⁵ The *2015 Lifeline Second FNPRM* 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 three 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,¹²⁶ nor

¹²² 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.").

¹²³ See 47 U.S.C. § 214(e)(1)(A).

¹²⁴ See *2012 Lifeline Reform Order* ¶¶ 361-381.

¹²⁵ See 47 C.F.R. § 54.201(e); *1997 USF First Report and Order* ¶¶ 151, 153; *2012 Lifeline Reform Order* ¶ 501.

¹²⁶ See *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 170 (2d Cir. 2013).

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).¹²⁷ In *Prometheus Radio Project v. FCC*, 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.¹²⁸ 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.’”¹²⁹ Here, the FCC issued a Fact Sheet and draft on October 26, 2017 and initiated the Sunshine Period on November 9, 2017,¹³⁰ providing 14 days (or nine business days) for parties to respond, or half the time that the *Prometheus* court found insufficient.

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.¹³¹ However, the Commission may not “bootstrap notice”

¹²⁷ See *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011).

¹²⁸ See *id.*

¹²⁹ *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)).

¹³⁰ See *Draft Order* at 1; *Sunshine Notice* at 1.

¹³¹ See Letter from David LaFuria, Counsel for Smith Bagley, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-42, GN Docket No. 17-199, 1-2 (Oct. 20, 2017).

from an ex parte, which the D.C. Circuit has long found insufficient for APA notice-and-comment purposes.¹³²

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 Lifeline support, and whether that definition should supersede *the Tribal facilities definition it just adopted* for “facilities” on Tribal lands.¹³³ For these reasons, the Commission’s Tribal Facilities Requirement is unlawful because it is not a logical outgrowth of the Commission’s 2015 proposal.

b. The Tribal Facilities Requirement Violates the Communications 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

¹³² 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)).

¹³³ See 2017 *Lifeline Digital Divide Order* ¶ 77.

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.

(i) 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.¹³⁴ 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
- (3) forbearance from applying such provision or regulation is consistent with the public interest.¹³⁵

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

¹³⁴ See *Fourth Report and Order* ¶ 30.

¹³⁵ See 47 U.S.C. § 160.

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).”¹³⁶ In so doing, the Commission has permitted wireless reseller ETCs “to participate in the federal Lifeline program *and* receive Lifeline-only support.”¹³⁷ 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 *supra* Section III.A.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 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 wireless reseller ETCs 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

¹³⁶ See *id.* § 214(e)(1)(a).

¹³⁷ See *2012 Lifeline Reform Order* ¶ 362 (citing *2005 TracFone Forbearance Order*).

Tribal lands.¹³⁸ Today, just as in 2012, “the additional competition that [wireless reseller ETCs] provide” on Tribal lands does more to ensure just and reasonable rates and terms than the Tribal Facilities Requirement.¹³⁹

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 wireless reseller ETCs as their preferred provider on Tribal lands.¹⁴⁰ In fact, reinstating the facilities requirement would harm consumers by reducing competition in the marketplace, eliminating innovative service offerings, and taking away consumers’ own preferred service plans through regulatory fiat.¹⁴¹

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 reseller ETCs have driven vigorous competition among Lifeline providers on Tribal lands, leading to improved and varied service offerings for consumers. wireless reseller ETCs 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, wireless reseller ETCs 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

¹³⁸ See, e.g., *ETC November 9 Ex Parte* at Exh. A, 2; *Tribal ETC November 9 Ex Parte* at 1-10.

¹³⁹ See *2012 Lifeline Reform Order* ¶ 371.

¹⁴⁰ See *Fourth Report and Order* ¶ 23.

¹⁴¹ See *Clyburn Dissent*.

distinguish wireless reseller ETCs 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 reseller ETCs provide convenience and mobility that low-income consumers require and that wireline providers—facilities-based or otherwise—cannot provide.

The Tribal Facilities Requirement likely will 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.

(ii) 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.¹⁴² 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.”¹⁴³ 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

¹⁴² See 47 U.S.C. § 214(e).

¹⁴³ 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.”¹⁴⁴

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.¹⁴⁵ 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.”¹⁴⁶ 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.’”¹⁴⁷

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*.¹⁴⁸ And while the Commission asked whether

¹⁴⁴ See *id.* § 54.403(b) (emphasis added).

¹⁴⁵ See 47 U.S.C. § 214(e)(1)(A).

¹⁴⁶ See *1997 USF First Report and Order* ¶ 370.

¹⁴⁷ See *id.* ¶ 169.

¹⁴⁸ See *2015 Lifeline Second FNPRM* ¶ 167.

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 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 likely will be held unlawful.

(iii) **The Tribal Facilities Requirement Relies on a Misinterpretation of Section 254(e)**

In the *Fourth Report and Order* the Commission suggested that the Tribal Facilities Requirement would advance the goals of Section 254(e) of the Communications Act,¹⁴⁹ claiming that the rule would “ensure[] that the payments Lifeline providers receive from the Fund to serve

¹⁴⁹ 47 U.S.C. § 254(e),

rural Tribal lands will be reinvested in the ‘provision, maintenance, and upgrading’ of facilities in those areas.”¹⁵⁰ One problem with this unsupported contention is that Section 254(e) does not require carriers to use Lifeline support exclusively for the provision, maintenance, and upgrading of *facilities*. It straightforwardly allows Lifeline support to be used “for the provision, maintenance, and upgrading of facilities *and services*[.]”¹⁵¹

The Commission did not explain how limiting Lifeline funds to facilities-based carriers would advance the objectives of a statutory provision that does not require or even favor expenditures on facilities. Nor could it reasonably do so. The Commission long ago rejected the argument that Section 254(e) requires carriers to spend support amounts on facilities.¹⁵² Moreover, the Commission’s Lifeline regulations merely require that the full amount of the Lifeline support be passed through to consumers, and do not require that *any* portion be spent specifically on “facilities.”¹⁵³ Thus, the Commission’s reliance on Section 254(e) for legal support was misplaced.¹⁵⁴

c. The Tribal Facilities Requirement Is Arbitrary and Capricious

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

¹⁵⁰ *Fourth Report and Order* ¶ 27 & n.66 (quoting 47 U.S.C. § 254(e)).

¹⁵¹ 47 U.S.C. § 254(e) (emphasis added).

¹⁵² See *2005 TracFone Forbearance Order*, ¶ 26; see also *2011 USF/ICC Transformation Order*, ¶ 64 (Section 254(e) refers “to ‘facilities’ and ‘services’ as distinct items for which federal universal service funds may be used”).

¹⁵³ See 47 C.F.R. § 54.403.

¹⁵⁴ See *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (unexplained inconsistencies in agency policy are arbitrary and capricious); see also *id.* at 2124-25 (an agency’s irrational statutory interpretation must be rejected).

Tribal areas, encourage investment, and make services more affordable for Tribal consumers.¹⁵⁵

The Commission's reasoning is unsupported, contradicts the record, unreasonably departs from over a decade of findings that a facilities requirement contravenes the purposes of the Lifeline program, and fails to consider critical aspects of the problem before it, including the willingness of facilities-based wireless carriers to provide Lifeline service to Tribal consumers.

(i) The Commission's Speculation that Removing Enhanced Subsidies for Non-Facilities Based Providers Would Promote Facilities Deployment and Access to Affordable Service on Tribal Lands Is Unsupported and Irrational

Under the APA, agency orders are subject to reversal if they are arbitrary and capricious.¹⁵⁶ 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."¹⁵⁷ An agency's judgment must be based on some logic and evidence, not sheer speculation.¹⁵⁸ Specifically, there must be "a rational connection between the facts found and the choice made."¹⁵⁹ "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

¹⁵⁵ See *Fourth Report and Order* ¶¶ 23, 27-28.

¹⁵⁶ See 5 U.S.C. § 706(2)(A).

¹⁵⁷ 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)).

¹⁵⁸ See *State Farm*, 463 U.S. at 43.

¹⁵⁹ See *id.* (internal quotation marks omitted).

be ascribed to a difference in view or the product of agency expertise.”¹⁶⁰ Importantly, “the APA requires an agency to provide more substantial justification when ‘its 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.’”¹⁶¹

The Commission committed numerous decision-making errors by adopting the Tribal Facilities Requirement. First, the FCC failed 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.¹⁶² 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 ignored and ran 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 Requirement would have on the availability and affordability of Lifeline-

¹⁶⁰ *Id.*

¹⁶¹ *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (citation omitted); *see also id.*, at 535 (Kennedy, J., concurring in part and concurring in judgment).

¹⁶² *See Fourth Report and Order* ¶ 27.

supported service on Tribal lands.¹⁶³ 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.”¹⁶⁴

Further, the Commission failed to consider whether facilities-based providers were willing to provide Lifeline service in Tribal areas, even though the record clearly demonstrated that without non-facilities-based providers, there would be few *if any* providers to fulfill the need of Tribal subscribers. For example, Navajo Nation explained that “*none* of the major facilities-based wireless carriers (AT&T, Sprint and Verizon) provide Lifeline service on the Navajo Nation.”¹⁶⁵ In a resolution of its Tribal Council concerning the Lifeline program, Crow Creek explained that residents on the Crow Creek reservation already “have limited access to essential services,” including “Lifeline service,” because Verizon Wireless, after acquiring Western Wireless, showed “no interest in serving this market,” and in fact “relinquished its eligibility” to offer Lifeline service in the state altogether.¹⁶⁶ Similarly, the Oglala Sioux Tribe explained that from 2005 to 2014, the number of Lifeline subscribers served by AT&T’s wireless arm and area wireline incumbents fell from 6,969 to 694.¹⁶⁷ Wireless reseller ETCs expressed similar

¹⁶³ See *Tribal ETC November 9 Ex Parte* at 5-7.

¹⁶⁴ *Navajo Nation Comments* at 10.

¹⁶⁵ See *id.* (emphasis in original).

¹⁶⁶ *Crow Creek Sioux Tribal Resolution* at 1.

¹⁶⁷ See *Oglala Sioux Comments* at p.3 of Attachment.

concerns. Petitioner Assist explained that in Oklahoma, “not a single” Lifeline subscriber is served by a “facilities-based wireless carrier,” and that nationwide facilities-based wireless carriers “have either not secured or relinquished the necessary ETC designations in most states to provide wireless Lifeline service.”¹⁶⁸

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 reducing competition and service options for low-income residents of Tribal lands.¹⁶⁹ The situation in South Dakota is illustrative. Beginning in 2001, Verizon Wireless’s predecessors had been certified as ETCs eligible to offer Lifeline service in South Dakota.¹⁷⁰ In 2010, however, Verizon started to relinquish its ETC status in parts of the state. Verizon received less than \$100 in Lifeline support from 2010 through 2013, and had exited the state altogether by 2014.¹⁷¹ Though Sprint continues to participate in the Lifeline program in more states than its

¹⁶⁸ See *Comments of Assist Wireless* at 19-20; see also *Comments of Boomerang Wireless on the Second Further Notice of Proposed Rulemaking to Modernize and Restructure the Lifeline Program*, WC Docket Nos. 11-42 et al., 13-14 (Aug. 31, 2015) (*Comments of Boomerang Wireless*) (summarizing low and dwindling Lifeline subscribership among facilities-based carriers, and explaining that “with the exception of Sprint,” the four nationwide wireless carriers “have not shown interest in engaging in outreach to serve Lifeline eligible low-income subscribers, especially those on Tribal lands”).

¹⁶⁹ See *Clyburn Dissent*.

¹⁷⁰ See *WWC License, LLC and RCC Minnesota, Inc. for Relinquishment of Eligible Telecommunications Carrier Designations*, Petition for Relinquishment of Eligible Telecommunications Carrier Designation 2 (Pub. Util. Comm’n. of S.D. Sept. 21, 2012), <https://puc.sd.gov/commission/dockets/telecom/2012/TC12-158/petition.pdf>; see also *Crow Creek Tribal Resolution* at 1 (explaining that Verizon Wireless’ predecessor, Western Wireless, used to offer Lifeline on the Crow Creek reservation).

¹⁷¹ See *Universal Service Administrative Co., Funding Disbursement Search*, <https://www.usac.org/li/tools/disbursements/results.aspx>; see also *Crow Creek Tribal Resolution*

peers, it does not provide Lifeline service in South Dakota. AT&T provides wireless Lifeline service in a very small part of the state, and the sole remaining facilities-based wireless carrier to offer Lifeline service, Standing Rock Telecommunications, likewise serves only a portion of the Standing Rock reservation and no other areas.¹⁷² Thus, wireless resellers that *provide* Lifeline service using the radio access networks of facilities-based carriers that *do not provide* Lifeline service are essential to expanding access to affordable telecommunications in the state.¹⁷³

Against this backdrop, the Commission's assertion that the Tribal Facilities Requirement would

at 1 (explaining that Verizon Wireless has shown no interest in providing Lifeline on the Crow Creek reservation).

¹⁷² See Oglala Sioux Comments at p.3 of Attachment.

¹⁷³ See Universal Service Administrative Co., Lifeline Participation, <https://www.usac.org/li/about/process-overview/stats/participation.aspx> (last accessed June 22, 2018) (showing that in South Dakota, just 9 percent of all eligible households participate in the Lifeline program). To the extent the Commission was speculating that the departure of wireless resellers might spark renewed interest in the Lifeline program by facilities-based carriers, it failed to explain why that assumption would be reasonable. Indeed, facilities-based carriers and trade associations representing their interests pushed the Commission to make it *easier* to relinquish their ETC designations, and supported broad participation in the program by carriers of all types, including wireless resellers. See, e.g., Comments of United States Telecom Association at 5, WC Docket No. 10-90 et al. (filed Sept. 9, 2015) (noting that the "widespread market entry of other Lifeline providers," like wireless resellers, have made the participation of facilities-based carriers less important); Comments of AT&T at 27-29, WC Docket No. 11-42 et al. (filed Aug. 31, 2015) (urging the Commission to "encourage voluntary Lifeline participation by the broadest possible range of providers," and to allow "ETCs . . . to make an independent determination as to whether they want to continue to participate in the Lifeline program[.]"); *CTIA Nov. 8, 2017 Ex Parte* at 3 (opposing the elimination of "non-facilities-based providers" from the Lifeline program). As AT&T, a large facilities-based provider, explained, "[t]he significant administrative burdens of being a Lifeline ETC coupled with potential FCC enforcement actions" served as a "powerful deterrent to participation" in the Lifeline program by facilities-based providers, a state of affairs that has little to do with the ability of wireless resellers to receive enhanced Lifeline support. Comments of AT&T, WC Docket Nos. 11-42 et al, 6 & n.20 (Aug. 31, 2015) (*AT&T Comments*) (citing relinquishment notices filed by its affiliate Cricket Communications and by T-Mobile). In other words, \$35 of monthly support is generally not enough to interest large facilities-based carriers in providing service on tribal lands, as the Commission previously observed. See *2005 TracFone Forbearance Order*, ¶¶ 9, 24 (finding that wireless reseller participation results in "greater utilization of Lifeline-supported services" and would "expand participation of qualifying consumers").

encourage investment in Tribal areas and result in more affordable service for eligible Tribal subscribers on Tribal lands was irrational.

Third, the Commission failed to recognize that enhanced Tribal support does get passed through to underlying carriers who in turn deploy infrastructure.¹⁷⁴ The Commission entirely ignored the comments of Navajo Nation, which explained that because wireless reseller ETCs 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.”¹⁷⁵ Moreover, the Commission improperly disregarded—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 usage and revenues create incentives for infrastructure deployment by facilities-based network operators.¹⁷⁶

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”¹⁷⁷ again ignored that the four nationwide facilities-based wireless carriers do not participate in the

¹⁷⁴ See *Fourth Report and Order* ¶ 28.

¹⁷⁵ See *Navajo Nation Comments* at 10.

¹⁷⁶ See, e.g., *Tribal ETC November 9 Ex Parte* at 8-9. Subsequent comments included economic evidence demonstrating that wireless resellers support network investment. See, e.g., Comments of CTIA, WC Docket Nos. 17-287, 11-42, 09-197, 15 and Exhibit A., Declaration of Dr. John Mayo.

¹⁷⁷ See *Fourth Report and Order* ¶ 28.

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.¹⁷⁸

Fifth, the Commission's assumption that the presence of a "middle man" in the chain of production creates inefficiency was unsupported and is irrational. Facilities-based providers are not compelled to sell service to wireless resellers, and the rates that they charge wireless resellers are not regulated.¹⁷⁹ When a facilities-based carrier sells wholesale network access to a wireless reseller rather than as a retail service direct to the consumer, the facilities-based carrier economizes on costs associated with retail operations, which are outsourced to the wireless reseller. A facilities-based provider's partnership with a wireless reseller therefore results from the same efficient "make or buy" decisions that "firms in the rest of the economy make."¹⁸⁰

As the Commission itself explained, facilities-based providers contract with resellers "when the wireless reseller has better access to some market segments than the host facilities-based service provider," and when the wireless reseller "can better target specific market segments, such as low-income consumers or consumers with lower data-usage needs."¹⁸¹ Their

¹⁷⁸ See *Navajo Nation Comments* at 10; *Clyburn Dissent, ETC November 9 Ex Parte*, Exh. A, 2; *Tribal ETC November 9 Ex Parte* at 5, 8-9.

¹⁷⁹ See *Reexamination of Roaming Obligations of Commercial Mobile Radio Serv. Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 15817, ¶ 51 & n.122 (2007); *Worldcall Interconnect, Inc. a/k/a Evolve Broadband, Complainant*, Order, 31 FCC Rcd. 3527, ¶¶ 16-17 & n.48 (2016).

¹⁸⁰ *W. Res., Inc. v. Surface Transp. Bd.*, 109 F.3d 782, 787 (D.C. Cir. 1997) (observing the principle that firms will "buy" rather than "make" "elements of their production" that an outside firm can produce "at a lower incremental cost") (internal quotation marks omitted).

¹⁸¹ *Twentieth Report on Wireless Competition*, ¶ 15; see also *Comments of Telscape Communications, Inc. and Sage Telecom Communications, LLC* WC Docket No. 11-42 et al., 2 (filed Aug. 31, 2015) (explaining that as a wireless reseller, it "has primarily focused on offering specialized services to meet the needs of Spanish-speaking consumers, including low-income

decision to offer service indirectly “through wholesale relationships with wireless resellers” rather than directly suggests only that wireless resellers perform these outreach and customer support functions more efficiently.¹⁸² The result is a “win-win-win” that the Commission failed to recognize.¹⁸³ Facilities-based providers win because they “are able to sell capacity,” wireless resellers win because they “are able to leverage those communications assets to reach low-income consumers on Tribal lands,” and eligible low-income populations win because they “have affordable access to modern . . . wireless communications services.”¹⁸⁴

The Commission did not explain how divesting facilities-based providers of the freedom to reach a “make or buy” decision on the merits might improve the efficiency of the Lifeline program. The Commission just took it as a given that “ensuring that facilities-based carriers receive 100 percent of [enhanced Lifeline] support” will “mean more investment in rural Tribal areas.”¹⁸⁵ But as explained, facilities-based providers already have determined that selling access to a wireless reseller would be *more* profitable than selling directly to Lifeline customers, and would make *more* resources available to build facilities, reduce rates, and improve service.¹⁸⁶

consumers”); *CTIA Nov. 8, 2017 Ex Parte at 3* (explaining the “important role that non-facilities based wireless providers play in the U.S. wireless market to tailor service plans and offerings to low-income consumers’ needs”).

¹⁸² Reply Comments of Boomerang Wireless on the Second Further Notice of Proposed Rulemaking to Modernize and Restructure the Lifeline Program, WC Docket Nos. 11-42 et al., 4 (Sept. 30, 2015) (*Boomerang Reply Comments*).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Fourth Report and Order* ¶ 28.

¹⁸⁶ See also *Navajo Nation Comments* at 10 (by selling access to wireless resellers, “facilities-based carriers . . . end up with a significant percentage of [Lifeline] support, which allows them to expand infra-structure deeper into the Navajo Nation”); *Boomerang Reply Comments* at 6 (“By generating demand, [wireless resellers] help to improve the business case for these [facilities-based] providers to make investments to achieve more extensive and reliable coverage

The Commission's implausible—and unexplained—assumption that these voluntary, market-driven transactions *decreased* the amount of Lifeline support available for investment was arbitrary and capricious.¹⁸⁷

Sixth, the Commission failed 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.”¹⁸⁸ The Commission's decision to impose the Tribal Facilities Requirement will have the opposite effect: forcing out of business many providers who have developed business models in order to serve Tribal subscribers where facilities are present, reducing competition, consumer choice, and affordability of service.¹⁸⁹ Moreover, the Commission failed 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 failed to analyze the number of consumers who stand to lose their service from its

in Tribal lands”); *AT&T Comments* at 6 & n.20 (explaining that the administrative burdens of serving Lifeline subscribers has led facilities-based providers to stop providing Lifeline directly); *CTIA Nov. 8, 2017 Ex Parte* (observing the important role of wireless resellers in serving low-income populations).

¹⁸⁷ See, e.g., *U.S. Telecom Ass'n*, 227 F.3d at 461-62 (the FCC must explain the basis for its conclusions); *Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993) (conclusory statements inadequate under the APA); *Sierra Club*, 167 F.3d at 665 (the “rulemaking record” must provide “enough clarity for [a reviewing court] to say that the agency's path may reasonably be discerned”); see also *Sorenson*, 755 F.3d at 707-09.

¹⁸⁸ See *2000 Tribal Lifeline Order* ¶ 46.

¹⁸⁹ See *Navajo Nation Comments* at 10.

change and did not include any cost-benefit analysis of the effect of the Tribal Facilities Requirement on low-income residents of Tribal lands.¹⁹⁰

While the D.C. Circuit has found that the predictive judgments of agencies are due deference,¹⁹¹ the agency is not entitled to deference where substantial evidence does not support its claim.¹⁹² 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 wireless reseller ETCs from receiving enhanced Tribal support will better achieve Lifeline program goals. Moreover, the Commission's prediction here failed to meaningfully address evidence in the record that undermines its viewpoint.¹⁹³ 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.

(ii) The Commission Unreasonably Departed 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 departed from over a decade of policy finding that the presence of wireless reseller ETCs advances the goals of the Lifeline program and that prohibiting wireless reseller ETCs from participating in the

¹⁹⁰ See *Clyburn Dissent*.

¹⁹¹ 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 F.2d 795, 821 (D.C. Cir. 1983); *Charter Commc'ns, Inc. v. FCC*, 460 F.3d 31, 44 (D.C. Cir. 2006)).

¹⁹² See *Time Warner Ent. Co., LP. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001).

¹⁹³ See, e.g., *Navajo Nation Comments* at 10; *Tribal ETC November 9 Ex Parte* at 7-9.

program impedes those goals.¹⁹⁴ 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.”¹⁹⁵ 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 participate in the Lifeline program.¹⁹⁶ 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 wireless reseller ETCs 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 wireless reseller ETCs’ 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

¹⁹⁴ See *Encino Motorcars*, 136 S. Ct. at 2126 (“a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by [an agency’s] prior policy”).

¹⁹⁵ See *TracFone Forbearance Order* ¶ 9. See also *i-wireless Forbearance Order* ¶ 10; *Virgin Mobile Forbearance Order* ¶¶ 19-21.

¹⁹⁶ See *2012 Lifeline Reform Order* ¶ 368.

encourage those without service to initiate service and better enable those currently subscribed to maintain service.”¹⁹⁷ As ETC Petitioners and other commenters stated in the record, the Tribal Facilities Requirement would undermine the enhanced Tribal benefit’s “primary goal” by reducing competition among providers, consumer choice, affordability, and wholesale revenues for underlying facilities-based providers.¹⁹⁸ The Commission failed 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, and without meaningfully explaining the basis for its shift in direction, would upend the Commission’s bi-partisan, successful framework in favor of a framework that would shatter the compact between the Commission and low-income residents of Tribal lands. The Commission’s departure is unlawful and likely will be vacated by the court.

4. The Tribal Rural Limitation Is Unlawful

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.¹⁹⁹ The Tribal Rural Limitation is unlawful 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) it is arbitrary and capricious.

¹⁹⁷ See *2000 Tribal Lifeline Order* ¶ 44.

¹⁹⁸ See, e.g., *Tribal ETC November 9 Ex Parte* at 7-8.

¹⁹⁹ See *Fourth Report and Order* ¶¶ 7-8.

a. The Tribal Rural Limitation Was Adopted without Adequate Notice

The Commission’s definition of “rural” for purposes of receiving enhanced Tribal Lifeline support likely will 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.”²⁰⁰ 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.”²⁰¹ 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.”²⁰²

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 non-density-based definition used in the E-Rate program.²⁰³ This E-Rate definition of “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

²⁰⁰ See 47 U.S.C. § 553(b)(3).

²⁰¹ See *CSX Transportation*, 584 F.3d at 1081.

²⁰² *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

²⁰³ See *Fourth Report and Order* ¶¶ 7-8.

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.²⁰⁴ 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.²⁰⁵ This is particularly true for ETC Petitioners, which do not provide E-Rate-supported services and as a result 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

²⁰⁴ See *id.* ¶ 15; *id.* at App’x E; see also *Tribal ETC November 9 Ex Parte* at 7 n.22.

²⁰⁵ See *Prometheus Radio Project*, 652 F.3d at 453.