

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of

Connect America Fund

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WC Docket No. 10-90

**ORDER ON RECONSIDERATION**

**Adopted: December 20, 2018****Released: December 31, 2018**

By the Commission: Commissioner O’Rielly issuing a separate statement.

**I. INTRODUCTION**

1. Tribal lands are frequently located in rural areas where it is more costly and difficult to provide broadband services to communities in need.<sup>1</sup> In the 2018 *Tribal Opex Relief Order*, the Commission recognized the higher operating expenses facing carriers on Tribal lands and granted relief from certain operating expense (opex) limits it had imposed on rate-of-return carriers in 2016.<sup>2</sup> To ensure that relief went only to those carriers with the greatest need to accelerate broadband deployment, the Commission limited this relief to carriers that, at the time of the *Tribal Opex Relief Order*, had “not deployed broadband service of 10 Mbps download/1 Mbps upload to 90 percent or more of the housing units on the Tribal lands in its study area.”<sup>3</sup> Based on the best data available to the Commission at the time, the Order listed carriers eligible for immediate relief. This list did not include Mescalero Apache Telecommunications, Inc. (Mescalero Apache), a carrier that provides voice and broadband services to the Mescalero Apache Reservation in New Mexico.

2. Mescalero Apache filed a petition for reconsideration of the *Tribal Opex Relief Order*,<sup>4</sup> arguing that the housing units “capable of receiving 10/1 Mbps connectivity” in Mescalero Apache’s study area “represent less than 90 percent of the total households to which [Mescalero Apache] has deployed service.”<sup>5</sup> Indeed, it contends that deployment is 88.97% “at best.”<sup>6</sup> Upon review, we agree that Mescalero Apache fell below the 90% benchmark and should be granted relief, including the same retroactive relief granted to other carriers in the *Order*.

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<sup>1</sup> *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17820, para. 482 (2011) (*USF/ICC Transformation Order*), *aff’d sub nom, In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

<sup>2</sup> *Connect America Fund*, Report and Order, FCC 18-37 (Apr. 5, 2018) (*Tribal Opex Relief Order*); *Connect America Fund et al.*, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, 3124-26, para. 95-104 (2016) (*Rate-of-Return Reform Order and Further Notice*).

<sup>3</sup> *Tribal Opex Relief Order*, FCC 18-37, at 3, para. 7.

<sup>4</sup> Mescalero Apache Telecommunications, Inc. Petition for Reconsideration, WC Docket No. 10-90 (May 30, 2018) (*Petition for Reconsideration*).

<sup>5</sup> *Id.* at 4. Although Mescalero Apache uses the terms “households” and “housing units” interchangeably, the relevant metric for evaluating eligibility for relief is housing units. See 47 CFR 54.303(a)(6).

<sup>6</sup> Letter from Patrick R. Halley, Counsel to Mescalero Apache Telecommunications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (May 14, 2018) (*Mescalero Apache May 14 Ex Parte*).

## II. BACKGROUND

3. In 2011, the Commission comprehensively reformed and modernized the high-cost program of the Universal Service Fund to support networks capable of providing both voice and broadband services.<sup>7</sup> In an effort to ensure more efficient use of that funding and expand that support to standalone broadband services, the Commission in 2016 established a new mechanism for the distribution of Connect America Fund support in rate-of-return areas. As part of these reforms, the Commission adopted a limitation on the amount of operating expenses (opex) for which rate-of-return carriers may receive high-cost support.<sup>8</sup> This rule set a limit on operating expense costs calculated by comparing each study area's opex cost per location to a regression model-generated opex per location plus 1.5 standard deviations.<sup>9</sup> In a Further Notice, the Commission asked whether the opex limitations should be modified for carriers serving Tribal lands.<sup>10</sup>

4. In April 2018, the Commission adopted the *Tribal Opex Relief Order*, granting relief to carriers with the greatest need for broadband deployment in Tribal lands.<sup>11</sup> The Commission determined that carriers receiving legacy high-cost support and predominantly serving Tribal lands can recover increased operating costs from the Universal Service Fund if they had not yet deployed broadband service of 10 Mbps download/1 Mbps upload (10/1 Mbps Service) to 90% or more of the housing units on Tribal lands in the carrier's study area.<sup>12</sup> The *Order* provided a list of carriers eligible for relief based on the best data available at the time, Form 477 information submitted by the carriers to the Commission and by housing unit information from the U.S. Census Bureau.<sup>13</sup> Mescalero Apache was not listed as an eligible carrier because it did not meet the 90-percent condition according to the *Order*'s calculation.

5. On May 30, 2018, Mescalero Apache filed its petition for reconsideration of its eligibility for relief.<sup>14</sup> Mescalero Apache argues that notwithstanding the 10/1 Mbps Service deployment reflected in its FCC Form 477 filings, its actual deployment of 10/1 Mbps Service was below 90% on Tribal lands in its study area.<sup>15</sup> Mescalero Apache cites a May 22, 2018 *ex parte* letter in which it argued that it is eligible for relief based on an analysis it conducted demonstrating that its deployment of 10/1 Mbps Service is 88.97% "at best" on Tribal lands.<sup>16</sup> The National Tribal Telecommunications Association submitted comments in support of Mescalero Apache's petition.<sup>17</sup> No parties opposed the petition.

## III. DISCUSSION

6. We agree with Mescalero Apache that it is eligible for the requested relief because, based on additional evidence provided by Mescalero Apache, it did not meet the 90-percent deployment threshold at the time the *Tribal Opex Relief Order* was adopted in April 2018.

7. Mescalero Apache argues that the Commission has allowed carriers to "provide granular

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<sup>7</sup> See generally *USF/ICC Transformation Order*.

<sup>8</sup> *Rate-of-Return Reform Order and Further Notice*, 31 FCC Rcd at 3124-26, para. 95-104.

<sup>9</sup> *Id.* at 3125, para. 99.

<sup>10</sup> *Id.* at 3227-28, para. 382.

<sup>11</sup> *Tribal Opex Relief Order*, FCC 18-37, at 3, para. 7.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at Appendix D.

<sup>14</sup> *Petition for Reconsideration* at 4.

<sup>15</sup> *Id.*

<sup>16</sup> *Mescalero Apache May 14 Ex Parte*, at 5.

<sup>17</sup> National Tribal Telecommunications Association Comments, WC Docket No. 10-90 (filed July 23, 2018).

actual deployment information . . . when a carrier is substantially impacted, including detailed maps and speed test data” in other proceedings.<sup>18</sup> Mescalero Apache provided the Commission with “a detailed assessment of [its] deployment . . . based on industry accepted engineering principles and selected speed tests at actual locations.”<sup>19</sup>

8. Mescalero Apache confirmed that its FCC Form 477 data was correct under the relevant instructions, but explained that its actual service data differs from its Form 477 data.<sup>20</sup> It asserted that the Form 477 data is less granular when measuring the “very rural and mountainous geography” in its study area and the availability of broadband deployment to housing units within census blocks.<sup>21</sup>

9. To determine its actual deployment of 10/1 Mbps service, Mescalero Apache estimated the number of housing units on Tribal lands in its study area and compared their distances from the nearest Mescalero Apache remote office or Digital Subscriber Line Access Multiplexer (DSLAM).<sup>22</sup> Mescalero Apache points out that the bandwidth customers receive depends on the distance between the remote office or DSLAM and the deployed home; the further signals must travel over copper from the DSLAM, the lower the bandwidth the customer experiences.<sup>23</sup> Mescalero Apache further explains that its vendors advertise a 10/1 Mbps service capacity range of between 7,100 and 10,000 feet from the remote office or DSLAM for deployments with gauges of copper similar to that deployed by Mescalero Apache.<sup>24</sup> Based on the vendor advertised ranges and its own experience, Mescalero Apache estimates that its subscribers cannot receive 10/1 Mbps service if the deployed location is more than 9,600 feet from a remote office or DSLAM.<sup>25</sup> It further provided maps showing the ranges of DSLAMs and remote offices to housing units less than and greater than 9,600 feet to support its assertions.<sup>26</sup> Mescalero Apache’s analysis found that its actual deployment is no more than 88.97% on Tribal lands, which would have qualified it for the relief afforded in the *Tribal Opex Relief Order*.<sup>27</sup>

10. We are persuaded by both the data provided and the record that Mescalero Apache falls below the 90% deployment threshold for relief. Based on Mescalero Apache’s analysis of its network and the locations of its actual subscribers, we conclude, for the limited purpose of determining eligibility for opex relief, that it had not deployed 10/1 Mbps Service to more than 90% of the housing units on Tribal lands in its study area at the time the Commission adopted the *Tribal Opex Relief Order*. Accordingly, we grant Mescalero Apache’s petition insofar as it argues that it was incorrectly excluded from the portion of the *Tribal Opex Relief Order* identifying carriers afforded relief.

#### IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 4(i), 254, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 254, and 405, and Section

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<sup>18</sup> *Mescalero Apache May 14 Ex Parte*, at 6 (citing process used in the 100 percent overlap rule). Since FCC Form 477 data are reported at the census block level, they do not provide any sub-block information, including whether Mescalero Apache offers service to only a subset of locations in some census blocks.

<sup>19</sup> *Id.* at 2.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 6.

<sup>22</sup> *Id.* at 8.

<sup>23</sup> *Id.* at 8, 11.

<sup>24</sup> *Id.* at 8.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 10-11.

<sup>27</sup> *Id.* at 7, 11.

1.429 of the Commission's rules, 47 CFR § 1.429, that the Petition for Reconsideration of Mescalero Apache Telecommunications, Inc. IS GRANTED to the extent described herein.

12. IT IS FURTHER ORDERED that this Order on Reconsideration SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

Re: *Connect America Fund*, WC Docket No. 18-90.

Last April, the Commission voted to effectively waive the existing operating expenses limitations for several rate-of-return carriers predominantly serving Tribal lands. Those minor guardrails prevent carriers from spending outrageous or irrational amounts on opex in excess of their industry peers. At the time, I had serious concerns about this policy decision and its potential to undermine the Commission's previous market-driven Universal Service reforms. Ultimately, after a lengthy negotiation period, I was willing to reach a compromise with the Chairman and my fellow commissioners to direct the increased opex support in a more targeted manner, and, in turn, lessen the order's potential for wasteful inefficiency.

With this item, we find ourselves re-plowing the same field. While I have ultimately voted to grant the petition at hand, I do so with real trepidation regarding the precedent we set and the incentives we create.

First, this decision is by no means an exemplar of promoting broadband deployment among unserved Americans. While so many communities—Tribal and otherwise—languish without any form of broadband, today we devote scarce *extra* opex support to a carrier that has already deployed 10/1 Mbps service to a smidge short of 90 percent of its housing units in its study area, based on its own mapping and analysis. The company in question may be able to demonstrate that its deployment is barely under the applicable threshold, but I still struggle to make sense of why this carrier is deserving or in need of a waiver for additional opex funding.

As is the case under the rate-of-return budgetary cap, every dollar spent inefficiently comes at the expense of another deserving carrier and their consumers who still lack access to broadband. Given the diverse conditions present on Tribal lands, a blanket approach to those communities does not adequately reflect principles of need or efficiency. Had the significant excess funding per year that Mescalero Apache claims it is formally entitled to gone instead to support broadband deployment in truly unserved communities—Tribal or otherwise—it would have been spent in a more justified manner.

Second, this order highlights the problem of relying on Form 477 data for purposes of providing USF subsidies—a use for which the data was never originally intended. While the flaws of such reliance are well-known, the Commission has inconsistently chosen to either rely on the data, as in the second A-CAM offer, or reject it, as in the case at hand, in the absence of a formal challenge process, claiming the latter would be burdensome and time-consuming for staff. Rather, the Commission here chooses to allow Mescalero Apache to mount its own informal challenge, unencumbered by objective challenge process parameters derived through a notice-and-comment process. Does this mean that every time the Form 477 Data is wrong or fails to reflect actual deployment, parties—provided they have the necessary resources—can mount an informal challenge process to dispute the Commission's reliance on existing maps? In my opinion, this ad hoc approach is not sufficiently transparent, leaves too much up to discretion, and is a poor substitute for a thorough comment opportunity. The Commission's Form 477 Data problem is very real, and we don't help matters by foregoing a meaningful challenge process for purposes of convenience.

In the end, I have decided to honor the deal I struck with former Commissioner Clyburn with respect to the 90 percent deployment threshold. While it wasn't my first choice of a landing spot on this difficult issue, sticking to my word is central to who I am, and I believe strongly in protecting parties' reliance interests. Moreover, I still believe that the benchmark represents a reasonable guardrail. Here, Mescalero demonstrates that it squeaks by under the threshold. Therefore, despite having multiple problems with this outcome as described above, I vote to approve the order.