



NATIONAL CONGRESS OF AMERICAN INDIANS

February 27, 2015

The Honorable Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

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RE: PETITION FOR RECONSIDERATION BY THE NATIONAL CONGRESS OF AMERICAN INDIANS ON THE REPORT AND ORDER FOR WC 10-90; WC 14-58; AND WC 14-192

Dear Secretary Dortch,

Pursuant to section 1.429 of the Commission's rules, the National Congress of American Indians (NCAI) petitions the Federal Communications Commission (FCC) to reconsider its December 18, 2014, decision in its Report and Order (Order) in the above docket proceedings. Specifically, NCAI petitions the Commission regarding adopted interim reforms to the National Average Cost per Loop (NACPL) Support mechanism in its December 2014 Order. NCAI is filing this petition on the basis that the Commission has acted contrary to its *2000 Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes* by failing to engage in formal consultation with tribal nations prior to adopting rules to reform the NACPL.

Despite having information in the record to this proceeding, the Commission has adopted rules that would substantially reduce support for broadband deployment to tribal lands and tribally-owned carriers that provide service to those lands. In addition to previous filings on this matter, the FCC was also notified of the importance of this issue after NCAI adopted a resolution in October 2014, expressing concern for the proposed reforms and calling on the FCC to engage in formal consultation before moving forward.

BACKGROUND ON PROCEEDING

NCAI, as the oldest and largest representative organization of American Indian and Alaska Native tribal governments, has a long history and relationship with the FCC. We commend the Commission for its many efforts to encourage greater access to communications services on tribal lands, however, in this instance the FCC has adopted interim rules that will harm the substantial progress we've made over the last six years. If the FCC's promise to consult with tribal leaders before taking, "any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources" is to hold true, the FCC must reconsider this decision and engage in formal consultation before adopting such interim reforms to NACPL.

In September 2014, Alexicon Consulting submitted a white paper that analyzed what effects the proposed NACPL freeze would have on carriers receiving High Cost Loop Support (HCLS).¹ Using available data from the National Exchange Carrier Association (NECA) for the reporting years 2010 through 2012, the White Paper recalculated the HCLS for over 600 study areas based on the NACPL freeze and adjusted HCLS recovery percentage proposals put forward by the Commission. More importantly, the data illustrated decreases in HCLS support for a number of the tribally-owned and operated telecommunications providers.²

Based on an understanding of the potential loss of support for many tribal communities, in October 2014, at NCAI's 71st Annual Convention our members considered and adopted a resolution on the proposed HCLS reforms proposed by the FCC in its NPRM.³ The adopted resolution expressed the importance of maintaining the level of ongoing high cost loop support to address the historic lack of communications service provided to tribal communities. NCAI called on the FCC and its Office of Native Affairs and Policy (FCC-ONAP) to engage in formal consultation with tribal nations to fully understand the importance of the HCLS program in promoting the deployment of communications services on tribal lands. NCAI requested that such consultation must occur before the Commission took any additional steps to limit support provided to carriers serving tribal lands under the HCLS mechanism. This request was consistent with the FCC's own *2000 Consultation Policy Statement*.

On November 14, 2014, the Wireline Competition Bureau submitted a staff report on the impact of the FCC's proposed reforms to the HCLS mechanism.⁴ The Staff Report showed an increase in the number of study areas receiving support and a projected "zero" for study areas losing all HCLS compared to a proposal submitted by NTCA. However, the overall data set compiled by the Bureau staff also illustrated that nine of the ten tribally-owned and operated telecommunications providers would receive decreases in their HCLS support of an estimated \$865,000 under the Commission proposals.⁵ On December 18, 2014, the FCC released its *Order* in which it adopted its proposed reforms to HCLS on an interim basis, while indicating that it intends to act on long-term reform in the coming year.⁶

This petition asks the Commission to reconsider its decision to implement its proposed reforms to the HCLS mechanism because it failed to engage in formal consultation. NCAI's Resolution calling for Consultation put the FCC on notice that tribal governments saw this as a significant policy for which consultation was warranted. In addition, evidence in the record indicated the magnitude of the decreased funding for carriers serving tribal lands. The Commission's adoption of the reforms, without consultation with tribal representatives, is inconsistent with the Commission's clear commitments in its *Consultation Policy Statement*. The result is the adoption of reforms that not only will have the immediate effect of decreasing critical support for investing in broadband to serve tribal lands, but also will have long term "chilling effects" on those tribal communities that are exploring self-determination remedies to address the disparate levels of access to broadband on

¹ See Alexicon Consulting, "White Paper: Adjusting Recovery Percentages to Cap Total High Cost Loop Support," available at <http://apps.fcc.gov/ecfs/document/view?id=7522902861> (Sept. 19, 2014) ("Alexicon White Paper").

² *Id.*, App. B-E.

³ See NCAI Resolution on Consultation (attached).

⁴ See Letter for the Record from Mark Walker, Legal Advisor to the Chief of the Wireline Competition Bureau, to FCC Secretary Marlene H. Dortch, WC Docket Nos. 10-90 and 14-58, available at <https://prodnet.www.neca.org/publicationsdocs/wwpdf/112514fcc.pdf> (Nov. 24, 2014) ("FCC Staff Report").

⁵ *Id.*

⁶ *HCLS Reform Order*, para. 100.

tribal lands. For these reasons, we respectfully request that the Commission reverse the reforms made to the HCLS mechanism and consult with tribal communities before adopting any further such reforms.

THE CRITICAL NEED FOR TRIBAL CONSULTATION ON TELECOMMUNICATIONS REFORMS

The Commission should have engaged in consultation with tribal representatives before moving forward with the proposed reforms to the HCLS mechanism. If it had, it would have better understood the importance of maintaining the critical levels of HCLS in funding the deployment of broadband on tribal lands. Tribal lands continue to be the most disconnected communities in the country due to the very high costs to deploy these services. To address this barrier, the universal service high cost fund has been used over the years to deliver communications service where it is otherwise prohibitively expensive to provide service. The high costs associated with deploying broadband coupled with many tribal lands still remaining disconnected to these services should have necessitated tribal consultation prior to the Commission's ruling. If proper consultation protocols were adhered to by the FCC it would have heard from tribal leaders that the Commission's HCLS reform would hinder service provider abilities to further deployment broadband on tribal lands. NCAI's passage of a resolution requesting formal consultation should have put the FCC on notice that this was a significant policy that warranted consultation before a decision was made.

Since passage of the Telecommunications Act of 1996, the FCC has taken significant steps to engage tribal communities in its decision-making processes. In 2000, the FCC recognized its intentions and commitment to Indian Country by adopting its *Consultation Policy Statement*.⁷ The Policy Statement specifically acknowledges that tribes called upon the Commission to develop, "a statement of policy that recognizes Tribal sovereignty, federal trust principles, and the importance of agency consultation with federally-recognized Indian Tribes."⁸ Additionally the Policy Statement indicated nine commitments by the Commission related to steps it would take in recognition of its trust responsibility with Indian tribes. The most relevant raised by this petition is the commitment by the Commission to, "consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources."⁹

In the *2011 Universal Service Reform Order*, the Commission through FCC-ONAP and in coordination with the Native Nations Task Force reached out to tribal governments and carriers serving tribal lands to better understand the unique challenges and costs faced by these communities.¹⁰ As a result of that consultation, the Commission adopted a requirement that Eligible Telecommunications Carriers consult with the tribal communities they serve to work with them on

⁷ See *Consultation Policy Statement*.

⁸ *Id.* at 4080 (citing support for a policy statement by Cheyenne River Sioux Telephone Authority; the Oglala Sioux Tribe; Chickasaw Nation; Mohegan Tribe; Walker River Paiute Tribe; the Picuris Pueblo; the Tuscarora Indian Nation; Salt River Pima-Maricopa Indian Community; Tohono O'odham Nation; Gila River Telecommunications, Inc.; Crow Tribe of Indians of Montana; and the All Indian Pueblo Council).

⁹ *Id.* at 4081. The wording of this statement envisions consultation on specific policies and their potential impact, not a general consultation about broad goals we all share, such as improving access to broadband and spectrum.

¹⁰ *Connect America Fund et al.*; WC Docket Nos. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (2011).

developing a needs assessment and broadband deployment plan, among other things.¹¹ Additionally, by working with tribal entities before implementation of the quantile regression analysis (QRA), the Commission was able to develop a tribal differential that took into account the higher costs associated with serving tribal areas and lessened some of the harmful effects of the QRA for some tribal carriers.¹²

However, during the HCLS/NACPL proceedings last year the Commission failed to conduct any formal consultation on the proposed reforms before acting. Directly contrary to the commitments set forth in the Commission's *2000 Consultation Policy Statement*, the Commission moved forward despite a Resolution from NCAI in October 2014. NCAI's resolution acknowledged that no formal consultation had occurred on this proceeding and called upon the FCC to engage in formal consultation with tribal nations, "prior to taking any additional steps to limit support provided to carriers serving tribal lands." The Commission failed to act on these requests and as a result it has adopted measures that will have a detrimental effect on carriers serving tribal lands, regardless of their duration.¹³ This outcome is contrary to the Commission's prior commitments and its objective of encouraging the deployment of broadband to underserved and unserved areas.

THE POTENTIAL NEGATIVE IMPACTS OF PROPOSED HCLS CHANGES TO TRIBAL LANDS

In addition to the Resolution from NCAI, the Commission had evidence in the record that demonstrated the substantial loss of support on tribal lands that would result from the Commission's HCLS proposal.¹⁴ The Alexicon White Paper shows that, as proposed, the HCLS reforms would drain more than \$865,000 annually from tribally-owned carriers serving tribal lands. Additionally, a number of non-tribally owned carriers that serve tribal lands will lose significant amounts of support under the Commission's reforms.¹⁵ This is a severely harmful loss of critical funding to carriers serving tribal lands and is inconsistent with the FCC's recognition in 2010 that, "tribes need substantially greater financial support than is presently available to them, and accelerating Tribal broadband deployment will require increased funding."¹⁶

¹¹ *Id.* at 17869; *Office of Native Affairs and Policy, Wireless Telecommunications Bureau, and Wireline Competition Bureau Issue Further Guidance on Tribal Government Engagement Obligation Provisions of the Connect America Fund*, Public Notice, 27 FCC Rcd. 8176 (2012).

¹² *Connect America Fund; High-Cost Universal Service Support*, Order, WC Docket No. 10-90; WC Docket No. 05-337; 27 FCC Rcd. 4235 (2011) (*2011 Connect America Fund Order*). In other areas, including wireless tribal bidding credits and radio licensing priorities, the FCC and tribal communities have been able to secure mutual benefits through a collaborative consultation process.

¹³ The Commission has indicated that the reforms it adopted to HCLS are "interim" reforms and that they will develop long term reform by the end of 2015. *HCLS Reform Order* at para. 100.

¹⁴ See *Alexicon White Paper*.

¹⁵ *Id.* Alexicon's original data, which were developed based on certain estimated NECA data, originally showed a loss of support of more than \$900,000 for all tribally-owned telephone companies. Since adoption of the Commission's Order, Alexicon has revised its estimate based on NECA's released data and the new amount of lost support is \$865,000.

¹⁶ *Connecting America: The National Broadband Plan*, at 8.4, Box 8-4, available at <http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf> (2010); see also Federal Communications Commission, Wireline Competition Bureau; *Connect America Fund; High-Cost Universal Service Support*, Order, WC Docket No. 10-90; WC Docket No. 05-337; 27 FCC Rcd. 4235, 4247 (2011) ("We also agree with commenters who emphasized that carriers serving particular areas such as Alaska, Tribal lands, and national parks could face unique challenges. In particular, some commenters suggest that it is more costly to provide service on Tribal lands; the methodology now includes an additional independent variable for the percentage of each study area that is a federally-recognized Tribal land.").

Additionally, the data submitted in the White Paper is further substantiated by the Commission's own Staff Report, which was added to the record on November 2014.¹⁷ In that report, the Commission's own data shows that tribally-owned carriers would lose \$730,000 annually under the FCC's proposed reforms and that certain non-tribal carriers serving tribal lands would also stand to lose large sums of support. For example, Triangle Telephone Cooperative in Montana is projected to lose more than \$440,000 in support; Siskiyou Telephone in California is expected to lose more than \$315,000; and Ponderosa Communications, which serves parts of Arizona and California, is expected to lose more than \$272,000 in support. In addition, Reservation Telephone is projected to lose more than \$30,000, Tri-County Telephone will lose almost \$140,000, and Consolidated Telephone could lose over \$180,000.

This data demonstrates that reductions in HCLS support of this magnitude was, or should have been, known to the Commission. The amount of lost support is a critical amount of funding for the nine tribal telephone companies and the non-tribally owned telephone companies working to bring vital communications access to historically underserved tribal lands. Consultation with tribal representatives was warranted and necessary on this matter given the Commission's acknowledgement of the need for more support to bring broadband to tribal lands.

THE COMMISSION MISSED THE OPPORTUNITY TO DEVELOP A TRIBAL TAILORED APPROACH

Despite evidence in the record that referenced the potential harmful effects of capping the NACPL, the Commission missed the opportunity to develop a tribally tailored approach. Such a tailored policy has been developed by the Commission in the past. In fact, the Tribal Mobility Fund serves as a prime example of how the Commission has previously undertaken reforms to the Universal Service Fund (USF) and directed proceeds from such reforms to provide greater access to broadband on tribal lands. The Mobility Fund and the Tribal Mobility Fund were both created from cost savings that resulted from reforms in the USF program. Through consultation with tribal nations and a long record of tribal input and recommendations, the Commission recognized that in order to promote deployment on tribal lands, "a more tailored approach regarding Mobility Fund support for Tribal lands may be beneficial."¹⁸ As a result, the Commission established the \$300 million Mobility Fund and the \$50 million Tribal Mobility Fund, to allocate specifically targeted support to bring wireless service to tribal lands.¹⁹

NCAI firmly believes that had the Commission engaged in consultation with tribal representatives before capping NACPL, the Commission could have seized the opportunity to develop reforms that would further support broadband deployment to tribal lands, instead of hindering it. The Commission's record on tribal matters has shown that when it engages with tribal governments and carriers it obtains a greater understanding of the unique challenges providers face in bringing communications services to our lands. With such information the Commission can then develop USF reforms to promote our shared objective of providing critical access to broadband services on tribal lands.

THE FCC'S ADOPTION OF THE HCLS REFORMS WITHOUT TRIBAL CONSULTATION WILL HAVE A CHILLING EFFECT ON BROADBAND DEPLOYMENT TO TRIBAL LANDS

¹⁷ FCC Staff Report.

¹⁸ 2011 *Connect America Fund Order*, 27 FCC Rcd. at 4406, para 479.

¹⁹ *Id.*

The Commission's failure to engage in consultation prior to acting also has the potential to create a "chilling effect" on tribes that are considering starting a communications company to deploy broadband services on their lands. As Chairman Wheeler stated at the NCAI Executive Council Winter Session in 2014, "our analysis estimates that the percentage of Americans in rural Tribal communities without access to fixed broadband is eight times higher than the national average. That is simply unacceptable."²⁰ That gap means many Americans living on tribal lands do not have the same access to economic opportunity, to jobs, to healthcare and to digital learning services offered through broadband services.

To address the broadband gap, and as an exercise of self-determination, a number of tribal governments have started their own communications companies, and more are considering this option. These tribally-owned telephone companies were created to expand residential access to their communities, and in many instances were providing first-time connections for their residents. Like many providers serving sparsely-populated areas throughout rural America, tribal telecommunications providers face the extraordinarily high cost of deploying and maintaining their own communications infrastructure. Therefore, this is not a decision that tribal governments enter into without analyzing the implications of such a decision for their communities, and the reforms adopted under the recent HCLS decision further hinders the ability of tribal carriers to serve their communities. Following the Commission's decision to reform HCLS absent meaningful tribal consultation, any tribal government that considers starting a communications company will have to assume the risks associated with engaging in a venture where its ability to have a meaningful voice in policy matters may be diminished. The detrimental effects of the Commission's decision will be significant and is contrary to the FCC's objectives in this proceeding.

ADVANCING AND SUPPORTING OUR GOVERNMENT-TO-GOVERNMENT RELATIONSHIP

The move to reform HCLS is a drastic error at a time when the Commission has otherwise displayed an understanding of the importance in formal consultation with tribal governments. These consultation procedures are of the highest importance to tribes in order to further facilitate and spur broadband deployment to the most disconnected lands in the country. We applaud the FCC's Office of Native Affairs and Policy (FCC-ONAP) and the great work it has done to increase awareness of tribal issues at the Commission. FCC- ONAP, through its efforts to engage tribal communities across the nation, has made great strides in building relationships between tribal governments and the FCC, and the recently reinvigorated Native Nations Broadband Task Force also provides tribal communities another seat at the table to engage the FCC on policy matters.

The Commission has a record of demonstrating that it is ready and willing to engage with tribal nations and modify proposed reforms to take into account the unique challenges many tribal lands and residents face in accessing communications services. It is vital that the Commission continue its history of engaging with tribes on a government-to-government level in this proceeding as well.

²⁰ FCC Chairman Wheeler Keynote to NCAI, available at <http://www.fcc.gov/document/chairman-wheeler-remarks-national-congress-american-indians> (Mar. 12, 2014). According to the Commission's recent Annual Broadband Progress Report, under the new definition of broadband (25 Mbps/3 Mbps) fully 63% of those living on tribal lands (2.5 million people) lack access to broadband and 85% living in rural areas of tribal lands (1.7 million people) lack access. See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, GN 14-126, FCC 15-10, para. 6 (Feb. 4, 2015).

Chairman Wheeler stated his commitment to uphold the federal trust relationship during his keynote address at the NCAI Executive Council Winter Session in March 2014. During his speech he firmly stated:

It all begins with a strong and healthy relationship between the FCC and Tribal leaders. The Commission and your Nations share a unique trust relationship. We have built successful opportunities at the Commission when we have drawn upon that relationship and your status as sovereigns. But we have much more work to do. We hear all the time about the next-generation of technologies. Well, as partners in this unique relationship, now is the time for the next-generation of consultation between the FCC and Tribal Nations.²¹

As partners in advancing broadband access throughout the nation, we cannot afford another regulatory change that will delay the deployment of communications services to Indian Country. The Commission must act consistently with the commitments set forth in its *2000 Consultation Policy Statement* by consulting with tribal nations to determine HCLS impacts to tribal and non-tribal carriers serving tribal lands. Such actions are necessary to uphold the Commission's commitment to engaging in formal consultation before taking steps that significantly affect tribal governments, their land and resources.²² For these reasons, the Commission should reverse its reforms to the HCLS mechanism and consult with tribal governments and technical experts before implementing any further reforms.

I am hopeful that we can work together to resolve this issue and continue the vital work of bringing telecommunications services to tribal lands. If you have any questions please contact NCAI Legislative Associate, Brian Howard, at bhoward@ncai.org.

Sincerely,



Jacqueline Pata
Executive Director
National Congress of American Indians

Attached: NCAI Resolution #ATL-14-076, *Calling on the Federal Communications Commission to Engage in Tribal Consultation Regarding Proposed Reforms to the High Cost Loop Support Mechanism in the Universal Service Fund.*

²¹ *Id.*

²² *Consultation Policy Statement.*



NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians Resolution #ATL-14-076

TITLE: Calling on the Federal Communications Commission to Engage in Tribal Consultation Regarding Proposed Reforms to the High Cost Loop Support Mechanism in the Universal Service Fund

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WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, Section 254 of the Telecommunications Act of 1996, ensures that all Americans, regardless of where they live, will have access to communications services at reasonable and affordable rates; and

WHEREAS, this universal service principle is executed by providing explicit financial support through the Universal Service Fund (USF) to telecommunications companies providing service to rural and insular areas where the cost of providing service to consumers could not otherwise be achieved at affordable rates; and

WHEREAS, the Federal Communications Commission (FCC) has since that time provided such support through a series of mechanisms designed to offset such high costs, including the High Cost Loop Support (HCLS) program, which has provided critical ongoing capital and operating support to price cap carriers and rate of return telecommunications companies; and

WHEREAS, those carriers receiving HCLS provide service to tribal lands, Alaska Native villages, and Native Hawaiian Homelands, and rely on HCLS to offset the high costs of serving those communities; and

WHEREAS, despite HCLS funding, tribal communities in the U.S. continue to have the lowest telephone and broadband deployment rates of any group of Americans; and

WHEREAS, on June 10, 2014, the FCC initiated a Further Notice of Proposed Rulemaking seeking comment on reforms to HCLS, which has been capped since 2001; and

WHEREAS, the proposed reforms, such as the current proposal to freeze the National Average Cost Per Loop Support, would substantially reduce this critical support for approximately half of all current recipients, many serving tribal areas; and

WHEREAS, the Office of Native Affairs and Policy (ONAP) was established in 2010, to promote formal consultation with tribal nations and native communities as they exercise their inherent sovereignty and self-determination; and

WHEREAS, such consultation is intended to help the FCC understand the impact on tribal communities of potential changes to its various regulations early in its decision-making processes to ensure its policies take into account the unique challenges in providing communications services to tribal communities; and

WHEREAS, Executive Order 13175 mandates federal agencies to consult with tribal governments when proposed rules or policies have tribal implications, and the FCC has adopted its 2000 *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*; and

WHEREAS, on this proposed rulemaking regarding HCLS there has been no formal consultation on this issue, and the Commission is considering implementing this capping mechanism annually as soon as January 1, 2015.

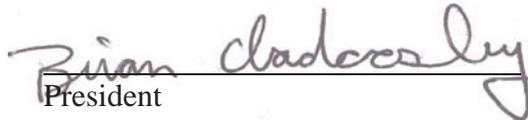
NOW THEREFORE BE IT RESOLVED, that NCAI calls on the Federal Communications Commission (FCC) and its Office of Native Affairs and Policy to engage in formal consultation with tribal nations to fully understand the importance of the High Cost Loop Support (HCLS) program in promoting deployment of communications services on tribal lands; and

BE IT FURTHER RESOLVED, that the FCC immediately engage in formal government-to-government consultation prior to taking any additional steps to limit support provided to carriers serving tribal lands under the HCLS mechanism; and

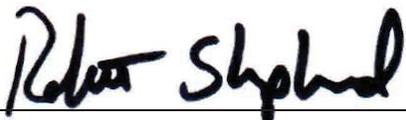
BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2014 Annual Session of the National Congress of American Indians, held at the Hyatt Regency Atlanta, October 26-31, 2014 in Atlanta, Georgia, with a quorum present.


President

ATTEST:


Recording Secretary