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June 11, 2015

By ECFS

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

**Re: Ex Parte in *In re Lifeline and Link Up Reform and Modernization*,
WC Docket Nos. 11-42, 03-109 and 09-197**

Dear Ms. Dortch:

On June 9, 2015, and June 10, 2015, the undersigned counsel for Assist Wireless, LLC (Assist) and Easy Wireless, LLC (Easy, together the Companies), met by telephone with Ryan Palmer and Daniel Alvarez, respectively, regarding the Lifeline reform item that the Federal Communications Commission (FCC or Commission) is scheduled to consider at its June 18, 2015 Open Meeting.¹ In particular, we discussed the history of the Oklahoma Tribal lands definition and the potential legal and practical problems that could arise from altering the geographic eligibility criteria for enhanced Lifeline benefits in Oklahoma without first providing public notice and an opportunity for comment by all interested stakeholders and without engaging in meaningful and transparent consultation with Tribal constituencies on any proposed changes. I expressed grave reservations with respect to the concept of “clarifying” or “interpreting” in a new and novel way the Commission’s existing rule, even if only on an “interim” basis, and suggested that such an approach would likely not be remembered for its being long on creativity but rather for the perception (at a minimum) that it was short on due process. I averred that the Lifeline program would be far better served by exploring and deciding how best to target enhanced Lifeline benefits in Oklahoma through straightforward notice and comment rulemaking and cautioned that the Commission could do far more harm than

¹ Press Release, FCC, FCC Announces Tentative Agenda for June Open Meeting (May 28, 2015), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0528/DOC-333693A1.pdf.

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good for the program and the vulnerable population it serves by sparking more controversy over its actions at the outset of this important proceeding.

Under the current, well-established Commission definition of “Tribal lands”, the operation of the Lifeline program has been and continues to be successful in Oklahoma. Program participation rates are among the best in the nation and consumers enjoy robust benefits that include unlimited voice and text options, as well as broadband options made possible by ETCs providing smartphones to consumers participating in the program. The enhanced subsidy is only partially responsible for making this possible. A highly competitive market and entrepreneurs specializing in reaching and serving the needs of low-income Americans also contribute to the program’s success.

For more than a decade, there has been clarity as to which areas are eligible for enhanced Tribal benefits in Oklahoma and which are not. While it is appropriate for the Commission to explore whether it effectively is targeting enhanced benefits in Oklahoma, the Commission should be mindful that changing what has been in place for so long will require a transition period. The transition should be fair to consumers, as well as to ETCs that have made significant investments in service offerings, smartphones and other devices, stores, and employees based on the reasonable expectation that the Commission’s rules would change only after public notice, comment and a careful balancing of stakeholder interests designed to produce a result that is fair, just and reasonable.² I submitted that, at a minimum, the Commission should consider adopting a transition period of 180 days. More time may be required after considering the potential impact of any changes on consumers and particular low-income communities that may share many of the characteristics of those that will continue to be eligible for enhanced Tribal support, carrier store lease commitments, concerns raised by Tribal representatives and other factors.³

² Assist and Easy each have dozens of retail store locations and employees reflecting substantial investments and a firm commitment to serving the eligible low-income consumers in the greater Oklahoma City market. Each company has additional stores and employees serving other parts of Oklahoma. With relatively few exceptions, neither company is presently authorized by the Oklahoma Corporation Commission to serve non-Tribal areas in Oklahoma.

³ Among other factors the Commission should consider is the fact that the Oklahoma Corporation Commission presently requires a minimum service offering of 500 minutes for non-Tribal areas. With nearly no authority to serve these areas, this has not been an issue for competitive ETCs to date. However, if large swaths of existing ETC service territory are converted to non-Tribal areas, current Lifeline subscribers will be faced with the prospect of having to pay a significant amount more for a service offering that provides significantly less. The Commission can easily anticipate that, under such circumstances, many eligible consumers will not be able to afford Lifeline service in Oklahoma. The Commission should act carefully to mitigate this unfortunate but likely outcome and to ensure that any

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The Commission's Definition of "Tribal Lands" in Oklahoma Is Well-Settled

The definition of Tribal lands eligible for enhanced Lifeline benefit in Oklahoma was established in 2000, confirmed in 2003, and has remained uncontested since.⁴ If the Commission were to issue an order modifying through clarification or interpretation this definition after twelve years – without notice and comment – it must make clear that its action would have prospective effect only. Otherwise, its action could raise concerns regarding improper payments.⁵ Regardless, the current proposed action, as we understand it, would create a significant risk of legal challenge and would elevate doubts about the Commission's ability to effectively manage the program.

In the *2000 Tribal Lifeline Order*, the Commission defined the term "Tribal lands" to incorporate the Bureau of Indian Affairs' (BIA's) definitions of "reservation" and "near reservation."⁶ The definition included "any federally recognized Indian Tribe's reservation, pueblo, or colony, *including former reservations in Oklahoma.*"⁷ The Commission took this action as part of a comprehensive review of promoting Lifeline for Tribal areas. Initially, the Commission stated that further modifications to BIA's (or Congress') definition of Tribal lands would apply in equal measure to the Commission's classifications, without further action by the Commission.

The Commission's deference was tested when BIA altered its Tribal lands and reservation definition shortly after the Commission adopted the *2000 Tribal Lifeline Order*. In

action it takes to deny eligible subscribers an enhanced Lifeline benefit does not effectively deny them any Lifeline benefit.

⁴ See 47 C.F.R. § 54.400(e) (defines Tribal lands as "any federally recognized Indian Tribe's reservation, pueblo, or colony, including former reservations in Oklahoma...").

⁵ The Lifeline program has an improper payment rate of 0.32%, which is well below the federal government average and other popular programs, including the FCC's successful E-rate program. FCC, Fiscal Year 2014 Agency Financial Report 93 (2014).

⁶ See *Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, FCC 00-208, ¶¶ 50-53 (2000) (*2000 Tribal Lifeline Order*). Note on August 31, 2000, the FCC on its own motion released an order staying the implementation of the "near reservation" portion of the rule and sought comment on how to define alternative geographic classifications consistent with the Commission's goal of targeting unserved areas. See *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-45, 15 FCC Rcd 17112 (2000).

⁷ 25 C.F.R. § 20.1(v) (emphasis added).

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March 2001, BIA revised its definition of “reservation” to no longer include, among other things, “former reservations in Oklahoma.”⁸ Instead, BIA transitioned to a procedure of case-by-case federal recognition of Tribes, Tribal lands, and “service areas.”⁹ In May 2003, the FCC issued an Order rejecting BIA’s new definition of Tribal lands.¹⁰ Instead of adopting BIA’s new approach, the Commission wrote into its regulations BIA’s prior definition which specifically included “former reservations in Oklahoma.”¹¹ The Commission stated that retaining BIA’s prior definition would “alleviate the potential for ongoing administrative uncertainty.”¹² Additionally, the Commission recognized that although the BIA’s new definition no longer referenced “former reservations in Oklahoma” the Lifeline program would benefit from continuing to include former reservations.¹³

No changes have been made to the Commission’s definition of Tribal lands for the state of Oklahoma – or to its, Universal Service Administrative Company’s (USAC) or the Oklahoma Commission’s interpretation of that definition – since the *2003 Tribal Lifeline Order*. Further, the Further Notice of Proposed Rulemaking adopted in tandem with the 2012 Lifeline Reform Order contains no notice that the Commission would consider changes to the definition of Tribal lands in Oklahoma.¹⁴ Prior to this week, the Companies were unaware that the Commission was considering altering the boundaries of Oklahoma Tribal lands as part of the anticipated June 18 Lifeline reform order (rather than in a new Notice of Proposed Rulemaking).

⁸ See 25 C.F.R. § 20.100; see also 66 Fed. Reg. 15029 (rel. March 15, 2001) (BIA chose to rely on “service area” rather than reservations to determine geographic eligibility).

⁹ The Federal Code defines “service area” as a geographic area designated by the Assistant Secretary where financial assistance and social services programs are provided. Such a geographic area designation can include a reservation, near reservation, or other geographic location. E.g., “The Assistant Secretary has designated the entire State of Alaska as a service area.” See 25 C.F.R. § 20.1. See also *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 80 Fed. Reg. 1942 (Jan. 14, 2015).

¹⁰ See *Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twenty-Fifth Order on Reconsideration, Report and Order, Order, and Further Notice of Proposed Rulemaking, FCC 03-115 (May 21, 2003) (*2003 Tribal Lifeline Order*).

¹¹ *Id.* ¶17.

¹² *Id.*

¹³ *Id.*

¹⁴ See *In the Matter of Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42 *et. al.* Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11 rel. February 6, 2012.

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The Alternative Maps for Tribal Lands in Oklahoma Are Inconsistent with the Current Rule

One map accurately depicts the meaning of the Commission's existing definition of Tribal lands in Oklahoma. This map has been in use for more than a decade and it can be found on the OCC website.¹⁵ Alternative maps that depict Oklahoma Tribal lands do not comport with the FCC's current definition, which relies on "former reservations." Most notably, the United States Department of Agriculture's (USDA's) Natural Resources Conservation Service (NRCS) has a map that identifies "Tribal Jurisdictional Areas in Oklahoma" for use in administering conservation programs and technical services to Tribes. This map is based on an application of BIA's current service area list of federally recognized Tribal entities in Oklahoma. Such service area designations are made through applications of the BIA's current definition of Tribal lands, which was adopted in 2001. This is the same definition that the Commission *expressly rejected* in its 2003 Tribal Lifeline Order because it does not include former reservations.¹⁶

The Commission Should Adhere to its Obligations Under the Administrative Procedure Act and to its Commitment to Consult with Tribal Nations Prior to Making Any Change to the Areas Eligible for Tribal Lifeline Support in Oklahoma

As explained above, the Commission currently is considering whether to make a significant and substantive change to the Tribal areas eligible for enhanced Lifeline support in Oklahoma – perhaps effectively adopting an outcome it rejected over a decade ago. We estimate that the proposed change could impact more than 70,000 low-income Oklahomans who presently are eligible for and receive enhanced Lifeline benefits. A change of this magnitude cannot reasonably be defended as being interpretive and can only result from notice and comment rulemaking. The Administrative Procedure Act requires this.¹⁷ Consumers and service providers who have relied on the current rule as it has been consistently interpreted for over a decade have a right to such due process. And the Lifeline program deserves it.¹⁸

¹⁵ 2011 Oklahoma Tribal Lands Map (last visited June 11, 2015), available at <http://www.occeweb.com/pu/OUSF/2011OKTribalLandsMap.pdf>.

¹⁶ See 2003 Tribal Lifeline Order, ¶17.

¹⁷ See 5 U.S.C. § 553(b); see also *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005), citing *Shalala v. Guernsey Mem'l Hospital*, 514 U.S. 87, 100 (1995) (requiring notice and comment prior to an agency adopting "a new position inconsistent with" its prior rules or that effects a "substantive change in the regulation"); *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997) (holding that the Commission "may not bypass procedure by rewriting its rules under the rubric of "interpretation").

¹⁸ The substantive work that lies ahead will be difficult. Questionable process will make the task of modernizing Lifeline for the broadband era even more difficult.

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Moreover, pursuant to Executive Order¹⁹ and the Commission's Policy on engagement with Indian Tribes,²⁰ the Commission owes Tribal Nations a consultation that is not only meaningful and transparent to them but also to the public at large. While the sense of urgency that recently has evolved with respect to the Commission's current initiative to modernize the Lifeline program for the 21st century is commendable, the apparent desire to redefine areas eligible for Tribal support in Oklahoma does not constitute an emergency or other good cause justifying "interim" relief, or a legally suspect approach that changes the rules first and seeks comment to support and arrive at a justification for those or other changes later.²¹ A measured approach that allows for notice, comment and consideration of potential consequences is not only required by the law but it is the best means to ensure that any tentative conclusions made on June 18 have the best chance of resulting in sound public policy.

Conclusion

Assist and Easy appreciate the opportunity to raise these issues with the Chairman's Office and the Wireline Competition Bureau. The Companies support reform and modernization of the Lifeline program and each looks forward to engaging constructively in the rulemaking to come. That rulemaking would offer the required process and be the appropriate place for the Commission to carefully consider the effectiveness of its longstanding rule governing eligibility for enhanced Lifeline support in Oklahoma.

¹⁹ Exec. Order No. 13,174, 65 Fed. Reg. 67249 (Nov. 6, 2000); President's Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57881 (Nov. 5, 2009).

²⁰ *In Re Statement of Policy on Establishing a Gov't-to-Gov't Relationship with Indian Tribes*, 16 FCC Rcd 4078 (June 23, 2000).

²¹ 5 U.S.C. § 553(b)(3)(B); *see also Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, (D.C. Cir. 2014) (holding that the Commission did not have good cause, and was not owed judicial deference, to bypass the Administrative Procedure Act notice and comment procedures when adopted interim rules for Internet Protocol Caption Telephone Service).

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This *ex parte* notification is being filed electronically pursuant to Section 1.1206 of the Commission's Rules. Please do not hesitate to contact me, if I can provide additional information useful to the Commission in its consideration of these important matters.

Respectfully submitted,



John J. Heitmann
*Counsel to Assist Wireless, LLC and
Easy Wireless, LLC*

cc: Daniel Alvarez
Rebekah Goodheart
Ryan Palmer