

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

*In the Matter of Lifeline and Link Up Reform and
Modernization; Telecommunications Carriers
Eligible for Universal Service Support; Connect
America Fund*

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) WC Docket Nos. 11-42, 09-197, 10-90,
FCC 15-71
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JOINT PETITION FOR PARTIAL STAY

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I. INTRODUCTION

In the *Matter of Lifeline and Link Up Reform and Modernization; Telecommunications Carriers Eligible for Universal Service Support; Connect America Fund*, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, WC Docket Nos. 11-42, 09-197, 10-90, FCC 15-71 (rel. June 22, 2015) (the “Order”), the Commission undertook several reforms of its Lifeline program. In particular—without providing notice and seeking comment on the issue, and acknowledging its “depart[ure] from the [FCC] staff’s prior informal guidance”—the Order narrowed the geographic scope of Tribal lands in which individuals are eligible for the Tribal Lifeline benefit.¹ As the Commission observed, these regulatory changes “will result in a reduction in the geographic scope of ‘former reservations in Oklahoma’” in which Tribal Lifeline support was previously available under the Commission’s rules.² The rule is scheduled to take effect on February 9, 2016.

Assist Wireless, LLC, Easy Telephone Services Company d/b/a Easy Wireless, TerraCom, Inc. and True Wireless, LLC (collectively, “Petitioners”) are all Eligible Telecommunications Carriers (“ETCs”) that provide services to Lifeline customers in Oklahoma. Petitioners have sought review in the United States Court of Appeals for the D.C. Circuit of those portions of the Order that will severely limit the amount of subsidies available to Petitioners and their customers by eliminating Tribal Lifeline benefits in parts of Oklahoma.³ While Petitioners pursue their legal challenge to the Order in the D.C. Circuit, Petitioners seek

¹ See Order ¶¶ 257-267.

² *Id.* ¶ 264.

³ See *Petition for Review, Assist Wireless, LLC, et al. v. FCC, et al.*, No. 15-1322 (D.C. Cir. Sept. 11, 2015).

temporary and partial relief from the Commission. Specifically, Petitioners request that the Commission immediately grant a partial stay of the Order insofar as it relates to the implementation of the Oklahoma Historical Map which redefines “former reservations in Oklahoma” pending judicial review. 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 November 6, 2015.

II. BACKGROUND

A. The Commission’s Definition of “Tribal Lands” in Oklahoma Is Well-Settled

For over 15 years, the Commission’s Lifeline program has provided enhanced support to eligible low-income recipients who reside on Tribal lands (“Tribal Lifeline Benefits”).⁴ A critical factor in ensuring that this form of Lifeline support can be used to benefit those communities is the operative definition of the territories in which Tribal Lifeline Benefits are available.

Section 54.400(e) of the Commission’s rules⁵ defines “eligible resident of Tribal lands” as follows:

An “eligible resident of Tribal lands” is a “qualifying low-income consumer,” as defined in paragraph (a) of this section, living on Tribal lands. For purposes of this subpart, “Tribal lands” include any federally recognized Indian tribe’s reservation, pueblo, or colony, including former

⁴ See Order ¶ 158-161; *In Re Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, et al.*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208 (2000) (“2000 Tribal Lifeline Order”).

⁵ 47 C.F.R. § 54.400(e).

reservations in Oklahoma; Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688); Indian allotments; Hawaiian Home Lands—areas held in trust for Native Hawaiians by the state of Hawaii, pursuant to the Hawaiian Homes Commission Act, 1920 July 9, 1921, 42 Stat. 108, et. seq., as amended; and any land designated as such by the Commission for purposes of this subpart pursuant to the designation process in §54.412.⁶

The Commission's definition of Tribal lands was established in 2000, confirmed in 2003, and has remained uncontested since that time. In its *2000 Tribal Lifeline Order*, the Commission defined the term "Tribal lands" to incorporate the definitions of "reservation" and "near reservation" used by the Department of the Interior's Bureau of Indian Affairs (BIA) for purposes of BIA's financial assistance and social services programs.⁷ Tracking the BIA rules then in place, the Commission's definition—which was adopted following notice and comment⁸—included as "tribal lands" "any federally recognized Indian Tribe's reservation, pueblo, or colony, *including former reservations in Oklahoma.*"⁹

In the *2000 Tribal Lifeline Order*, the Commission stated that further modifications to BIA's (or Congress') definition of Tribal lands would apply in equal measure to the

⁶ See 47 C.F.R. § 54.400(e) (defining Tribal lands as "any federally recognized Indian Tribe's reservation, pueblo, or colony, including former reservations in Oklahoma....").

⁷ See *2000 Tribal Lifeline Order* ¶¶ 17-19. On August 31, 2000, the Commission 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).

⁸ 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, Further Notice of Proposed Rulemaking, 14 FCC Rcd 21177 (1999) ("*Further Notice*"); see also *2000 Tribal Lifeline Order* ¶ 15.

⁹ 47 C.F.R. § 54.400(e) (emphasis added).

Commission's classifications, without further action by the Commission.¹⁰ However, in March 2001, shortly after the Commission adopted the *2000 Tribal Lifeline Order*, BIA revised its definition of "reservation" to no longer include, among other things, "former reservations in Oklahoma."¹¹ Instead, BIA transitioned to a procedure of case-by-case federal recognition of Tribes, Tribal lands, and "service areas."¹² In doing so, BIA invoked the "good cause" exception to regular rulemaking requirements under the Administrative Procedure Act.¹³

Despite BIA's change, the Commission continued to adhere to its existing definition of "reservation" for purposes of determining eligibility for Tribal Lifeline Benefits. Thus, in 2003, the Commission retained the "former reservations in Oklahoma" phrase as part of the definition of "reservation" under Section 54.400(e) of the Commission's rules.¹⁴ Doing so, the Commission explained, would "alleviate the potential for ongoing administrative uncertainty."¹⁵ The Commission recognized that although the BIA's new definition no longer referenced

¹⁰ See *2000 Tribal Lifeline Order* ¶ 19 ("If BIA or Congress should modify these definitions in the future, we intend such modifications to apply in equal measure to the classifications adopted in this Order without further action on our part.").

¹¹ See 25 C.F.R. § 20.100; see also *Technical Amendments to Financial Assistance and Social Service Programs*, 66 Fed. Reg. 15029, 15030 (Mar. 15, 2001) (BIA chose to rely on "service area" rather than reservations to determine geographic eligibility.).

¹² BIA 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. "The Assistant Secretary has designated the entire State of Alaska as a 'service area.'" 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).

¹³ See *Technical Amendments to Financial Assistance and Social Services Programs*, 66 FR 15029-31 (Mar. 15, 2001) (citing 5 U.S.C. § 553(b)(3)(B)).

¹⁴ See *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscriberhip 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, 18 FCC Rcd 10958, ¶ 15-17 (2003) ("*2003 Tribal Lifeline Order*").

¹⁵ *Id.* ¶ 17.

“former reservations in Oklahoma” the Lifeline program would benefit from continuing to include former reservations.¹⁶

In reaching this conclusion, the Commission offered the following rationale:

Notwithstanding the fact that BIA modifications did not include “former reservations in Oklahoma” and Indian allotments in its definition of “reservation,” BIA continues to provide financial assistance in these areas. Accordingly, we find that maintaining the current definition of “reservation” for universal service purposes will be consistent with BIA’s action in continuing to provide assistance in these areas, and with the Commission’s commitment to increase subscribership and improve access to telecommunications services. We believe that this will ensure that the definition of “reservation” will remain consistent with the underlying goals of the Commission’s enhanced Lifeline and Link-Up programs.¹⁷

The Commission has not made any changes to this rule and the areas entitled to Tribal benefits for the state of Oklahoma since the *2003 Tribal Lifeline Order*.

B. The BIA Map on the Oklahoma Commission’s Website Reflects “Former Reservations”

Following the *2003 Tribal Lifeline Order*, in November 2004, the Universal Service Administrative Corporation (“USAC”) provided the following information to Lifeline entities on the areas within Oklahoma eligible for the Tribal Lifeline benefit:

The areas of Oklahoma where consumers are entitled to Enhanced Lifeline and Link-Up are the entire state of Oklahoma, except for the panhandle and the southwest area identified as “the Leased District.” That is, the following counties should be excluded from participation in Enhanced Lifeline and Link-Up: (1) in the panhandle, Cimarron, Texas, and Beaver counties; (2) in the Southwest corner of Oklahoma, Greer, Harmon, and Jackson counties, as well as the area of Beckham County south of the North Fork of the Red River. And to confirm, the only current reservation in Oklahoma is the Osage Nation.¹⁸

¹⁶ See *id.*

¹⁷ *Id.*

¹⁸ See Email from TelcoLifeline@universalservice.org to Andra Farley *et al.*, re: “FCC has clarified which areas in Oklahoma are eligible for Enhanced Lifeline and LinkUp” (Nov. 5, 2004)(“USAC 2004 Email”).

This information conforms to the map that had been available on the Oklahoma Corporation Commission's ("Oklahoma Commission") website prior to the Commission's June 2015 decision. In the Order, the Commission acknowledges that "USAC has distributed Tribal support in Oklahoma based on a map displayed on the Oklahoma Commission's website, which was based upon informal guidance provided by FCC staff in 2004."¹⁹

The map identified on the Oklahoma Commission's website has been in use for more than a decade and reflects the meaning of the Commission's longstanding definition of Tribal lands in Oklahoma. A copy of the map²⁰ appears below:



¹⁹ See Order ¶ 258.

²⁰ See Indian Reservation Boundary Lines Shown with Respect to Oklahoma County Lines (1951), available at <http://www.occeweb.com/pu/OUSF/2011OKTribalLandsMap.pdf> (last visited Oct. 13, 2015).

This map also comports with the information USAC provided in November 2004.²¹ The map includes all counties in Oklahoma except: Cimarron, Texas and Beaver (the Panhandle) and Greer, Harmon and Jackson and a portion of Beckham county (the southwest corner).

As noted by Hon. Gary Batton, Chief, Choctaw Nation of Oklahoma:

[A]ll of Oklahoma—the entire state—was established as “Indian Territory.” Many different tribes, ours included, were pushed into Oklahoma from our homelands in other regions and forced to live among each other in new configurations. As a result, Choctaws have lived for decades in communities throughout all of Oklahoma, even as our “reservation” status has been forcibly changed to “former reservation.” Today, many Choctaws continue to live in scattered communities and neighborhoods throughout all of Oklahoma.²²

This map reflects that reality and includes former reservations in the state of Oklahoma.

C. The Order Redefined Tribal Lands in Oklahoma Without Providing Notice or Seeking Public Comment

1. The Commission Radically Altered the “Former Reservations” Previously Deemed Tribal Lands

The Order acknowledges that the new map depicting the redefined “former reservations in Oklahoma” (which the Commission refers to as the “Oklahoma Historical Map”) will significantly curtail the territories in Oklahoma in which eligible low-income persons may receive Tribal Lifeline Benefits.

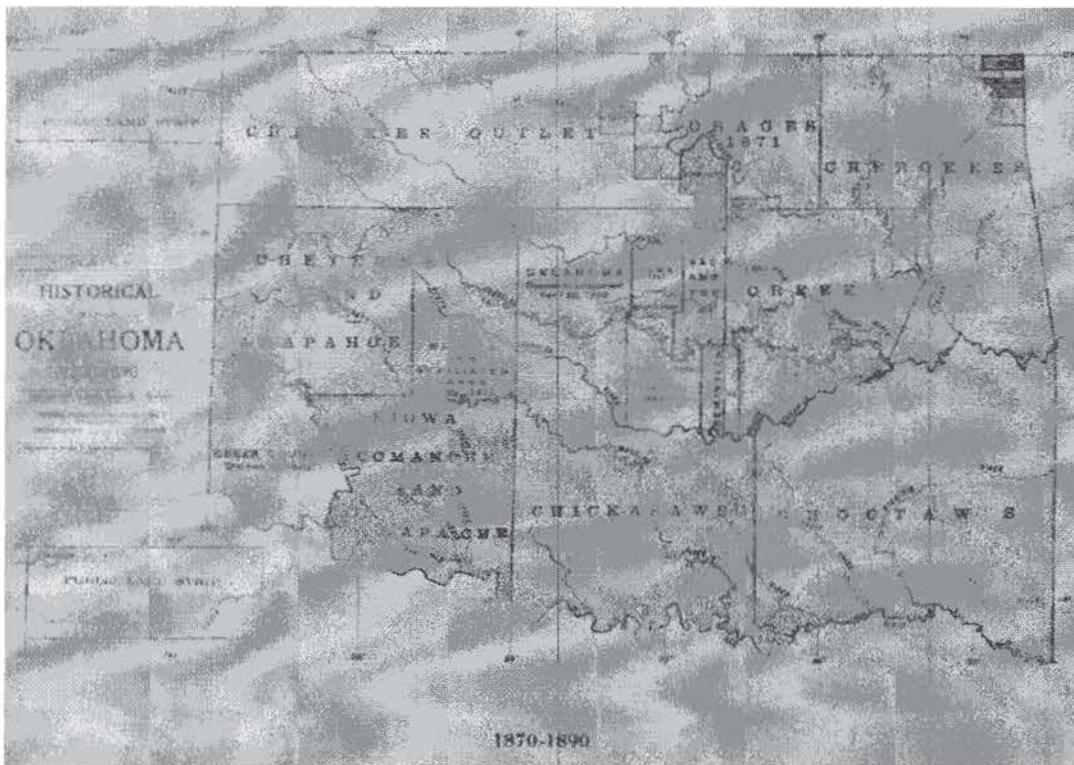
As the Order notes, this regulatory change “will result in a reduction in the geographic scope of ‘former reservations in Oklahoma,’” by (1) “exclu[ding] . . . the region within central Oklahoma historically and commonly known as the ‘Unassigned Lands’” (which covers most of “the area within the Oklahoma City municipal boundaries”) and (2) “exclu[ding] . . . the

²¹ See USAC 2004 Email.

²² Statement of Hon. Gary Batton, Chief, Choctaw Nation of Oklahoma, WC Docket No. 11-42, *et al.*, 2 (filed Aug. 31, 2015)(“Choctaw Nation Comments”).

‘Cherokee Outlet’” (i.e., a “60 mile strip of land approximately 225 miles long on the northern edge of Oklahoma”).²³

Thus, the new map (copied below) depicts Oklahoma after certain areas were open to settlement on April 22, 1889. By using a map after that date, the Commission is attempting to eliminate enhanced Tribal Lifeline support for regions that were previously held by Tribal Nations and which are encompassed by the definition of Tribal Lands.



In addition to removing former reservations from Lifeline coverage in direct conflict with 47 C.F.R. § 54.400(e), the Commission’s definition of “Tribal lands” in which Tribal Lifeline Benefits are available is now inconsistent with BIA’s coverage of those territories for purposes

²³ Order ¶ 264 and n. 531 (emphasis added).

of its financial assistance and social programs. BIA continues to provide Tribal support to members of Tribal Nations throughout the state of Oklahoma and throughout the country.²⁴

The most recent Indian population and labor force report released by the U.S. Department of the Interior identifies populations of American Indians and Alaska Natives “who are living on or near the tribal areas of federally recognized tribes.”²⁵ This report, which is based on the 2010 census, reflects that the American Indian population in Oklahoma is the highest in the United States at 471,738—over three times the population of Alaska Natives.²⁶ The report also shows that a significant number of American Indians reside in the Northern and Central counties in Oklahoma.²⁷ Thus, while BIA recognizes that one hundred thousand American Indians reside in these areas, the Commission’s new map seeks to exclude large portions of Cleveland, Kay, Lincoln, Logan, Noble, Oklahoma, Pawnee, and Payne from receiving the Tribal Lifeline benefit.

Based on this report and the governing BIA rules (which continue to provide support based on the case-by-case approach described above), it appears that BIA continues to provide assistance to Tribes located in the areas of Oklahoma that are now excluded from Tribal Lifeline Benefits under the Commission’s redefinition of “former reservations in Oklahoma.”²⁸

²⁴ See *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 80 Fed. Reg. 1942 (Jan. 14, 2015). BIA has two regions that cover Oklahoma: the Eastern Region of Oklahoma (covering Eastern Oklahoma), and the Southern Plains Region (covering the remaining portions of Oklahoma). BIA Regional Office information is available at <http://www.indianaffairs.gov/WhoWeAre/RegionalOffices/index.htm>.

²⁵ See 2013 Indian Population and Labor Force Report, United States Department of the Interior – Office of the Secretary Office of the Assistant Secretary – Indian Affairs, 9 (Jan. 16, 2014).

²⁶ *Id.* at 14.

²⁷ *Id.* at 22, n. 9.

²⁸ *Id.*; 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).

2. The Commission Adopted this Drastic Change Without Notice and Comment

The Notice of Proposed Rulemaking that culminated in the Order contained no notice that the Commission would consider any changes to the definition of Tribal lands in Oklahoma (much less the radical change effected here),²⁹ nor does the Order suggests otherwise.

Instead, the Order proposes a post-hoc consultation process with the Oklahoma Commission and Tribal Nations to determine whether it has chosen the appropriate map and that the map it has selected may change again.³⁰

D. The Reaction to the Change to the Redefinition of “Former Reservations in Oklahoma”

In the wake of the Order, numerous commenters—including various tribes located in Oklahoma and throughout the United States, and ETCs—have expressed concern about the Commission’s drastic departure from settled law.³¹ Further, the Oklahoma Commission noted its position that the new Tribal map adopted by the FCC is unworkable and absent further guidance “there will not be a feasible way” to implement the FCC’s decision.³² In particular, Tribal governments have expressed dismay about being excluded from the deliberative process.³³

²⁹ See *In the Matter of Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11 (Feb. 6, 2012).

³⁰ Order ¶ 265 (emphasis added).

³¹ See, e.g., Comments of the National Congress of American Indians (NCAI), WC Docket No. 11-42, *et al.*, 1 (filed Aug. 31, 2015); Choctaw Nation Comments at 2; Comments of the Nez Perce Tribe, WC Docket No. 11-42, *et al.*, 4 (filed Aug. 31, 2015); Reply Comments of Assist Wireless, LLC and Easy Telephone Services Company d/b/a Easy Wireless, WC Docket No. 11-42, *et al.*, 3-5 (filed Sept. 30, 2015).

³² Comments of the Public Utility Division of the Oklahoma Corporation Commission, WC Docket No. 11-42, *et al.*, 19 (filed Aug. 31, 2015).

³³ See, e.g., Comments of the NCAI at 8; Reply Comments of the Cheyenne and Arapaho Tribes, WC Docket No. 11-42, *et al.*, 4 (filed Sept. 30, 2015); Reply Comments of the Cheyenne River Sioux Tribe, WC Docket No. 11-42, *et al.*, 4 (filed Sept. 28, 2015);

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.³⁴ All four factors are met here.

A. Petitioners Are Likely to Succeed on the Merits

1. The Commission Violated the Administrative Procedure Act By Failing to Provide Notice and Seek Comment

“The Administrative Procedure Act imposes notice-and-comment requirements . . . that *must be followed* before a rule may be issued.”³⁵ As explained below, the Commission violated the Administrative Procedure Act (“APA”) when, in the guise of reinterpreting its rule defining the territories in which Tribal Lifeline Benefits are available, the Commission in fact changed the law without providing public notice and seeking comment.³⁶

Since 2000, the Commission’s rules have provided that Tribal Lifeline Benefits are available to qualified applicants who reside in “any federally recognized Indian tribe’s reservation, pueblo, or colony, including former reservations in Oklahoma...”³⁷ The rule has been consistently applied by the Commission and the Oklahoma Commission to include the

³⁴ See *Amendment of Parts 73 and 76 of the Commission’s Rules et al.*, Gen. Docket No. 87-24, 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)).

³⁵ *United States Telecom Ass’n v. FCC*, 400 F.3d 29, 34 (D.C. Cir. 2005) (citing 5 U.S.C. § 553; (emphasis added).

³⁶ The *Order* does not assert—nor could it—that the Commission provided notice and sought comment on this geographic change. See *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (in defending its action, the agency is limited to the grounds “upon which the record discloses that its action was based”).

³⁷ 47 C.F.R. § 54.400(e) (emphasis added); *2000 Tribal Order* ¶ 17.

entire state of Oklahoma, except for six counties and a portion of one additional county, as reflected in the map USAC provided in 2004.³⁸ In the Order, the Commission recognized as much, conceding that “USAC has distributed Tribal support in Oklahoma based on a map displayed on the Oklahoma Commission’s website, which was based upon informal guidance provided by the FCC staff in 2004.”³⁹

In an abrupt reversal of course, the Order discarded this long-established rule by adopting a new map that excludes large swathes of Oklahoma that have been considered to be “former reservations in Oklahoma” and treated unambiguously as Tribal lands for purposes of the Lifeline program for over a decade. This is a significant and substantive change in the law, requiring notice and comment, not a mere change in interpretation or “clarification” of existing law.⁴⁰ “[W]hen an agency changes the rules of the game”—which is exactly what the Commission did in the Order—“more than a clarification has occurred. To conclude otherwise would intolerably blur the line between when the APA notice requirement is triggered and when it is not.”⁴¹

Nor may the Commission “bypass [the APA’s notice-and-comment] procedure by rewriting its rules under the rubric of ‘interpretation.’”⁴² Notice and comment are required if, as here, an agency adopts “a new position *inconsistent with*” its prior rules, or effects “a *substantive*

³⁸ See note 21 *supra*.

³⁹ Order ¶ 258.

⁴⁰ See 5 U.S.C. § 553; *U.S. Telecom Ass’n*, 400 F.3d at 34.

⁴¹ *Sprint Corporation v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003); see also *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

⁴² *C.F. Commc’ns Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997). For that reason, *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199 (2015), is inapposite. That case concerned interpretive rules, see *id.* at 1210, not the sort of legislative rule that the Commission adopted here.

*change in the regulation.*⁴³ That the Commission changed the law here—rather than merely clarifying existing law—is confirmed by the very significant effects the Order will have on the rights and obligations of numerous ETCs and Tribal members, as described more fully below.⁴⁴

2. The Commission's Action Was Arbitrary and Capricious

Apart from failing to engage in the requisite notice-and-comment process, the Commission violated the APA by departing from its precedent without adequate explanation,⁴⁵ failing to explain key aspects of the problem,⁴⁶ and inexplicably undermining the goals of the Lifeline program generally and the particular definitions of Tribal lands that the agency itself adopted.

Long-standing Commission policy provides that the Commission, “to the extent practicable, will consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources.”⁴⁷ As comments filed in the wake of the Order demonstrate, however, the Commission neglected to meaningfully consult with Tribal governments regarding the redefinition of “former reservations in Oklahoma” through the adoption of the Oklahoma Historical Map.⁴⁸ This failure to explain why proper consultation with Tribal governments was not “practicable” or why the long-standing policy did not apply in this case was arbitrary and capricious.

⁴³ *U.S. Telecom Ass'n v. F.C.C.*, 400 F.3d 29, 35 (D.C. Cir. 2005) (emphasis added, internal citations omitted).

⁴⁴ See Section III (B) (discussing irreparable harm).

⁴⁵ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

⁴⁶ See *Motor Vehicle Mfrs Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁴⁷ *In Re of Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 26 FCC Rcd 4078, ¶ 4 (June 23, 2000).

⁴⁸ See notes 31, 33, *supra*.

The Order is also arbitrary in numerous other respects. For example, the Commission did not explain how territories which were previously considered to be “former reservations” could now change status and not be considered “former reservations” under the same rule. Moreover, the Commission never considered the consequences of its actions, including the impact of its rule on ETCs and their subscribers. This, too, is hard to fathom given that the purpose of Tribal Lifeline Benefits is to improve subscribership levels among Tribal communities.⁴⁹ Nor did the Commission adequately reconcile its new approach in the Order with the BIA rules for financial assistance and social services programs. Since the inception of Tribal Lifeline Benefits, the Commission modeled its definitions of Tribal territories (including former reservations) on those BIA rules.⁵⁰ Yet the Order inexplicably adopts a map defining Tribal territories in Oklahoma in a way that will exclude large swaths of territory in which assistance appears to remain available under the relevant BIA rules.⁵¹ Finally, the Order asserts that the Historical Map provides more “clarity” than the one that has been used consistently for over a decade,⁵² but never takes account of the administrability problems this Historical Map poses given the lack of certainty about the exact boundaries of the territories delineated.⁵³ In short, the Commission’s action was arbitrary and capricious on multiple grounds and therefore violated the APA.

⁴⁹ See, e.g., *2000 Tribal Lifeline Order* ¶ 5.

⁵⁰ See Section II (A), *supra*.

⁵¹ See Section II (C), *supra*; see also, generally, *Ex Parte* Letter from John J. Heitmann, Counsel to Assist Wireless, LLC and Easy Wireless, LLC, to Marlene H. Dortch (June 11, 2015).

⁵² See Order ¶ 260.

⁵³ See Comments of Assist Wireless, LLC and Easy Telephone Services Company d/b/a Easy Wireless, WC Docket No. 11-42, *et al.*, 10-11 (filed Aug. 31, 2015); Comments of the Public Utility Division of the Oklahoma Corporation Commission, WC Docket No. 11-42, *et al.*, 19 (filed Aug. 31, 2015); Comments of Assist Wireless, LLC and Easy Telephone Services Company d/b/a Easy Wireless, *In re: Inquiry of the Oklahoma Corporation Commission to Identify and Resolve Issues Related to the Federal Communications Commission Second Further Notice of Proposed Rulemaking As it Affects the Requirements Associated with the Provision of Lifeline Service in Oklahoma*,

B. Petitioners Will Be Irreparably Harmed Absent a Partial Stay

Petitioners will be irreparably harmed if a stay of those portions of the Order implementing the Oklahoma Historical Map is not granted. Petitioners are all ETCs that provide services to Lifeline customers in Oklahoma, including customers who are eligible for certain Tribal Lifeline Benefits. Petitioners' businesses will be substantially and irreversibly impacted if Tribal Lifeline Benefits are reduced through the use of the Oklahoma Historical Map. As set forth in the accompanying declarations of Byron Young, Michael Fina, Joe Fernandez, and Dale R. Schmick, attached hereto as Exhibits 1, 2, 3, and 4, respectfully, each Petitioner will suffer myriad irreparable harms if the Order is not partially stayed.

In particular, if the new rule implementing the Oklahoma Historical Map enters into effect, as planned, on February 9, 2016,⁵⁴ Petitioners anticipate that, collectively, the Tribal Lifeline Benefits they receive (for their customers) will suddenly be cut by over 1.484 million⁵⁵ dollars per month. This will have immediate and severe effects on the companies, including likely driving one of the Petitioners out of business.⁵⁶

Collectively, Petitioners serve over 170,000 customers in Oklahoma, and, of those customers, it is estimated that at least of 59,370 reside in areas that would no longer be covered were the Oklahoma Historical Map be implemented.⁵⁷ At a minimum, by eliminating the Tribal Lifeline benefit for these customers, Petitioners are facing a \$1,484,250 loss of revenue each

Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, Notice of Inquiry, Cause No. PUD 201500350 (filed Oct. 12, 2015).

⁵⁴ See Order ¶ 265 (providing that new map will become controlling 180 days from the Effective Date of the Order—*i.e.*, 180 days from August 13, 2015, *see* 80 Fed. Reg. 40923).

⁵⁵ See Young Decl. ¶ 7; Fina Decl. ¶ 18; Fernandez Decl. ¶ 7; Schmick Decl. ¶ 9.

⁵⁶ See Fina Decl. ¶¶ 14, 18, 21; *see generally*, *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (*per curiam*).

⁵⁷ See Young Decl. ¶¶ 4, 7; Fina Decl. ¶ 16; Fernandez Decl. ¶¶ 4, 7; Schmick Decl. ¶ 7.

month.⁵⁸ And, the loss of revenue could be much greater, as Petitioners expect that many of the customers faced with a reduction in services will drop service altogether.⁵⁹ This significant loss of revenue is quantifiable, would be imminent if the Oklahoma Historical Map is implemented, and is unrecoverable, therefore meeting the standard of irreparable harm.⁶⁰

Faced with the substantial loss of revenue and customers, in many instances, Petitioners will be forced to let employees go and shutter store fronts in Oklahoma.⁶¹ Petitioners will also irreversibly lose many of the significant investments they have made in Oklahoma and will also have to pay implementation costs if the redefinition of “former reservations in Oklahoma” is implemented.⁶²

Equally significant, the fallout from the change will also result in the loss of goodwill for each of the Petitioners, as the Petitioners’ current affected customers look to Petitioners to explain why they are experiencing a reduction in the benefits for which they are eligible.⁶³ Impacted customers will only blame their carrier when they lose their benefits while their

⁵⁸ See Young Decl. ¶ 7 Fina Decl. ¶ 18; Fernandez Decl. ¶ 7; Schmick Decl. ¶ 9.

⁵⁹ See Young Decl. ¶¶ 9-10; Fina Decl. ¶ 19; Fernandez Decl. ¶¶ 9-10; Schmick Decl. ¶ 10.

⁶⁰ *Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 242 (D.D.C. 2014) (finding irreparable harm where “[p]laintiffs’ injuries, while economic in nature, are ‘certain, imminent, and unrecoverable.’”); *Brendsel v. Office of Fed. Hous. Enter. Oversight*, 339 F. Supp. 2d 52, 66 (D.D.C. 2004) (general rule that economic losses are not irreparable harm “is of no avail . . . where the plaintiff will be unable to sue to recover any monetary damages against [federal agencies]”).

⁶¹ See Young Decl. ¶¶ 12-13; Fina Decl. ¶¶ 24-25; Fernandez Decl. ¶¶ 12-13; Schmick Decl. ¶¶ 12-13.

⁶² See Young Decl. ¶¶ 16-17; Fina Decl. ¶¶ 31-33; Fernandez Decl. ¶¶ 12-14, 17; Schmick Decl. ¶¶ 18-20.

⁶³ See *Armour & Co. v. Freeman*, 304 F.2d 404, 406 (D.C. Cir. 1962) (finding that a company would suffer irreparable injury from a rule that would force it either to misbrand its products and damage its reputation or withdraw from the market and face unrecoverable lost profits); see also *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (affirming preliminary injunction when harm to plaintiff’s business-development opportunities and customer goodwill resulting from defendant’s conduct would cause an indeterminate amount of loss for years to come).

neighbor down the street continues to be eligible for the Tribal Lifeline benefit.⁶⁴ Petitioners also face irreparable damages arising from the loss of customer goodwill and its impact on the acquisition of new customers.⁶⁵

Finally, Petitioners will suffer from the confusion that the Order causes—contrary to its professed purpose of providing “clarity.”⁶⁶ As discussed above, while it is clear that large swaths of territory in which Tribal Lifeline Benefits have been available for the past fifteen years will no longer be covered,⁶⁷ as the Oklahoma Commission has pointed out, the redefinition of “former reservations in Oklahoma” leaves uncertain the precise boundaries of the now-excluded territories.⁶⁸

The irreparable harm that will result for Petitioners and their customers cannot be undone by a later reversal by the Commission. Once Petitioners inform their current customers that they will either have to pay more to keep their current benefits or accept a decrease in benefits, and customers’ service is suspended, it is highly unlikely that Petitioners’ businesses can recover.

C. A Stay Is in the Public Interest and Will Prevent Harm

Delaying the effective date of implementation of the Oklahoma Historical Map is appropriate because a partial stay of the Order will prevent harm to other stakeholders and will

⁶⁴ See Young Decl. ¶ 15; Fernandez Decl. ¶ 16.

⁶⁵ See Young Decl. ¶¶ 14-16; Fina Decl. ¶¶ 29-30; ; Fernandez Decl. ¶¶ 14-16; Schmick Decl. ¶ 17.

⁶⁶ See Order ¶ 260.

⁶⁷ See Section II (C), *supra*; see also Order ¶ 264 and n. 531.

⁶⁸ See *In Re Inquiry of the Oklahoma Corporation Commission to Identify and Resolve Issues Related to the Federal Communications Commission Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, as it Affects the Requirements Associated with the Provision of Lifeline Service in Oklahoma, Comments of Assist Wireless, LLC and Easy Telephone Services Company d/b/a Easy Wireless*, Notice of Inquiry, Cause No. PUD 201500350, 5-7 (Oct. 12, 2015); see also Young Decl. ¶¶ 18-19; Fernandez Decl. ¶¶ 18-19; Schmick Decl. ¶¶ 21-22.

benefit the public interest. Not only will the partial stay prevent the Petitioners from suffering irreparable harm, it will not cause any harm to anyone else, let alone irreparable harm. As an initial matter, the Commission will not be injured by a continuation of the status quo that has been in place unchanged for more than a decade.

A stay is necessary to further the public interest because it will allow Lifeline customers to continue to receive the benefits to which they are entitled on an uninterrupted basis and it will allow the Commission the opportunity to properly consult with the Tribal Nations as it should have done in the first place. In contrast to the non-existent impact a stay will have on the Commission, a stay is necessary for customers and the ETCs because once the new map depicting the redefinition of “former reservations in Oklahoma” is implemented, its impact cannot be undone.

In changing its rules to provide additional Lifeline support to Tribal lands in 2000, the Commission sought to “promote telecommunications deployment and subscribership for the benefit of those living on federally-recognized American Indian and Alaska Native tribal lands, based on the fact that American Indian and Alaska Native communities, on average, have the lowest reported telephone subscribership levels in the country.”⁶⁹ Those public policy goals have not changed, yet the Commission, without any study or consultation with the impacted consumers, seeks to arbitrarily and capriciously eliminate certain regions of Oklahoma from receiving the enhanced tribal benefit. Moreover, at a time when the Commission is seeking comment on establishing minimum service levels “for Tribal Lifeline, recognizing the additional support may allow for greater service offerings”, the implementation of the Oklahoma Historical

⁶⁹ 2000 Tribal Lifeline Order ¶5.

Map will diminish service levels rather than enhance them.⁷⁰ The Commission acknowledges as much in the Order.⁷¹ A stay will permit uninterrupted services to be provided to the eligible consumers at the current levels rather than a reduction in service and will continue the stated policy goals of bringing service to underserved populations.

The fundamental importance of a stay of the redefinition of Tribal lands for the public can be seen in the strongly worded comments submitted by various Tribal Nations in response to the redefinition of Tribal lands. For example, Hon. Gary Batton, Chief, Choctaw Nation of Oklahoma, wrote:

□ we must remind the FCC that many of the thousands of Choctaw families who live in urban Oklahoma areas like Oklahoma City or Tulsa reside in lower-income neighborhoods that are nearly as isolated from telephone service infrastructure as are Choctaw families in rural south-eastern Oklahoma. Thus, in those communities, the Tribal Lands Lifeline subsidy continues to be a justifiable way to increase telephone penetration.⁷²

He concluded by stating that “the cut off of the Tribal Lands Lifeline subsidy based on location in Oklahoma would be painfully disruptive to many Choctaw households throughout Oklahoma for whom this subsidy is the difference between telephone service and disaster.”⁷³ A stay here is needed because the ramifications of eliminating the tribal benefits to the impacted consumers cannot be undone by a later court order or further map change. In addition, a stay will enable the critical consultation process with the sovereign Tribal Nations that is missing from the Order.

⁷⁰ Order ¶ 34.

⁷¹ Order ¶ 267 (“We direct ETCs to work with the OCC to ensure Lifeline consumers have sufficient information regarding how the Oklahoma Historical Map’s boundaries will affect them, *so that consumers can adjust to any changes or alterations to the Lifeline service plans to which they currently subscribe.*”) (emphasis added).

⁷² Choctaw Nation Comments at 2.

⁷³ *Id.* at 3.

A stay would also forestall the expense and confusion—in the industry and among consumers—that would result from efforts to implement the Oklahoma Historical Map prematurely without adequate guidance from the Commission.⁷⁴ In its motion for an abeyance filed with the Court of Appeals for the D.C. Circuit, the Commission admits that:

the precise boundaries of the “former reservations in Oklahoma” will not be finalized until FCC staff completes “government-to-government consultation with the Tribal Nations in Oklahoma for the specific purposes of ensuring the accuracy and operational effectiveness of the boundaries as presented in the Oklahoma Historical Map.” Order ¶ 265.⁷⁵

The government-to-government consultation should have occurred *before* the Commission redefined “former reservations in Oklahoma.” Regardless of the outcome of that consultation, the 180-day period to transition to the Oklahoma Historical Map is running—thereby necessitating a stay now.

Furthermore, the application of the Commission’s redefinition of “former reservations in Oklahoma” will cause immense confusion and concern amongst the population of affected consumers, the majority of whom have no idea that their benefits are about to be reduced. Consumers will not be harmed by the stay because they will keep their current plans rather than being forced to accept plans with fewer minutes, basic phones and fewer benefits and will not be forced to face the confusion that will result from a rushed or unnecessary transition.⁷⁶

⁷⁴ See Section II (B).

⁷⁵ See Motion to Hold in Abeyance and to Defer the Record, USCA Case #15-1322, Document #1578067 (October 14, 2015) at 3.

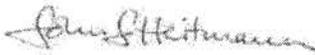
⁷⁶ See Young Decl. ¶¶ 8-9, 15-16; Fina Decl. ¶¶ 26-28; Fernandez Decl. ¶¶ 8, 16; Schmick Decl. ¶¶ 15, 22-23.

IV. CONCLUSION

The Commission should grant a partial stay of the Order's redefinition of "former reservations in Oklahoma" through the use of the Oklahoma Historical Map and 180-day transition period pending judicial review.

October 16, 2015

Respectfully Submitted,



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REDACTED - FOR PUBLIC INSPECTION

EXHIBIT 1

DECLARATION OF BYRON YOUNG

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

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)	
<i>In the Matter of Lifeline and Link Up Reform and</i>)	WC Docket Nos. 11-42, 09-197, 10-90,
<i>Modernization; Telecommunications Carriers</i>)	FCC 15-71
<i>Eligible for Universal Service Support; Connect</i>)	
<i>America Fund</i>)	
)	

**DECLARATION OF BYRON YOUNG
IN SUPPORT OF ASSIST WIRELESS, LLC'S
MOTION FOR A PARTIAL STAY**

I, BYRON YOUNG, declare as follows:

1. I am more than 18 years of age and am the Chief Executive Officer of Assist Wireless, LLC ("Assist" or "Company").

2. I submit this declaration in support of Petitioners' motion for a partial stay of the Order of the Federal Communications Commission ("FCC") as it relates to the FCC's decision to redefine "former reservations in Oklahoma." *See In the Matter of Lifeline and Link Up Reform and Modernization; Telecommunications Carriers Eligible for Universal Service Support; Connect America Fund*, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, WC Docket Nos. 11-42, 09-197, 10-90, FCC 15-71 (FCC Rel. June 22, 2015) (the "Order"). Unless expressly stated, this declaration is based on my personal knowledge.

Assist's Presence in Oklahoma

3. Assist is a wireless reseller that is designated as an eligible telecommunications carrier ("ETC") to provide service in Arkansas, Maryland, Missouri, and Oklahoma. The