

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
ETC Annual Report and Certifications)	WC Docket No. 14-58
)	
Developing a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	

COMMENTS OF NATIONAL TRIBAL TELECOMMUNICATIONS ASSOCIATION

The National Tribal Telecommunications Association (“NTTA”)¹ hereby responds to the Commission’s Further Notice of Proposed Rulemaking (“*Notice*”) in the above captioned proceedings.² NTTA appreciates the Commission’s recognition of the “distinct challenges in bringing communications services to Tribal lands” and the emphasis in the *Notice* on how best to increase deployment in these areas, including seeking comment on rules to target additional support to rate-of-return carriers serving such Tribal lands.³ In particular, we appreciate the Commission’s commitment “to take action before the end of the year to further promote broadband deployment on Tribal lands where it is now lacking.”⁴

I. INTRODUCTION AND SUMMARY

The Commission’s *2016 Broadband Progress Report* found that 41 percent of Americans living on Tribal lands (approximately 1.6 million people) lack access to fixed high-speed

¹ NTTA consists of Tribally-owned communications companies including Cheyenne River Sioux Telephone Authority, Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., Hopi Telecommunications, Inc., Mescalero Apache Telecom, Inc., Saddleback Communications, San Carlos Apache Telecommunications Utility, Inc., Tohono O’odham Utility Authority, and Warm Springs Telecom.

² *Connect America Fund et al.*, Report and Order and Order on Reconsideration, And Further Notice of Proposed Rulemaking, WC Docket Nos. 10-90, 14-58, 02-92, FCC 16-33 (rel. Mar. 30, 2016) (*Rate of Return Reform Order*).

³ *Id.* ¶ 374.

⁴ *Id.* ¶ 162 n. 362.

broadband service (25/3 Mbps) as compared to only 10 percent of the U.S. population as a whole.⁵ The numbers are even more alarming on Tribal lands in the lower 48 states where nearly 60 percent are without access to fixed broadband.⁶ Worse yet, 68 percent of Americans living on Tribal lands in rural areas, compared to 39 percent of the entire U.S. rural population, lack access to a fixed broadband connection. While these statistics are troubling, the numbers alone do not convey the real impact on Tribal communities who struggle to succeed without access to the important educational, healthcare, and economic opportunities enabled by high-speed Internet access.

The FCC and numerous other federal agencies have noted that there is a direct correlation between the lack of broadband infrastructure in Indian Country and the unique challenges faced by carriers serving Tribal lands, many of which are not present to the same extent, if at all, by other carriers serving rural areas. Tribally-owned carriers whose service areas are 100 percent Tribal know these challenges well,⁷ which is why NTTA submitted a proposal nearly a year ago to develop a Tribal Broadband Factor (“TBF”), a simple approach designed to target additional universal service support to rate-of-return carriers serving Tribal lands.⁸ Due to the demonstrably higher operating costs for carriers serving Tribal lands and the historic lack of investment in these areas, there is a clear need for high-cost Universal Service Fund (“USF”) rules that reflect the unique challenges and costs to serve Tribal lands.

⁵ *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*, 2016 Broadband Progress Report, 31 FCC Rcd 699, 732 ¶ 80 (2016).

⁶ *Id.*

⁷ See *infra* Section II.B.

⁸ Letter from Godfrey Enjady, President, Nat’l Tribal Telecomms. Ass’n, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (filed June 19, 2015); Letter from Gregory W. Guice, Counsel for Gila River Telecomms., Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (filed Oct. 23, 2015); Letter from Gregory W. Guice, Counsel for Gila River Telecomms., Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (filed Nov. 2, 2015).

Based on these unique barriers, and informed by our understanding of the rules adopted in the *Rate of Return Reform Order*, NTTA proposes that the Commission waive or significantly modify the operations expense limitation rule for carriers that predominantly serve locations on Tribal lands. Providing such relief would appropriately recognize that carriers serving Tribal lands face significantly higher operating expenses than other rural carriers. It would provide critical relief for some carriers already set to see major reductions in support as a result of the new rules and for many others that may see reductions in the future. While this would make a significant difference to these companies, the overall impact on the distribution of high-cost support among rural carriers would be negligible. Additionally, the Commission should adopt a TBF using a 25 percent multiplier to provide additional support to carriers serving Tribal lands for increased broadband investment. There is substantial support for such a multiplier which would be consistent with numerous past FCC actions. Additional support made available as a result of the TBF could be utilized by carriers to help them meet the five-year broadband deployment obligations they must meet as required by the *Rate of Return Order* or to meet more stringent buildout requirements at higher speeds over a longer ten-year term.

II. FEDERAL UNIVERSAL SERVICE POLICIES MUST ADDRESS AN INFRASTRUCTURE GAP THAT REFLECTS THE UNIQUE COSTS ASSOCIATED WITH SERVING TRIBAL LANDS

Since the FCC released the National Broadband Plan in 2010, the Commission and other federal government agencies, as well as numerous Members of Congress, have lamented the lack of broadband infrastructure in Indian Country. They have noted the importance of closing this connectivity gap, highlighting not only the lack of access to high-speed networks, but also the unique challenges associated with the provision of service on Tribal lands that other carriers do not face. NTTA members can attest first-hand to these unique challenges and increased costs, examples of which are provided below.

A. The Federal Government Has Consistently Recognized Unique Deployment Barriers for Carriers Serving Tribal Lands.

The Commission has consistently highlighted the substantial broadband infrastructure gap on Tribal lands and has specifically recognized the unique challenges associated with deployment on Tribal lands – challenges that other carriers serving non-Tribal rural, high-cost areas do not face to the same extent, or at all in some instances. As the Commission observed in the 2011 *USF/ICC Transformation Order*, “various characteristics of Tribal lands may increase the cost of entry and reduce the profitability of providing service, including: ‘(1) The lack of basic infrastructure in many tribal communities; (2) a high concentration of low-income individuals with few business subscribers; (3) cultural and language barriers where carriers serving a tribal community may lack familiarity with the Native language and customs of that community; (4) the process of obtaining access to rights-of-way on tribal lands where tribal authorities control such access; and (5) jurisdictional issues that may arise where there are questions concerning whether a state may assert jurisdiction over the provision of telecommunications services on tribal lands.’”⁹ The *USF/ICC Transformation Order*, also accurately noted that “Tribal Nations also cannot collateralize trust land assets, and as a result, have more limited abilities to access credit and capital.”¹⁰

Also in 2011, in the *Native Nations NOI*, the Commission stated that “[s]ubstantial barriers to telecommunications deployment are prevalent throughout Tribal lands. Those barriers include rural, remote, rugged terrain and areas that are not connected to a road system that increase the cost of installing infrastructure, limited financial resources to pay for

⁹ *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17820 ¶ 482 (2011) (*USF/ICC Transformation Order*) (citing *Federal-State Joint Board on Universal Service et al.*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12226 ¶ 32 (2000)).

¹⁰ *Id.* ¶ 1059; See also *Universal Service Reform et al.*, Notice of Proposed Rulemaking, 25 FCC Rcd 14716, 14727 ¶ 33 (2010) (*2010 Mobility Fund NPRM*) (noting that “Tribal lands are often in rural, high-cost areas, and present *distinct* connectivity challenges.”) (emphasis added).

telecommunications services that deter investment by commercial providers, a shortage of technically trained Native Nation members to plan and implement improvements, and difficulty in obtaining rights-of-way to deploy infrastructure across some Tribal lands.”¹¹ The National Broadband Plan identified similar challenges, noting that many Tribal communities face significant obstacles to the deployment of broadband infrastructure, including “high build-out costs” and “limited financial resources that deter investment by commercial providers.”¹²

To respond to the disproportionate impact on carriers serving Tribal lands, the Wireline Competition Bureau (“WCB”) recognized the unique costs associated with serving these areas in its April 2012 Order modifying the methodology used for its quantile regression analysis benchmarking rule. WCB noted that carriers serving Tribal lands “could face unique challenges” and stated that because “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.”¹³ The effect of the Tribal Coefficient was to reduce devastating losses that had previously occurred as a result of the implementation of the earlier benchmarking rule that had not taken unique Tribal lands costs into account.

More recently, the Administration’s Broadband Opportunity Council, led by the Department of Agriculture and the National Telecommunications and Information Administration (“NTIA”), noted that “[s]ome parts of the country, mostly rural and Tribal lands, are connectivity deserts – regions with little or no access to broadband – or ‘parched’ with broadband coverage inadequate to meet community needs” and that “[w]hile many communities

¹¹ *Improving Communications Services for Native Nations*, Notice of Inquiry, 26 FCC Rcd 2672, 2673 ¶ 1 (2011) (*Native Nations NOI*).

¹² FCC, *Connecting America: The National Broadband Plan*, at 152 (2010) (*National Broadband Plan*).

¹³ *Connect America Fund, High Cost Universal Service Report*, Order, 27 FCC Rcd 4235, 4245 ¶ 23 (2012).

around the country would benefit from Federal support in addressing connectivity issues, Tribal areas face particular challenges...creating yet another barrier for education, healthcare and economic development.”¹⁴

Moreover, the Government Accountability Office (“GAO”) recently issued a report concerning the barriers to broadband access on Tribal lands, concluding that the “[h]igh cost of infrastructure build out on tribal lands, which tend to be remote and rugged terrain, work in tandem with tribal member poverty to create a barrier to high-speed Internet expansion on tribal lands.”¹⁵ The data underlying the *GAO Report* indicates that factors complicating deployment on Tribal lands, include their distance from existing high-speed Internet networks and lack of access to middle-mile infrastructure; “the vastness of reservation lands; low population density; rugged terrain characteristics such as hills, mesas, rocks, and in some places, a lack of basic services such as roads, addresses, and commercial power.”¹⁶ GAO found that these circumstances coupled with a “lack of financial resources available to tribal households” create a barrier to high-speed Internet access.¹⁷ Beyond identifying the challenges to broadband deployment, the *GAO Report* also noted why access to broadband on Tribal lands is so important. For example, officials from several Tribes said high-speed Internet is essential for economic development, educational success, and to support telemedicine, which is particularly important in rural or remote areas.¹⁸

The Commission, along with other federal partners, has repeatedly acknowledged that broadband infrastructure deployment and maintenance on Tribal lands includes costs and other

¹⁴ Broadband Opportunity Council, *Report and Recommendations Pursuant to the Presidential Memorandum on Expanding Broadband Deployment and Adoption by Addressing Regulatory Barriers and Encouraging Investment and Training*, ¶¶ 6, 16 (2015).

¹⁵ U.S. Gov’t Accountability Off., GAO-16-222, *Telecommunications: Additional Coordination and Performance Measurements Needed for High-Speed Internet Access Programs on Tribal Lands* at 29 (2016) (*GAO Report*).

¹⁶ *Id.* at 11.

¹⁷ *Id.* at 12.

¹⁸ *Id.* at 8-9.

barriers not faced on non-Tribal lands. It is not surprising, therefore, that the FCC has also consistently reported the effects of these challenges in the form of reports showing an unacceptably low level of broadband connectivity for Tribal residents compared to the rest of the country.

B. NTTA Members Direct Experience Confirms the Unique Challenges and Costs for Carriers Serving Tribal Lands.

From our own experience deploying broadband to areas of the country that no other carrier was willing to serve, NTTA members can attest to the uniquely high costs associated with deploying and operating broadband networks in Indian Country for the many reasons listed above.¹⁹ Provided below is an overview and examples of some of the unique barriers that NTTA members face when deploying and maintaining broadband networks that other rural carriers do not face. These costs come in the form of time and expense incurred with gaining rights of way access and easements from the Bureau of Indian Affairs (“BIA”); service to Allotted Lands; obtaining “cultural clearances;” compliance with unique Tribal environmental policies; Tribal 9-1-1 system addressing challenges, including the lack of a standard Master Street Address Guide (“MSAG”); hiring polices requiring the employment of Tribal members that increase workforce recruitment and training costs; compliance with Tribal Council reporting and audits; and costs necessary to protect and advance Tribal sovereignty and self-determination.

Rights-of-Way and Easements. In a typical broadband build, a carrier is required to secure permission and permits from the local licensing authority (city, county or state). On Tribal lands, a carrier (whether Tribally-owned or not) must obtain approval from the local

¹⁹ NTTA members previously worked with WCB staff to identify the unique costs of serving Tribal lands in support of the Tribal Coefficient. GRTI and Hopi Telecommunications provided WCB access to its financial information under protective order to help inform the Commission’s understanding of the unique costs associated with serving Tribal lands.

licensing authority, which is typically the Tribe, and must obtain approval from BIA. Every Indian Affairs Agency administers this process a bit differently and delay is very common, typically resulting from additional survey and appraisal requirements. It is more expensive for a carrier to navigate two levels of regulation – no matter how streamlined or efficient. BIA’s role as administrator and manager of Native trust lands creates regulatory delay and oversight that contributes to many carriers choosing not to invest in infrastructure on Tribal lands.

As an example, Hopi Telecommunications, Inc. (“HTI”) is currently involved with an ongoing fiber deployment project in Arizona. To complete the project, HTI has had to cross over five separately owned lands, and therefore secure five separate rights-of-way approvals, including privately owned land, Arizona State Trust Land, Navajo Nation Trust Land, Individual Indian Allotment Land, and Hopi Tribe Trust Land. The entire fiber route is about 61 miles (9 miles on private land, 8 miles on Arizona State Trust Land, 37 miles on Navajo Trust Land, 1 mile on Allotment land, and 6 miles on Hopi Tribe Trust Land). The time and costs associated with obtaining the rights-of-way were substantial, and they were on top of very costly environmental, survey, and other costs.

Similarly, the Tohono O’odham Utility Authority (“TOUA”) is required to follow a cumbersome process in requesting a new right-of-way (“utility alignment”) when deploying infrastructure on Tohono O’odham Nation land. Among other hurdles it must clear, TOUA is required to get a District resolution approving the utility alignment. The Nation has 12 Districts, all of whom hold their meetings outside of the normal workday and in many cases on the weekend. This requires TOUA to pay overtime for personnel to attend meetings and answer questions about the project and the utility alignment request. It is not uncommon for TOUA to attend multiple District meetings before a vote on the requested resolution. Some of the Districts

also require TOUA to get letters of support from the villages within the District before they will consider the requested resolution. Recently for one project, TOUA had to attend meetings in six separate villages to get approval before the District voted on the utility alignment resolution. After a District resolution has been secured, a Legislative Council resolution is drafted which must be reviewed by the Nation's Attorney General Office before it is presented for approval by the Legislative Council's Natural Resources Committee prior to approval by the Legislative Council. This is a time consuming and costly process.

*Allotted Lands.*²⁰ Carriers must also secure permission of private owners of allotted lands impacted by broadband deployment. In most cases, allotted lands have multiple owners with undivided interests in a single 10-acre allotment. A broadband network facility may cross hundreds of allotments involving thousands of individual Indian trust land owners. Typically, the carrier must secure consent of landowners holding majority interests in an allotment to grant a right of way across the allotment.²¹ Substantial time and expense is incurred to provide voice and broadband service to allotted lands. For example, the Cheyenne River Sioux Reservation is 2.8 million acres and within the reservation boundaries there is a massive amount of fractionated lands. As new infrastructure is deployed, the Cheyenne River Sioux Telephone Authority has had to secure separate signatures for easements from landowners holding majority interests in the allotments, a time consuming and costly process.

A project involving Saddleback Communications on the Salt River Pima-Maricopa Indian Community ("SRP-MIC") is particularly illustrative of the challenge associated with allotted lands. The project involves an effort to underground about 1.5-miles of overhead

²⁰ See *Lands in Severalty to Indians*, Pub. L. No. 49-119, 24 Stat. 388 (1887) (*The Dawes Act*).

²¹ See *Indian Land Consolidation Act*, Pub. L. 97-459, 96 Stat. 2517 (1983).

electric and telephone lines on an existing SRP-MIC road and utility easement across 22 individual-owned allotments, a parcel of Tribally-owned land, and two parcels of fee-patent land. Within this project area, there are 14 privately owned homes on allotted lands. For the majority of the 14 homes the process of securing approval from the landowner is relatively straight forward, but for several of the homes lacking “homesite ground leases” Saddleback has to obtain a written right-of-entry from those owners holding a majority-interest in each allotment until such time as a homesite ground lease can be formalized. In most cases, it takes 18-24 months to get a homesite ground lease approved due to stringent federal and Tribal requirements related to land survey, National Environmental Policy Act (“NEPA”)²² clearance, cultural clearance, appraisal, landowner consents, and Tribal/federal approvals.

Obtaining signatures from the owners with majority-interest in each allotment is not a straight forward process; some of the landowners may live off-reservation, live out-of-state, or have whereabouts unknown. In many instances, homes have numerous individual landowners because the allotted lands have become increasingly fractionated with each new generation. Saddleback has observed in this project that each of the allotments impacted has between 12 and 29 landowners, with each landowner having an undivided interest of a varying percentage based on how they came to own their interest. Not relevant to this project, but indicative of the challenges of increasing fractionalization, in another part of the Community there is a 10-acre allotment with over 733 owners (each with an undivided interest). Fractionalization makes it extremely difficult to obtain majority-consent or agreement on most land-issues within the Community. Not only do the utility providers have to obtain permission from the allotted landowners, but they must also obtain permission from the Tribal council and

²² *National Environmental Policy Act of 1969*, Pub. L. No. 91-190, 83 Stat. 852 (1970) (*NEPA*).

BIA for all land transactions. Even though Saddleback Communications is a tribally-owned enterprise of the Community, Saddleback is reliant on Tribal staff for landowner information and administration of all easements and service line agreements due to sensitivity about personally identifiable information and Tribal sovereignty.

The Community desires every home, school, and business to have high-speed Internet service. However, these same themes also negatively impact Saddleback's fiber-to-the-home initiative. Saddleback strives to upgrade existing residential customers within the Community from copper to fiber optic lines, but because of these issues, Saddleback is forced to operate and maintain separate copper and fiber systems until such time as every home, business, and Tribal facility can be legally and physically upgraded. With each fiber-to-home conversion, Tribal staff must first confirm the residential address, identify the authorized occupant by verifying a homesite ground lease or sole landowner situation, and witness a service line agreement being "executed" and then filed with the Land Title Records Office in Albuquerque, New Mexico. These requirements impose a significant amount of cost and increase the time associated with broadband deployment on the Salt River Pima-Maricopa Indian Community.

Tribal Cultural Clearance and Compliance with Archaeological Resources Protection Act. Obtaining Tribal cultural clearance for construction of a broadband network as well as compliance with Archaeological Resources Protection Act ("ARPA")²³ requirements create considerable carrier expense. Even where areas identified for the build are not culturally sensitive, the process for evaluating the site and securing the permissions create additional expense. BIA authorizes and manages permits for excavation around or removal of archaeological resources on Tribal lands, thus adding the additional layer of regulatory oversight

²³ See Archeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721 (ARPA).

and approval. For example, TOUA recently completed two broadband projects, a middle mile project to construct 149.9 miles fiber optic cable between villages and a fiber-to-the-home project consisting of 98.6 miles of fiber optic cable in the 12 most populous villages on the reservation. The total cost for cultural and environmental reviews was \$489,225, which included cost for coordinating TOUA's field work and the development of reports with the Tribal Historic Preservation Office ("THPO") and the BIA Western Region Office ("BIA WRO") archaeologists. Their final reports were then reviewed and approved by the Nation's Office of Cultural Affairs. During the middle mile construction there were 10 villages in which TOUA encountered at least one archaeological site, with as many as four archaeological sites encountered in some villages. In such instances, the THPO ordered all construction activities to stop, resulting in construction delays and additional cost of construction crews standing idle while awaiting approval of an alternate construction route. In one instance, a cache site was uncovered and it delayed construction for more than a year while family, village representatives, the Nation's Office of Cultural Affairs, and TOUA came to an agreement that would allow construction to continue. Some of the more traditional villages require that a village member be present to monitor TOUA's construction work and observe all soil excavation, to ensure that no cultural items are uncovered. If cultural items are uncovered during construction the village assigned observer, compensated by TOUA, can stop construction. In one village included in the fiber-to-the-home project, TOUA paid the village observer for total 224.5 hours of time observing the construction within the village.

Environmental Compliance. All carriers must comply with the National Environmental Policy Act. However, because projects on Tribal lands involve BIA right-of-way approval, BIA is given responsibility for compliance with NEPA on Tribal lands. Once again, a carrier must

deal with multiple levels of federal regulatory oversight and approvals and may also need to comply with separate Tribal environmental programs and agencies. A 50 plus page policy manual guides parties on how to interface with the BIA under NEPA.²⁴ Multiple layers of compliance and regulation add costs for any carrier seeking to build network infrastructure for voice and broadband services on tribal lands.

E9-1-1 Addressing and Database Challenges. The MSAG is an official record of streets and thoroughfares in a given jurisdiction. Carriers rely on the MSAG to connect first responders to specific addresses. Tribes regularly avoid mapping and naming areas and streets on public maps to ensure they remain private and inaccessible to the general public. This creates an added layer of difficulty for carriers when establishing emergency E9-1-1 services on Tribal lands. Often arranging E9-1-1 service requires special attention, time and unique technical work-arounds.

Tribal Sovereignty. For carriers negotiating with Tribal businesses and governments, the issues of Tribal sovereignty require careful thought and drafting. All contracts require additional legal review to insure that a Tribal Nation's sovereignty and self-determination are protected. Negotiating terms for customer contracts, loans, intergovernmental agreements, lines of credit, bonding or insurance create an additional lawyer of expense.

Tribal Hiring Requirements. Carriers building on Tribal lands may be subject to Tribally-imposed hiring preferences. This is of great benefit to the Tribal community, but adds expenses associated with hiring, training and oversight. For example, the laws of the Tohono O'odham Nation include an Indian preference in employment provision requiring employers on

²⁴ See U.S. Dep't of the Interior, Bureau of Indian Affairs, *National Environmental Policy Act (NEPA) Guidebook 59 IAM 3-H* (Aug. 2012), available at <http://www.bia.gov/cs/groups/xraca/documents/text/idc009157.pdf>.

the Nation to “give preference to qualified Indians, with the first preference to local Indians, in all hiring, promotion, training, lay-offs and all other aspects of employment.”²⁵ Some villages on the reservation require that TOUA pay a village member to be on site during construction to observe all excavation, looking for any cultural items that may be uncovered. Additionally, every covered employer with a construction contract of \$100,000 or more is required to pay a one-time fee of 1/2 of 1% of the total amount of the contract to the Tohono O’odham Nation prior to commencing work within the exterior boundaries of the Nation.²⁶

Similarly, the Fort Mojave Indian Tribe requires each employer on the reservation to “give Indians preferential consideration for all promotional opportunities and shall encourage Indians to seek such opportunities.” Further, “for each promotion or supervisory position filled by a non-Indian, the employer shall file a report with the Director stating what efforts were made to inform Indian workers about the position, what Indians, if any, applied for the position and if an Indian was not chosen, the reasons therefore.”²⁷ The Fort Mojave Indian Tribe also requires a one-time “compliance fee” of one percent of any total contract over \$10,000 prior to commencing work on the reservation.²⁸ To be clear, NTTA members recognize and appreciate the importance of Indian hiring preferences for Tribes. Nonetheless, it does impose costs on carriers serving Tribal lands that other rural providers do not incur.

²⁵ Tohono O’odham Code, Title 13 – Employment, Chapter 1 – Tribal Employment Rights, Section 1103, Indian Preference in Employment, *available at* <http://www.tolc-nsn.org/docs/Title13Ch1.pdf>.

²⁶ *Id.* at Section 1110, Employment Rights Fee.

²⁷ Fort Mojave Tribal T.E.R.O Department, T.E.R.O Tribal Employment Rights Ordinance, Section 10, *available at* <http://mojaveindiantribe.com/tero-tribal-employment-rights-ordinance>.

²⁸ *Id.* at Section 11.

III. THE COMMISSION SHOULD TAKE TARGETED STEPS TO “PRESERVE AND ADVANCE” BROADBAND AVAILABILITY ON TRIBAL LANDS

As a result of these unique challenges, when the Commission released the National Broadband Plan in March 2010, the Plan stated that “Tribes need substantially greater financial support than is presently available to them, and accelerating Tribal broadband deployment will require increased funding.”²⁹ To date, however, the only funding the Commission has specifically targeted for investment on Tribal lands was the February 2014 Phase I Tribal Mobility Fund which made \$50 million available to wireless carriers to provide 3G or 4G wireless service in unserved areas.³⁰ No additional targeted support has been made available for rural carriers serving Tribal lands. In fact, as a result of the 2011 *USF/ICC Transformation Order* rate-of-return reforms and the more recent national average cost per loop (“NACPL”) freeze,³¹ many rural carriers serving Tribal lands, including NTTA members, are currently receiving less annual support than they were prior to the release of the National Broadband Plan’s recommendation to provide increased funding.

Many carriers stand to see even further reductions in support as a result of new rules adopted in the *Rate of Return Reform Order*. Therefore, building off the recent industry-wide reforms, the FCC should take the further step of targeting additional support to Tribal lands. Specifically, the Commission should waive or significantly modify the operations expense limitation rule for carriers that predominantly serve locations on Tribal lands and adopt a TBF using a 25 percent multiplier to provide additional support to carriers serving Tribal lands for increased broadband investment. Additional support made available as a result of the TBF could

²⁹ *National Broadband Plan* at 152.

³⁰ See FCC, *Tribal Mobility Fund Phase I Auction - Winning Bids Sorted by Bidder* (Feb. 28, 2014), http://wireless.fcc.gov/auctions/902/reports/902_winning_bids_by_bidder.pdf. The vast majority of the funds – over 80% – went to carriers serving Alaska with just over \$8 million awarded to carriers serving non-Alaska areas.

³¹ *Connect America Fund et al.*, Report and Order, 29 FCC Rcd 15644, 15684 ¶ 112 (2014) (*December 2014 NACPL Freeze Order*).

be utilized by carriers to help them meet the five-year broadband deployment obligations they must meet as required by the *Rate of Return Order* or to meet more stringent buildout requirements at higher speeds over a longer ten-year term.

A. The Commission Should Waive or Modify the Operating Expense Limitation for Carriers Serving Tribal Lands

In the *Rate of Return Reform Order*, the Commission adopted an operating expense limitation to limit operating costs eligible for support under the HCLS and CAF BLS mechanisms by comparing each study area's opex cost per location to a regression model-generated opex per location plus 1.5 standard deviations.³² The Commission considered, but elected not to adopt, the rural carrier associations' proposal that opex costs should only be limited for carriers with costs above the two standard deviations citing concerns that such limits would only impact 17 study areas.³³ However, the Commission seeks comment in the *Notice* on whether carriers serving Tribal lands should be exempt from the opex limits.³⁴ Furthermore, the Commission elected to defer implementation of opex expense limitations for carriers serving Alaska pending Commission consideration of the "Alaska Plan" submitted by the Alaska Telephone Association.³⁵ While not explicitly saying so, the temporary exemption of opex limits to these carriers appears to have been in recognition of the higher operating costs faced by carriers in Alaska.

As demonstrated above, carriers serving Tribal lands incur unique costs that other rural carriers do not face, including significantly higher operating expenses. These very unique costs are in addition to high operating costs associated with very sparsely populated service areas. Because of the unique and substantial operating costs associated with serving Tribal lands,

³² See *Rate of Return Reform Order* ¶ 99; 47 C.F.R § 54.303.

³³ *Id.* ¶ 100.

³⁴ *Id.* ¶ 382.

³⁵ *Id.* ¶ 94-95 n. 196.

NTTA urges the Commission to waive the opex limits for carriers with a majority of locations (51% or more) located in census blocks on Tribal lands. The number of carriers with a majority of locations in census blocks on Tribal lands is minimal, will not impact the overall budget for rate-of-return carriers, and will have a negligible impact on the distribution of funds available for rural carriers. Despite its negligible impact overall, exempting carriers that serve predominantly Tribal lands will have a substantial impact on the ability of these carriers to maintain and expand their broadband networks.

If the Commission determines that a complete exemption from the rule is not warranted, at a minimum, it should modify the application of the rule for carriers with a majority of locations on Tribal lands by comparing such carriers' study area's opex cost per location to a regression model-generated opex per location plus 2.5 standard deviations. While the Commission elected to use regression model-generated opex per location plus 1.5 standard deviations, NTCA noted that "any [opex] regression formula should utilize not less than two standard deviations to establish such operating expense limits, because a lesser standard would lack statistical integrity."³⁶ An earlier filing from WTA also called for the use of two standard deviations, noting that "[a]dding two standard deviations to regression results is a common practice for identifying outliers."³⁷ These recommendations were based on the typical operating expenses incurred by rural carriers and did not take into account the much greater operating expenses of carriers that predominantly serve Tribal lands. Therefore, if the Commission elects not to exempt carriers that serve Tribal lands from opex limits, it should, at a minimum, modify the application of the rule for carriers with a majority of locations located on Tribal lands by

³⁶ Letter from Michael R. Romano, Senior Vice President, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (filed Jan. 29, 2016).

³⁷ Letter from Gerard J. Duffy, Regulatory Council, WTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, at App. A (filed May 29, 2015).

using 2.5 standard deviations. Taking such action would appropriately recognize the higher operating costs unique to carriers serving Tribal lands and is supported by past FCC actions that modified general rules to take into account the unique aspects of service on Tribal lands.³⁸

B. The Commission Should Adopt a Tribal Broadband Factor to Target Additional Support for Infrastructure Investment in Indian Country

NTTA appreciates the fact that the capital investment allowances adopted in the *Rate of Return Order* are designed to help target support to those areas with the least broadband deployment.³⁹ As a general matter, the capex allowances appear to provide appropriate incentives for increased investment in rural unserved areas, including by carriers serving Tribal lands in areas that have historically seen lower levels of investment than other non-Tribal areas. However, just as carriers serving Tribal lands face higher opex costs than most rural carriers, the capital investment necessary to deploy broadband infrastructure in Indian country is also often higher than a typical rural carrier. Thus, while the capital investment allowances are a positive development, they are not a mechanism that specifically targets funding to Tribal lands for projects that may not otherwise be launched. Carriers with significant portions of their service area that remain unserved may be able to utilize the capital investment allowances in non-Tribal areas while still leaving Tribal portions of their territory unserved. Even with relatively generous capital investment allowances, there will almost assuredly still be areas on Tribal lands that remain unserved and would not benefit from the new capex mechanism. Finally, while the new rules have the potential to accrue to the benefit of carriers that serve Tribal lands, they are

³⁸ See, e.g., *High-Cost Universal Service Support et al.*, Order, 23 FCC Rcd 8834, 8848 ¶ 32 (2008) (*Interim Cap Order*) (permitting competitive ETCs serving “Covered Locations” to continue to receive uncapped high-cost support for lines served in those Covered Locations due to low penetration rates for basic telephone service on Tribal lands); see also *Extending Wireless Telecommunications Services to Tribal Lands*, Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 11794, 11802-803 ¶ 22 (providing incentives for wireless carriers to serve Tribal lands because “penetration rates for most non-tribal lands are significantly higher than those for most tribal lands.”) (*Tribal Lands Bidding Credit Order*).

³⁹ See *Rate of Return Order* ¶ 110; 47 C.F.R § 54.303.

unlikely to engage Tribal leaders and Tribal governments in a process to work with carriers serving their lands, whereas a mechanism that is uniquely designed to incentivize deployment on Tribal lands is likely to have such an effect.

For these reasons, it is essential that the Commission establish a Tribal-specific mechanism that further incentivizes capital investment in broadband networks – last mile and middle mile – to benefit Tribal residents, businesses and community anchor institutions. NTTA first submitted a proposal to adopt a TBF nearly a year ago⁴⁰ with refinements to the proposal in a series of letters based on input from FCC staff and further discussions among NTTA members.⁴¹ The TBF represents a simple approach to allocating carrier-specific funding amounts to carriers serving Tribal lands. The Commission should adopt a TBF that is a multiplier of existing carrier support levels and make such additional funding available for carriers to (a) meet the newly adopted broadband deployment obligations at 10/1 Mbps over the next five years⁴² or (b) meet enhanced deployment obligations over a longer 10 year period that are above and beyond the baseline buildout requirements.

Justification for a 25 percent multiplier. The TBF's 25 percent multiplier is merely a mechanism to generate a carrier-specific funding amount. What to require in exchange for such funding, and whether the acceptance of additional funding should be voluntary or not, are separate policy issues the Commission must decide, but the threshold issue for the TBF is what multiplier to use. NTTA continues to support a 25 percent multiplier. The impossibility of determining with precision the exact multiplier that is necessary for each carrier to achieve

⁴⁰ Letter from Godfrey Enjady, President, Nat'l Tribal Telecomms. Ass'n, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (filed June 19, 2015).

⁴¹ Gregory W. Guice, Counsel, Gila River Telecomms., Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No 10-90 (filed Nov. 18, 2015); Gregory W. Guice, Counsel, Gila River Telecomms., Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No 10-90 (filed Dec. 4, 2015).

⁴² *Rate of Return Reform Order* ¶¶ 173-77.

buildout at levels equal to or above the requirements adopted in the *Rate of Return Reform Order* does not constitute an excuse for the Commission to continue to leave Tribal residents behind. Moreover, past Commission actions have provided a 25 percent boost to carriers willing to serve Tribal lands and have recognized that exact precision is impossible in such exercises (just as it is when developing economic cost models used to distribute support).

Using a factor of 25 percent is equivalent in scope to the 25 percent bidding credit the Commission provided in the Tribal Mobility Fund Phase I and the Mobility Fund Phase I reverse auctions.⁴³ Additionally, in arriving at a total of \$50 million for the Tribal Mobility Fund Phase I, the Commission noted that the additional targeted support “is approximately 25 percent of the ongoing support awarded to competitive ETCs serving Covered Locations in 2010.”⁴⁴ In other words, like the TBF proposal, the Tribal Mobility Fund support amount was equal to 25 percent of the amount of support that was being provided to competitive ETCs serving Tribal lands at that time. The 25 percent factor is also comparable to the overall impact of the Tribal Coefficient described above for NTTA members.

Finally, in establishing a Tribal lands bidding credit for spectrum auctions, for license areas where the gross bid amount exceeds \$2 million, the Commission “impose[d] a 25 percent cap, which will permit bidders to recover a substantial portion of their infrastructure costs, and provide a considerable incentive to serve tribal lands.”⁴⁵ Significantly, in establishing such a bidding credit formula, the Commission wisely determined not to make the perfect the enemy of the good, acknowledge that “our bidding credit formula is inexact, and that carriers’ actual infrastructure costs may be higher or lower than the credit amount,” but finding that “a more precise formula that attempts to calculate infrastructure costs and coverage on a case-by-case

⁴³ *USF/ICC Transformation Order* ¶ 430.

⁴⁴ *Id.* ¶ 485.

⁴⁵ *Tribal Lands Bidding Credit Order* ¶ 28.

basis would prove overly burdensome to the Commission and carriers alike.”⁴⁶ The Commission’s Tribal bidding formula was instead designed to represent a “simple, objective, and reliable method of calculating the credit” that “allows carriers to recoup a significant portion of their infrastructure costs for serving tribal areas, prevents windfalls, and ensures administrative simplicity.” This is precisely the objective of the TBF and the Commission can confidently look to its past precedent in establishing a 25 percent multiplier.

Below are details associated with TBF eligibility and how a TBF could be implemented. In general, rate-of-return carriers who serve locations on Tribal lands and do not elect to transition to model-based support should be eligible.⁴⁷ However, eligibility for individual carriers will depend on the specific mechanics of how the Commission chooses to implement a TBF as described below.

TBF eligibility and deployment/service obligations. As the Commission points out in the *Notice*, the level of broadband deployment at the 10/1 speed benchmark varies considerably among carriers, within NTTA’s membership and more broadly.⁴⁸ NTTA has recognized this and previously proposed service obligations for carriers receiving TBF support that reflect their relative deployment levels at the time of receiving an offer of TBF support.⁴⁹ NTTA proposes two possible options for service obligations associated with the TBF, both of which would take into consideration current carrier broadband deployment levels.

⁴⁶ *Id.* ¶ 27.

⁴⁷ The TBF has been designed to support deployment only in the lower 48 states. The Alaska Telecommunications Association has submitted a separate “Alaska Plan” to provide support to Alaska rate-of-return carriers and the Commission has indicated that it intends to adopt separate Alaska-specific rules. According to the *2016 Broadband Progress Report*, only one percent of locations in the Hawaiian Homelands lack access to fixed broadband, so a TBF does not appear to be necessary for carriers serving the Hawaiian Homelands.

⁴⁸ *Rate of Return Reform Order* ¶ 370.

⁴⁹ Gregory W. Guice, Counsel, Gila River Telecomms., Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No 10-90 (filed Dec. 4, 2015).

Option 1. Recognizing the generally higher costs to build and maintain broadband networks in Indian Country, the first option would be for the Commission to provide additional support to carriers serving Tribal lands to be utilized to meet the five-year buildout obligations adopted in the *Rate of Return Order*. There would be no separate and additional deployment obligations associated with TBF funding and the funds would automatically flow to eligible carriers in the form of a 25 percent increase in monthly support to be utilized to meet the carrier's 10/1 Mbps deployment obligations. If this option is implemented, for carriers that have already deployed 10/1 service to more than 80 percent of their total locations, and are thus not subject to specific buildout obligations as a condition of receiving CAF- BLS support,⁵⁰ the Commission should consider whether to allow the use of TBF funds, on a voluntary basis, to achieve deployment levels at higher speeds over the same period, such as deployment of 25/3 Mbps to 75% of locations.⁵¹ This approach should only be available to carriers with a substantial majority of locations (greater than 75 percent) located in census blocks on Tribal lands. It would not be an equitable use of funds to provide additional support to carriers with only a small percentage of total locations on Tribal lands. Carriers should be required to certify that all of the additional support received will be used for investment in infrastructure serving Tribal lands.

Option 2. A second option would be to utilize the TBF to make available support over a ten-year term in exchange for more aggressive buildout obligations. Carriers electing to voluntarily accept the additional deployment obligations in exchange for the enhanced support would therefore not be subject to the Commission's general five-year deployment obligations. With this approach, TBF support amounts available would be proportionate to the percentage of

⁵⁰ *Rate of Return Order* ¶ 173.

⁵¹ Such deployment levels would be consistent with NTTA's proposed TBF buildout requirements in the Dec. 4 letter.

lines that a carrier serves that are on Tribal lands and the total support amount that a carrier receives for such lines based on the carrier's average cost per line, multiplied by a factor of 25 percent.⁵² For example, if a carrier serves 1,000 lines and receives \$1 million annually in high-cost support, and 700 of the lines are located on Tribal lands, the TBF would be calculated as follows: Average cost per line = \$1,000 (\$1 million / 1,000); Number of lines on Tribal land x average cost per line = \$700,000 (700 x \$1,000); TBF = \$175,000 (\$700,000 x .25). Thus, in addition to the fluctuating monthly per-line support amounts, the carrier would have an additional annual support amount of \$175,000 to invest on Tribal lands which would equate to \$1.75 million over a ten year term.

The objective is to create an easily determined support amount for each eligible entity and to make the process as simple as possible based on a single moment in time, and therefore not require any recalculations during the term of support. NTTA proposes that the Commission utilize the June 2015 FCC Form 477 deployment data to determine support amounts.⁵³ Under this approach, any carrier serving locations in census blocks on Tribal lands would be eligible, whether one percent or 100 percent of total locations. Participation would of course only make sense for those carriers with enough locations on Tribal lands that the additional support justified taking on additional deployment obligations.

As an example of how much funding would potentially be needed under this approach, NTTA members would receive just over \$6 million annually or approximately \$61 million over a 10 year term (See Table 1 below). We cannot say for certain how much funding would be made available for non-NTTA members utilizing this approach but we are confident the total would be

⁵² If it is possible, it would be ideal if there was a way to determine the per-line costs for the actual lines on Tribal lands rather than basing the calculation on the per-line average for all lines served by a carrier.

⁵³ Based on carrier-provided information in the National Broadband Map and data compiled by the National Exchange Carrier Association (NECA), NTTA estimates that the TBF would apply to approximately 75 rate-of-return carriers.

less than \$20 million annually and we suggest that the Commission cap total support at \$25 million annually.

Table 1⁵⁴

	Working Loops*	Percentage of working loops in census blocks on Tribal land	USF Support**	TBF Annual Support
Cheyenne River Sioux Telephone Authority	2,758	100	\$ 3,410,634	\$ 852,658.50
Fort Mojave Telecommunications, Inc.	886	100	\$ 2,029,327	\$ 507,331.75
Hopi Telecommunications, Inc.	1,731	100	\$ 977,105	\$ 244,276.25
Gila River Telecommunications, Inc.	3,365	100	\$ 8,499,470	\$ 2,124,867.50
Mescalero Apache Telecom, Inc.	1,238	100	\$ 2,870,399	\$ 717,599.75
Saddleback Communications	1,009	100	\$ 2,330,707	\$ 582,676.75
San Carlos Apache Telecommunications Utility, Inc.	2,613	100	\$ 1,908,364	\$ 477,091.00
Tohono O'odham Utility Authority	3,735	100	\$ 2,663,805	\$ 665,951.25
Total				\$ 6,172,453.00
* Information obtained from USAC USF disbursements				
** Disbursement data comprised of HCLS and ICLS funding levels from USAC's website				

In exchange for the voluntary acceptance of such funds, carriers would be expected to deploy broadband at higher speeds by the end of the ten-year term. NTTA previously proposed service obligations that includes buildout milestones at years three and five, ultimately resulting in deployment of service at 25/3 Mbps by year ten at different levels depending on present broadband availability.⁵⁵ We encourage the Commission to consider this proposal.

Alternatively, the Commission should consider the obligations imposed on carriers electing to receive model-based support in which service at 25/3 by the end of the ten-year term depends on

⁵⁴ Information on working loops from 2014 annual USAC high-cost loop filing.

⁵⁵ See Gregory W. Guice, Counsel, Gila River Telecomms., Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No 10-90, at 2 (filed Dec. 4, 2015). Note: some areas that are presently served will be unable to achieve the proposed speed obligations without further investment in costly middle mile infrastructure; thus, TBF support under this approach would be available for any capex costs necessary to meet the required service obligations, including to pay for middle mile connectivity.

the density of the carrier's service area.⁵⁶ As with option one above, carriers would be required to certify that all of the additional support received was used for investment in infrastructure serving Tribal lands.

Finally, the Commission should consider whether to implement both of the approaches above by requiring carriers eligible for option one to utilize the additional funding in order to meet their five-year buildout obligations or to voluntarily elect to receive increased support under option two in exchange for the enhanced buildout obligations. Under either option, the Commission should first look to the existing Connect America Fund ("CAF") reserves to fund the TBF.⁵⁷

The *Notice* observes that in the *USF/ICC Transformation Order* the Commission required ETC's to "meaningfully engage" with Tribal governments in their supported areas and asks whether the offer of additional voluntary Tribal-specific support "would encourage more robust ETC engagement by carriers with Tribal governments on whose lands they provide service."⁵⁸ Establishing Tribal-specific funding mechanisms is very likely to increase ETC engagement with Tribal governments. The Commission should take advantage of this opportunity to increase Tribal government engagement with carriers serving their lands through this process.

IV. CONCLUSION

The Commission has a significant opportunity to increase broadband deployment on Tribal lands by adopting rules consistent with the proposals put forth in these comments. While NTTA strongly supports Commission action consistent with these comments, we also remain

⁵⁶ See *Rate of Return Reform Order* ¶ 25.

⁵⁷ *Rate of Return Reform Order* Section IV.C.

⁵⁸ *Rate of Return Reform Order* ¶ 381.

willing to consider additional alternative proposals that will achieve our objective of accelerating broadband investment on Tribal lands.

Respectfully submitted,

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