

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Request for Review of the	)	CC Docket Nos. 96-45 and 02-6
Decision of the Universal Service	)	
Administrative Company or, in the	)	
Alternative, Request for Waiver	)	
	)	
Navajo Nation Diné	)	FRN: 0005013263/BEN 233673
Education Consortium	)	Form 471 App. Nos. 585247,
	)	586355
	)	Funding Request #s 1623407,
	)	1627256
	)	Funding Year: 2007

To: Chief, Wireline Competition Bureau

**REQUEST FOR REVIEW AND WAIVER**

**NAVAJO NATION DINÉ  
EDUCATION CONSORTIUM**

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## SUMMARY

The Navajo Nation is on the far side of the Digital Divide. It has worked hard over the past decade to overcome centuries of neglect. Through a generous grant from the Bill and Melissa Gates Foundation, over 1000 computers were made available for educational use, beginning in 2001. The Gates Foundation, in conjunction with the Navajo Nation government, determined that the best place for these computers was at the 110 Chapter Houses that serve multiple functions in Navajo cultural life, and constitute the only brick and mortar infrastructure that could serve as Libraries throughout the 27,000 square miles of the Navajo Nation.

The Navajo Nation Library Consortium was formed to execute Navajo law calling for the Chapter Houses to be the focus of community education efforts, and to extend the reach of the Navajo Nation Library. The Library Consortium Technology Plan provided the blueprint for this extension.

The Navajo Nation entered the E-rate program in FY 2003, and an outside 2006 KPMG audit for FY 2003 found the Navajo Nation to be in substantial compliance with FCC rules. Now, eight years after funding under E-rate began, USAC has issued Commitment Adjustment Letters (CALs) that unilaterally determine that the Chapter Houses do not qualify as “libraries” for purpose of E-rate funding, rejects the pending FY 2007 request for \$2,058,915.60.

USAC’s conclusion that the Navajo Chapter Houses do not qualify as libraries cannot stand. First, the conclusion violates the sovereign rights of the Navajo Nation to make its own determination of what constitutes a library. The Nation did so through a

statutory designation that USAC has no jurisdiction to overrule. Second, out of an abundance of caution, the Navajo Nation sought out and received acknowledgment letters from Arizona, New Mexico, and Utah. USAC exceeded its jurisdiction by rejecting those determinations as well.

Third, the definition of “libraries” under the 1996 Telecommunications Act is problematic, in that the Act initially referenced a definition from the Library Services and Construction Act (“LSCA”) that contained special provisions for dealing with Tribes. LSCA was repealed after the 1996 Act, and in codifying Section 254, Congress referenced the new Library Services and Technology Act (“LSTA”) which USAC has interpreted as altering the fundamental relationship between federal, state, and Tribal government. In short, USAC has applied a definition of “Library” that Congress did not intend.

Fourth, the FCC has acknowledged the need to bring telecommunications services to “anchor institutions” of the Tribes. For Navajos, the key anchor institution is the Chapter House. During FY 2007, the Chapter Houses functioned as libraries, and the Library Consortium used E-rate funding to extend the reach of the Navajo Nation library to the Chapter Houses through distance learning and education programs, as required by Navajo Nation statute.

USAC seeks rescission of funding based on a claim that the Master Agreement between the Navajo Nation and OnSat, the satellite provider of internet services, was not competitively bid. The evidence herein shows that the 2001 Master Agreement was competitively bid in an open process that included public presentations before the Tribal Council by two bidders. For FY 2007, the Nation complied with competitive bidding

regulations by filing an FCC Form 470 and posting its requirements. The Nation complied with the competitive bidding rules, as well as Navajo procurement law, by giving the greatest weight to price. Based on the price, proposed service offering and compliance with Navajo hiring preference requirements, OnSat was chosen as the provider, whereupon the Nation entered into a modification of the existing Master Agreement.

To the extent that a waiver of the rules is necessary, the Navajo Nation requests a waiver of the definition of a “Library” and of the competitive bidding rules. The Navajo Nation is one of the most challenging areas of the country in which to deliver telecommunications services. Many places lack basic infrastructure, including electricity. The special needs of the Navajo people, and the trust relationship between the federal government and tribes, should be taken into consideration to allow the core goal of the E-rate program to be realized. That goal is to assure Internet access to those whose economic circumstances place them on the far side of the Digital Divide.

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To: Chief, Wireline Competition Bureau

**REQUEST FOR REVIEW AND WAIVER**

The Navajo Nation Diné Education Consortium (“NNDEC” or “Beneficiary”) (BEN 233673), by its attorneys and pursuant to Sections 54.719(c) and 54.722(a) of the Commission’s rules,<sup>1</sup> hereby requests review of two (2) Commitment Adjustment Letters (“CALs”)<sup>2</sup> dated August 3, 2011, by the Universal Service Administrative Company (USAC), with respect to the above-referenced funding requests<sup>3</sup> by NNDEC for Funding

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<sup>1</sup> 47 C.F.R. §§ 54.719 & 54.722.

<sup>2</sup> The CALs consists of two separate documents, Notification of Commitment Adjustment Letters (“Notification”) and accompanying letters that explains the basis of the Notification (“CAL Explanation”). The CAL Explanation letters are all identical. The Nation was unable to locate the CAL Explanation letters bearing an August 3, 2011, so have appended as part of Attachment 1 the identical CAL Explanation Letter of July 22, 2011.

<sup>3</sup> It is critical to note that while the CAL Explanation discusses other funding years (*see, e.g.*, CAL, p. 13, referencing FY 2003, 2005, and 2006), and other requests for funding (*see, e.g.*, CAL, pp. 9-11, discussing the Navajo Nation Head Start centers which were funded by separate Forms 471 in 2005), the CALs only deny the Funding Requests listed in Chart 1. The current

Year (“FY”) 2007 under the Schools and Libraries portion of the Universal Service Fund (commonly referred to as the “E-rate Program”).<sup>4</sup> The chart below summarizes the CALs:

**Chart 1**

<u>Funding Request No</u>	<u>471 No.</u>	<u>Amount Sought to be Recouped</u>	<u>Amount Originally Requested but Never Funded</u>
1623407	585247		\$2,009,388.60
1627256	586355		\$49,527.00
Total			\$2,058,915.60

USAC denies the funding requests of NNDEC for \$2,058,915.60. This Request for Review (“Appeal”) is filed within sixty (60) days of the date that appears on the CALs and is therefore timely.<sup>5</sup>

The key findings of the CALs are that: 1) The Navajo Chapter Houses are not eligible for funding as libraries or as part of a library consortium; and 2) NNDEC violated the Commission’s competitive bidding rules. Because the first finding involves a novel interpretation of law that infringes the sovereignty of the Navajo Nation, NNDEC files this appeal directly with the Commission, rather than seeking reconsideration by USAC.

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appeal is limited to that denial, and the other allegations raised in the CALs will not be addressed unless they directly bear on those funding requests.

<sup>4</sup> A copy of the CAL Notifications and CAL Explanation Letter are appended hereto as Attachment 1. USAC previously issued a CAL for FY 2005, dated June 30, 2011, which is identical to the two CALs issued on August 3, 2011 for FY 2007. NNDEC timely appealed the June 30, 2011 CAL on August 29, 2011. Since the rescissions proposed by the August 3 CALs are based on the same rationale used in the June 30, 2011 CAL, NNDEC incorporates by reference its appeal of the June 30 CAL and hereby requests that the Wireline Competition Bureau refer to the August 29, 2011 filing for the exhibits. NNDEC will upload the exhibits and attachments again if so requested by the Bureau.

<sup>5</sup> 47 C.F.R. § 54.720. Once undersigned counsel receives confirmation of filing via ECFS, it will serve copies in electronic format to USAC, Schools and Library Division, and by mail to the last known address for OnSat.

USAC's authority to administer the E-rate Program is limited to implementing the Commission's rules and the interpretations of those rules established by applicable Commission precedent.<sup>6</sup> USAC is not delegated authority to make policy, render novel interpretations of Commission Rules, or establish new guidelines for the E-Rate Program.<sup>7</sup> USAC is responsible for "administering the universal support mechanisms in an efficient, effective, and competitively neutral manner."<sup>8</sup> The Commission's review of a USAC CAL is *de novo*.<sup>9</sup>

## I. **BACKGROUND**

### A. **The Need for Telecommunications Services In Indian Country Is Well Documented**

Before discussing the particular issues raised by the CALs, it will be useful to establish some context in which to understand those issues. As shown below, when the broader context is ignored, it is easy to lose sight of such critical considerations as tribal sovereignty, the trust relationship between federal and tribal governments and the essential purpose of the E-rate program.

Past communications policies of the United States bear witness to the legacy of repression and neglect inflicted on Native Americans. In the bifurcated jurisdiction between interstate and intrastate communications under the Communications Act of 1934, there has been little recognition of the sovereignty of Tribes. Interstate communications has been regulated by the Federal government; intrastate

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<sup>6</sup> 47 C.F.R. § 54.702(c).

<sup>7</sup> *Changes to the Board of Directors of the Nat'l Exchange Carrier Ass'n, Inc., Third Report and Order*, 13 FCC Rcd. 25058, 25066-67 (1998).

<sup>8</sup> 47 C.F.R. § 54.701(a).

<sup>9</sup> 47 C.F.R. § 54.723(b) ("The Federal Communications Commission shall conduct *de novo* review of requests for review of decisions issue[d] by the Administrator that involve novel questions of fact, law, or policy ....").

communications has been regulated by the states; but Tribal jurisdiction has been ignored, even when intrastate communications occur wholly on Tribal Lands. The “information age” has scarcely reached Tribal Lands, only 70 percent of which are served by Plain Old Telephone Service (“POTS”), as compared with near ubiquitous POTS service elsewhere in America (98%).<sup>10</sup> Over seventy-five percent (75%) of Navajos do not have access to broadband service via a wireline carrier, as compared to only 5.8% of the rest of the population.<sup>11</sup>

Because of the historic failure of the Federal government to make a place at the table for Tribes, the Navajos find themselves without effective 911 service, while the state of Arizona in 2009 returned \$8,655,700 of the \$17,460,160 collected (or almost exactly 50 percent) to the state general fund, apparently concluding that all Arizonans had access to 911 service.<sup>12</sup>

Broadband access on Tribal lands is dismal,<sup>13</sup> as the FCC now recognizes:

Available data, which are sparse, suggest that less than 10% of residents on Tribal lands have broadband available. The Government Accountability Office noted in 2006 that “the rate of Internet subscribership [on Tribal lands] is unknown because no federal survey has been designed to capture this information for Tribal lands.” But, as the FCC has previously observed, “[b]y virtually any measure, communities on Tribal lands have historically had less access to telecommunications services than any other segment of the population.” Many Tribal communities face significant obstacles to the deployment of broadband infrastructure, including high buildout costs, limited financial resources that deter investment by

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<sup>10</sup> As recently as 2000, POTS penetration in Navajo households was only 22 percent. See FCC “Fact Sheet Promoting Deployment/Subscribership in Underserved Areas, including Tribal and Insular Areas,” released June 8, 2000.

<sup>11</sup> See <http://www.broadbandmap.gov/summarize/native-nations/navajo-nation>.

<sup>12</sup> See *Second Annual Report to Congress on State Collection and Distribution of 911 and Enhanced 911 Fees and Charges*, issued August 13, 2010 (released August 16, 2010), p. 10.

<sup>13</sup> *Connecting America: The National Broadband Plan*, pp. 23, 146, released March 10, 2010, available for download at <http://www.broadband.gov/plan/>.

commercial providers and a shortage of technically trained members who can undertake deployment and adoption planning. Current funding programs administered by NTIA and RUS do not specifically target funding for projects on Tribal lands and are insufficient to address all of these challenges. Tribes need substantially greater financial support than is presently available to them, and accelerating Tribal broadband deployment will require increased funding.<sup>14</sup>

With the establishment of the Office of Native American Policy (“ONAP”), and the opening of several dockets focused on supporting deployment of telecommunications services to Indian Country,<sup>15</sup> the FCC is taking critical steps to focus on the needs of Native Americans. To understand the basis for this Appeal, however, one must realize how wide the “Digital Divide” is in the Navajo Nation and what limited resources exist, including bricks and mortar infrastructure. The lack of conventional infrastructure has a special bearing on the existence and nature of “libraries.”

**B. The Navajo Nation is on the Far Side of the Digital Divide**

As the largest native nation in the United States (in both population and reservation size), the Navajos have been particularly disadvantaged by Federal and state communications policies. The Navajo Nation consists of 17 million acres (26,111 square miles) in portions of three states (Arizona, New Mexico, and Utah). As the chart below indicates, it is comparable in size to West Virginia, which is considered a rural state, ranked 29<sup>th</sup> in population density. Were it a state, the Navajo Nation would rank 41<sup>st</sup> in

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<sup>14</sup> *Id.* at p. 146 (Box 8-3)(footnotes omitted).

<sup>15</sup> See e.g., *Improving Communication Services for Native Nations by Promoting Greater Utilization of Spectrum Over Tribal Lands*, WT Docket No. 11-40; *Improving Communications Services for Native Nations*, CG Docket No. 11-41.

geographic size but would rank 4<sup>th</sup> smallest in population density; only Montana (6.5 persons per square mile), Wyoming (5.4) and Alaska (1.2) are less densely populated.<sup>16</sup>

<i>Table 1: Geographic and Pop. Comparison</i>	Navajo Nation	West Virginia
Size (miles squared)	26,111	24,231
Population (in area)	~180,000	1,818,470
Pop per square mile	6.9	75

The 2009-2010 Comprehensive Economic Development Strategy of the Navajo Nation (“CEDS”) summarizes Navajo Nation economic data including budget figures, primary sources of revenue, major employers, poverty, employment and unemployment figures.<sup>17</sup> According to the CEDS, in 2007 the unemployment rate for the Navajo Nation was five times higher than the unemployment rate of the highest ranked U.S. State (Rhode Island at 10%), increasing from 42.16% in 2001 to 50.52% in 2007.<sup>18</sup> In 2007, the percentage of Navajo people on the Navajo Nation living below the federal poverty level was 36.76%.<sup>19</sup>

The FCC’s Broadband Map indicates that 40.2% of the Navajo population currently has no access to wireless service while the national average for those without wireless access is 1.5%.<sup>20</sup> Wireless broadband is available to 53.4% of the Navajo population while the national average availability is 96.9%. In an April 25, 2011 study, titled “Verification Analysis of the National Broadband Map,” IDinsight produced data

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<sup>16</sup> Compare [http://en.wikipedia.org/wiki/List\\_of\\_U.S.\\_states\\_by\\_area](http://en.wikipedia.org/wiki/List_of_U.S._states_by_area) (states ranked by geographic area) with [http://en.wikipedia.org/wiki/List\\_of\\_U.S.\\_states\\_by\\_population\\_density](http://en.wikipedia.org/wiki/List_of_U.S._states_by_population_density) (states ranked by population density).

<sup>17</sup> 2009-2010 Comprehensive Economic Development Strategy of the Navajo Nation (“CEDS”), available at [http://www.navajobusiness.com/pdf/CEDS/CED\\_NN\\_Final\\_09\\_10.pdf](http://www.navajobusiness.com/pdf/CEDS/CED_NN_Final_09_10.pdf).

<sup>18</sup> CEDS at 20.

<sup>19</sup> *Id.* at 23.

<sup>20</sup> <http://www.broadbandmap.gov/summarize/native-nations/navajo-nation>.

coverage maps for the State of Arizona.<sup>21</sup> Those maps show huge areas of the Navajo Nation empty – meaning that there are no data as to service availability.

Unless someone has spent a substantial amount of time on the Navajo Nation, it is impossible to comprehend three critical factors: 1) its sheer size; 2) the lack of population density; and 3) the absence of fundamental infrastructure. To understand the challenges the Navajo Nation faces, one needs to compare the Navajo Nation to the District of Columbia and two U.S. States that most resemble it in size, West Virginia and South Carolina. As the table below demonstrates, the Navajo Nation’s population density is 10-20 times lower than its nearest state in size, and 1000 times lower than the District of Columbia, where there is a library branch every 2.4 square miles. The 110 Chapter House libraries roughly coincide with the number of library and library branches in comparably sized states such as South Carolina and West Virginia.<sup>22</sup>

**Table 2: Comparison of Nation Size and Population to Other States and D.C.**

	Navajo Nation	South Carolina	West Virginia	District of Columbia
Size (miles squared)	26,111	31,117	24,231	68.3
Population (in area)	~180,000	4,321,249	1,818,470	581,530
Pop per square mile	6.9	139	75	8514
Counties/Chapters	110	46	55	1
Pop per county	1,591	93,940	33,063	581,530
Public Libraries	110	180 <sup>23</sup>	175 <sup>24</sup>	28 <sup>25</sup>
Square miles per Library	237	173	138	2.4

<sup>21</sup> The study is available for download at: [http://idinsight.com/documents/Verification\\_Analysis\\_of\\_National\\_Broadband\\_map.pdf](http://idinsight.com/documents/Verification_Analysis_of_National_Broadband_map.pdf).

<sup>22</sup> When the Gates Foundation gave its initial grants to the Navajo Nation, there were 108 Chapter Houses. Three Chapter Houses were subsequently built and brought into the NAATP program, but one Chapter House (Nageezi) burned down in 2005, leaving 110 Chapter Houses for FY 2007, the subject of this proceeding.

<sup>23</sup> Source: <http://www.publiclibraries.com/southcarolina.htm>.

<sup>24</sup> Source: <http://www.publiclibraries.com/westvirginia.htm>.

<sup>25</sup> Source: <http://www.publiclibraries.com/dc.htm>.

In short, all relevant statistics show that the Navajo (Diné) people reside on the far side of the “Digital Divide.” By effectively excluding the Navajo Nation from the E-rate program, the instant CALs would permanently deepen that Divide.

**C. The Gates Foundation’s Native American Access to Technology Program (NAATP) and Global Libraries Program**

While the Digital Divide may be widening as the rest of America gains access to greater bandwidth and faster speeds, the Navajo Nation has not been inactive. Beginning in 2000, the Nation received a total of \$6,135,285 from the Bill and Melinda Gates Foundation to install computers in each of the then 108 (now 110) Chapter Houses on the Nation through the Gates Native American Access to Technology Program (“NAATP”) (the “Gates Grants”).<sup>26</sup> The Gates Foundation recognized the Chapter Houses as the only brick and mortar infrastructure capable of serving as libraries to house the computers. Bringing connectivity to the Chapter Houses was a challenge ten years ago when broadband deployment on the Navajo Nation was even worse than it is today. As the Gates Foundation found in 2001:

The range of ‘preparedness’ for technology within the 160 NAATP sites [including all 108 Navajo Chapter House] is considerable, perhaps greater than within the U.S. Library Program, with urban tribes generally (but not always) exhibiting greater preparedness than rural tribes. Rural tribes typically are very interested, but have little to no infrastructure or experience with technology; urban tribes are more likely to have solid infrastructure bases and well developed technology systems.<sup>27</sup>

The Gates Foundation consistently regarded the Chapter Houses as libraries.

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<sup>26</sup> See Attachment 2, “Navajo Nation Response to USAC,” filed with USAC on December 8, 2008, Exhibit 1, “Native American Access to Technology Program: Progress Report, A Report to the Bill & Melinda Gates Foundation” (“Gates Report”).

<sup>27</sup> *Id.*, pp. 3-4.

- “There is widespread evidence of leveraging by the tribes of their partnership with the Gates Foundation to secure additional funding for other needs, including enhancement of libraries, renovation of buildings, or completely new buildings.”<sup>28</sup>
- The 2001 Gates Foundation recommended that “in response to tribal interests, incorporate more educational software for young adults and adults (e.g., adult literacy programs, Math Blasters, SAT Improver).”<sup>29</sup>
- “Unfortunately, some tribal librarians report a general lack of support for basic library functions, not to mention additional help to support the NAATP machines. Even before the computers arrived, many tribal librarians felt they needed more staff to handle the needs of the community. While the computers are much appreciated, many librarians – especially those that have been tribal librarians for 25 years or more – feel overloaded by new computer-associated demands and feel they do not have the time or expertise to adequately help patrons.”<sup>30</sup>
- “The New Mexico State Library classifies the tribal libraries as ‘certified,’ ‘developing’ or ‘potential;’ the last category that brings little state support. Truly excellent libraries in Indian Country have been the exception rather than the rule. There are signs that telecommunications and computers will spur commitments and action that will improve the libraries, and move those in the ‘developing’ and ‘potential’ stages to higher levels. Thus this new opportunity is both a challenge and a catalyst, pushing the communities to come up with plans for technology uses.”<sup>31</sup>
- The Gates Foundation continued to assist funding of connectivity to the Chapter Houses under their “Global Libraries Program” in 2004 and again in 2006.<sup>32</sup>

The Navajo Nation accepted the gift of the Gates Grants with the understanding that the Chapter Houses were considered libraries, and that the NAATP computers would be used in conjunction with library activities: “This gift is accepted with the understanding that it will be used to expand public access to computers and the Internet and, to the extent each of the Navajo Chapters listed in Exhibit A is participating in a

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<sup>28</sup> *Id.*, p. 5.

<sup>29</sup> *Id.*, p. 6.

<sup>30</sup> *Id.*, p. 18.

<sup>31</sup> *Id.*

<sup>32</sup> Attachment 2, Exhibit 3 (March 2, 2006 letter from Gates Foundation to Navajo President Joe Shirley Jr.).

library cataloging program co-sponsored by the Foundation and the New Mexico State Library, to provide such Navajo Chapter with library cataloging software and hardware.”<sup>33</sup>

In 2001 The Gates Foundation sought out providers of connectivity for the NAATP project through a competitive bidding process. As the 2001 Gates Foundation Report makes clear, the number of potential qualified vendors was small:

After working with a number of vendors, NAATP narrowed down the viable providers to two firms. (Others were interested, but pulled out for various reasons such as too few sites, unwillingness to adjudicate possible disputes in tribal courts, and the inability to make alterations to accommodate NAATP machines.) Both providers presented to the Navajo Division of Community Development and the Navajo Tribal Council. Based on the presentations, the Navajo Nation decided to contract with OnSat Network Telecommunications. At this point, the second provider declined to offer their product to other southwest tribes and NAATP has worked exclusively with OnSat since then.<sup>34</sup>

In November, 2001, the Nation was presented with OnSat’s standard form contract (the “Master Agreement”).<sup>35</sup> Through a series of amendments, the Master Agreement governed their relationship through FY 2007. This Master Agreement was also the contracting vehicle used by multiple departments of the Navajo Nation to receive satellite connectivity from OnSat. These departments included NNDEC, Navajo Nation Head Start, the Navajo Nation Office of President and Vice President, the Navajo Nation Department of Public Safety, and the Navajo Nation Department of Emergency Management.<sup>36</sup>

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<sup>33</sup> Attachment 2, Exhibit 3 (December, 2001 letter from Navajo President Kelsey A. Begaye to Ms. Patty Sonesifer, Co-Chair and President, Bill & Melinda Gates Foundation).

<sup>34</sup> *Id.*, p. 14.

<sup>35</sup> See Attachment 2, Exhibit 4.

<sup>36</sup> See Attachment 2, pp. 8-9 (chart summarizing OnSat Master Agreement and which Navajo Nation agencies utilized this Master Agreement).

**D. NNDEC's Initial Participation in the E-rate Program and the KPMG Audit**

Following the advice of the Gates Foundation, the Navajo Nation formed NNDEC (BEN 233673) to apply to the FCC E-rate program, beginning in FY 2003. NNDEC followed the E-rate procedures by filing and posting an FCC Form 470. When bids were solicited, OnSat was the only service provider who responded, and OnSat was specified in the Form 471. For FY 2003, payments under the E-Rate program were made directly to OnSat.

USAC engaged KPMG to conduct an audit of the Navajo Nation's participation in the E-rate program for FY 2003.<sup>37</sup> The KPMG Audit states: "The scope of this engagement included, but was not limited to, reviewing the Beneficiary's processes for program application, service provider selection and contracting, and program cost reimbursement."<sup>38</sup> The KPMG Audit described the Chapter Houses as libraries. "Further, we performed site visits at nine of the Beneficiary's 111 libraries. During those site visits, we determined that the selected libraries currently had Internet access, which was the service funded for FY 2003 under the selected Beneficiary-wide FRN."<sup>39</sup>

In the "Summary of Results" section, KPMG reports:

Based on the audit procedures performed and for the transactions tested, we conclude that the Beneficiary was generally compliant with the Rules identified above for FY 2003, and we identified improper payments of \$28,722. In addition, the results of our audit procedures disclosed two audit

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<sup>37</sup> See Attachment 4, Letter of February 7, 2006, from KPMG to USAC ("KPMG Audit").

<sup>38</sup> *Id.*, p. 2.

<sup>39</sup> *Id.*, p. 3. See also *Id.*, p. 4 (NNDEC "is comprised of 111 libraries located through the Navajo Nation"); p. 11 ("We selected the Beneficiary's libraries identified in Table 3 below for site visits").

findings and one beneficiary-specific other matter, which are reported herein.<sup>40</sup>

The audit found no improprieties in the selection of OnSat as service provider or in the USAC-prescribed contracting process, including competitive bidding rules.<sup>41</sup>

KPMG did make two Audit Findings:

- 1) At the time it filed its FCC Form 470, the Beneficiary did not have an approved budget for its non-discounted portion of the funding.<sup>42</sup> KPMG attributed this fact to the slow process for obtaining approval of the Gates Grant and for obtaining budget approval within the Navajo Nation. More importantly, KPMG concluded that “[t]here is no monetary effect from this audit finding, since all non-discounted costs were paid by the Beneficiary to the service provider.”<sup>43</sup> “The fact that Navajo Nation Library Consortium paid its non-discounted share indicates they had the resources; therefore, no recovery is required. USAC concurs with this audit finding.”<sup>44</sup>
- 2) The Beneficiary understated the discount rate at 85% when it could have received an 86% discount.<sup>45</sup> “The monetary impact as a result of this audit finding was \$28,722, which represents the additional funding the Beneficiary

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<sup>40</sup> *Id.*, p. 3.

<sup>41</sup> *Id.*, pp. 9-10 (“we obtained an understanding of the Beneficiary’s service provider selection and contracting process, including the related competitive bidding activities, through discussions with Beneficiary personnel and review of documentation provided by the Beneficiary”).

<sup>42</sup> *Id.*, pp. 13-14. *But see, Id.*, p 15, where KPMG found that the \$28,722 amount is in fact the additional amount the Beneficiary should have applied for, and USAC should have paid, because the Beneficiary underestimated slightly the discount rate to apply (85% discount applied for when in fact it was entitled to use an 86% discount rate). This was *not* an amount that KPMG concluded USAC should seek to collect back from the Beneficiary.

<sup>43</sup> *Id.*, p. 13.

<sup>44</sup> *Id.*, p. 14.

<sup>45</sup> *Id.*, p. 15.

would have received from SLSM had the Beneficiary applied the 86% discount rate.”<sup>46</sup>

#### **E. History of This Proceeding**

##### **1. Special Review by the Navajo Nation Auditor**

The relationship between the Navajo Nation and OnSat began to deteriorate sometime in 2005 or early 2006 (during the end of FY 2004 and beginning of FY 2005). NNDEC began receiving more and more complaints that service to the Chapter Houses was slow or went down often.<sup>47</sup> The Navajo Nation auditor also received complaints that OnSat was attempting to circumvent Navajo Nation accounting (accounts payable) procedures.

Standard accounting practices require vendor invoices to be submitted independently to the approving authority, generally the department manager and accounting manager, for proper review and approval. Thereafter, the approved invoices should be sent independently to accounts payable for payment processing and when the check is prepared, it should be mailed directly to the vendor.<sup>48</sup>

Contrary to these procedures, OnSat allegedly pressured Navajo Nation employees, including high ranking officials, to pay OnSat invoices (for the non-discounted portion of E-rate funding and for services provided to other Nation government entities under the Master Agreement), presented in person by OnSat personnel, including its principal, Dave Stephens. Based on this information, the Navajo Nation’s Auditor General began an investigation which culminated with the “Special

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<sup>46</sup> *Id.*

<sup>47</sup> See Attachment 2, pp. 17-19 and Exhibit 17 (*e.g.*, speed tests conducted in September, 2005 showed extremely slow data speeds at four Chapter House libraries).

<sup>48</sup> See Attachment 3, p. 8. Because the Special Review is the subject of litigation in Federal District Court in New Mexico, which has issued an injunction against its public release, Attachment 3 is being submitted separately under a request for confidentiality.

Review,” issued January 26, 2007. It is critical to note that the Special Review focused on potential violations of Navajo procurement and contract law, and was conducted by a Navajo Nation Auditor who had little, if any, understanding of the E-rate program, or E-rate rules.<sup>49</sup>

## 2. USAC Inquiry

On March 28, 2008, USAC informed the Navajo Nation that it would withhold payment on invoices from OnSat.<sup>50</sup> USAC’s letter also requested responses from the Nation based on the Navajo Nation Auditor General’s Special Review.<sup>51</sup> Undersigned Counsel were retained to conduct an investigation of the Nation’s participation in the E-rate program and independently assess the findings of the Special Review. As USAC withheld payments to OnSat under the E-rate program, OnSat threatened to shut off all service to the Nation, including satellite data services provided to the Navajo Nation Office of President and Vice President, the Navajo Nation Department of Public Safety, and the Navajo Nation Department of Emergency Management under separate modifications to the Master Agreement. Based on conversations between USAC and the Navajo Nation Office of the President and Vice President (including with then-President Joe Shirley, Jr., himself), USAC for the first time questioned whether the Navajo Chapter Houses qualify as libraries.<sup>52</sup> On or about April 7, 2008, OnSat shut down virtually all

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<sup>49</sup> Indeed, there are several places in the December, 2008 Navajo Nation Response to USAC (Attachment 3), where undersigned counsel pointed out significant errors in the Special Review related to the E-rate program. *See, e.g.*, Attachment 3, pp. 27-33.

<sup>50</sup> Attachment 1, p. 1. This withholding applied to FY 2006 Funding Requests 1484785, and 1487823, totaling \$2,256,189.30, and the FY 2007 Funding Requests at issue here.

<sup>51</sup> *See* Attachment 3.

<sup>52</sup> *See* Attachment 1, p. 2.

service to the Navajo Nation, including services that should have been supported by the E-rate program, but for which USAC was withholding funding.<sup>53</sup>

### 3. Navajo Nation Response

On December 8, 2008, the Navajo Nation provided its report (the “Nation’s Response to USAC”) on its participation in the E-rate program, and responded to USAC’s questions concerning the Special Review.<sup>54</sup> The issues addressed in the Nation’s Response to USAC go far beyond the issues raised by the CALs, which properly relates solely to FY 2007 E-rate funding for NNDEC. The Nation’s Response to USAC did, however, address the question as to whether the Chapter Houses qualify as libraries for E-rate purposes,<sup>55</sup> and whether E-rate supported services were used by other government entities.<sup>56</sup>

The Nation’s Response to USAC reported several concerns, especially about actions by OnSat that made it contractually difficult for the Nation to monitor OnSat services or to object to OnSat’s failure to deliver services under the terms of the Master Agreement.<sup>57</sup> The Nation’s Response to USAC also proposed a number of steps to strengthen future compliance with E-rate rules.<sup>58</sup> The “immediate first steps” included removing Ernest Franklin from his position as the Beneficiary’s E-rate coordinator and Executive Director of the Navajo Nation Telecommunications Regulatory Commission

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<sup>53</sup> Some of the Chapter Houses that had contracted separately with OnSat for service for their administrative offices (not via the Master Agreement) retained service.

<sup>54</sup> See Attachment 2.

<sup>55</sup> See *Id.*, pp. 33-36.

<sup>56</sup> See *Id.*, pp. 36-37.

<sup>57</sup> *Id.*, pp. 2-10.

<sup>58</sup> *Id.*, pp. 48-51.

(“NNTRC”), the appointment of a Special Prosecutor to investigate any violations of Navajo law, and a commitment to terminate contractual relations with OnSat.<sup>59</sup>

#### **4. USAC’s Visit to the Navajo Nation**

USAC representatives visited the Navajo Nation July 21-23, 2009.<sup>60</sup> What was originally billed as a HATS (Helping Applicants To Succeed) outreach initiative,<sup>61</sup> turned out to be a full-fledged investigation, including a visit to twelve (12) Chapter House libraries.<sup>62</sup> Undersigned counsel accompanied both USAC representatives and Nation employees on ten of the twelve Chapter House visits. These Chapter Houses included some of the most remote on the Navajo Nation, including the Mexican Water Chapter House (in Arizona just a few miles from the Utah border)<sup>63</sup> and the Casamero Lake Chapter House (in New Mexico on the far eastern edge of the Navajo Nation).<sup>64</sup> Arriving unannounced at each Chapter House, USAC representatives questioned any Chapter House employee present as to whether the Chapter Houses functioned as libraries,

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<sup>59</sup> *Id.*, p. 48.

<sup>60</sup> See Attachment 1, p. 2.

<sup>61</sup> See <http://www.usac.org/sl/about/hats-outreach/default.aspx> (description of USAC “HATS” program).

<sup>62</sup> It is important to note that by the time of the USAC visit, more than fifteen months after OnSat shut off service in April, 2008, some of the computer equipment had been moved or repurposed, since without E-rate support, the Chapter Houses could not continue to maintain the library computer labs. Further, given the controversy that swirled around OnSat by July 2009, the high profile reporting of the cessation of service, and OnSat’s lawsuit against the Nation to attempt to force the Auditor to withdraw her Special Report, it is little wonder that many of the Chapter Houses wanted nothing more to do with the library computer labs, or the E-rate program, notwithstanding the vital role they played in helping bridge the Digital Divide, especially for young Navajos.

<sup>63</sup> There were only 815 enrolled members of the Mexican Water Chapter as of the 2000 census. See <http://mexicanwater.ndes.org/cms/kunde/rts/mexicanwaterndesorg/docs/293108790-08-10-2005-14-23-14s.pdf>.

<sup>64</sup> The Casamero Lake Chapter had 549 enrolled members according to the 2000 census. See <http://casamerolake.ndes.org/cms/kunde/rts/casamerolakenndesorg/docs/450680520-01-10-2003-10-50-04e.pdf>.

whether there was separate connectivity for administrative uses, and whether the library computers were available “after hours.”<sup>65</sup>

## **5. Subsequent Navajo Nation Actions**

In the Fall of 2009, the Navajo Tribal Council appointed a special prosecutor to investigate the OnSat contracts and briefly placed Navajo Nation President Joe Shirley, Jr. on administrative leave. That decision was overturned by a Window Rock District Court decision.<sup>66</sup> To date, after almost two years of investigations, there have been no indictments of anyone connected with the OnSat contracts by the Navajo Special Prosecutor. More than three years after the close of FY 2007, there have been no Federal indictments of any individuals regarding the Nation’s participation in the E-rate program.

## **II. ARGUMENT**

### **A. The CALs are Overbroad**

As indicated at the outset, the August 3, 2011 USAC CALs involve *only* the FY 2007 applications of the Navajo Nation Diné Education Consortium, as indicated in Chart 1. USAC seeks to deny two funding requests totaling \$2,058,915.60. The CALs are overbroad in two respects. First, they address issues related to funding for Navajo Nation Head Start (a completely separate beneficiary, which has not received a separate CAL). Second, they address issues related to Funding Years other than 2007. USAC’s shotgun approach should not be countenanced. USAC’s decision to deny funding for a particular

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<sup>65</sup> The response of the Mexican Water Chapter House administrator was particularly enlightening. In response to the question of whether the Internet was ever made available after normal hours, she apologetically responded that yes, she did sometimes stay late so that two young men who were completing their college degrees could work on assignments, since the next closest computers available to them were in Shiprock, NM, some 65 miles away.

<sup>66</sup> *Office of the Navajo Nation President and Vice President, et al, v. the Navajo Nation Council*, WR-CV-512-09 (W.R. Dist. Ct. 2009).

program in a particular funding year should be without prejudice to funding for other programs or other funding years. In short, a CAL should address solely the specific funding request it seeks to rescind. This Appeal is therefore limited to issues related to the FY 2007 funding requests by NNDEC.

**B. The Navajo Chapter Houses Qualify As Libraries**

The principal basis for denying FY 2007 E-rate funding to NNDEC is that Navajo Chapter Houses do not qualify as libraries for purposes of the E-rate program. Half of the identical CALs are dedicated to explaining USAC's conclusions based on its "observations" and "interviews" concerning the Chapter Houses.<sup>67</sup> The gist of those observations is that in 2009, when USAC officials visited the Navajo Nation, the Navajo Chapter Houses did not *look* like traditional libraries to those USAC officials. Based on that perception, USAC more than three years after the close of the 2007 funding year concludes that the Chapter House libraries were not eligible for E-rate support.

**1. Requiring the Navajo Nation to Receive State Acknowledgement that Its Libraries Qualify for E-rate Support Violates the Sovereign Rights of the Navajo Nation**

The relationship between Federal, state, and Tribal governments is complex. Under the Constitution, Congress was granted the power to "regulate Commerce . . . with the Indian Tribes,"<sup>68</sup> while the President was empowered to make treaties, necessarily including Indian treaties, with the consent of the Senate.<sup>69</sup> In most areas, the Federal government preempts the states with respect to Tribes, yet Tribes occupy lands located within states. That dichotomy creates a longstanding tension between state and federal

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<sup>67</sup> Attachment 1, CAL Explanation Letter, p. 9.

<sup>68</sup> U.S. Const. Art. I, § 8, cl. 3.

<sup>69</sup> U.S. Const. Art. II, § 2, cl. 2.

law. Almost from the beginning of the country, the Supreme Court had to deal with the jurisdictional relationship between states and Tribes. In *Cherokee Nation v. Georgia*,<sup>70</sup> Chief Justice Marshall concluded that Tribes (at least those residing on reservations) were akin to states. The next term, in *Worcester v. Georgia*,<sup>71</sup> Justice Marshall elaborated on the status of Tribes with respect to states and state laws. There, several missionaries convicted of entering the Cherokee Nation without first obtaining a license from the state governor appealed their convictions. The Supreme Court overturned the convictions, concluding that the course of relations between the Federal government and the Cherokees provided ample evidence that the Federal government “manifestly consider[s] the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive.”<sup>72</sup> He went on: “The Cherokee nation, then, is a distinct community, occupying its own territory, with the boundaries accurately described, in which the laws of Georgia have no force.”<sup>73</sup> Although Indian law jurisprudence is anything but static, one principle has remained remarkably consistent: over matters that occur wholly within reservations, and affect only Tribal members, and relate to issues over which Tribes have asserted jurisdiction, the states have little or no role.<sup>74</sup> Indeed, any Federal law delegating to states jurisdiction of internal tribal determinations concerning tribal institutions clearly detracts from tribal self-government.

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<sup>70</sup> 30 U.S. (5 Pet.) 1 (1831).

<sup>71</sup> 31 U.S. (6 Pet.) 515 (1832).

<sup>72</sup> *Id.* at 557.

<sup>73</sup> *Id.* at 561.

<sup>74</sup> See *Williams v. Lee*, 358 U.S. 217 (1958); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) (state law cannot be extended into reservations where to do so would interfere with the functioning of Tribal governments); *McClanahan v. Arizona Tax Comm’n*, 411 U.S. 164 (1973) (state of Arizona could not tax a Navajo’s personal income derived from work on the Navajo nation).

Thus, the general rule for interpreting federal statutes affecting tribal jurisdiction is that tribal sovereignty and self-government are preserved unless a contrary intent of Congress is clear and explicit.<sup>75</sup>

The Navajo Nation has asserted jurisdiction over the education of Navajos, and over cultural preservation, especially the preservation of the Navajo language. Further, the Nation has statutorily determined that the Chapter Houses will be the focus of educational efforts. “*Educational . . . activities of the local community shall be centered in the chapter houses . . . [and] . . . chapter houses . . . shall be used for a variety of purposes such as adult education . . .*”<sup>76</sup> The purpose of the Office of the Navajo Nation Library, established within the Division of Diné Education, is “to provide educational, informational, cultural and recreational materials and services to *all* residents of the Navajo Nation.”<sup>77</sup> Because a single location on the Navajo Nation cannot serve a population spread across almost 27,000 square miles, the Office of the Navajo Nation Library therefore has the responsibility to “work with . . . chapters . . . to support . . . access to . . . Library services and resources” and “[t]o actively seek, secure and transport

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<sup>75</sup> See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980) (“Ambiguities in federal law have been construed generously in order to comport with [ ] traditional notions of [tribal] sovereignty and with the federal policy of encouraging tribal independence”; see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60 (1978) (federal statutes will not be interpreted to “interfere[] with tribal autonomy and self-government . . . in the absence of clear indications of legislative intent”); see *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767-68, 105 S.Ct. 2399, (1985) (“[t]he canons of construction [of statutes] applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians . . . [and] statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit”).

<sup>76</sup> 6 N.N.C. § 1 (emphasis added).

<sup>77</sup> Navajo Nation Library Plan of Operation, Section II, Resolution No. GSCAP-35-01 of the Government Services Committee of the Navajo Nation Council (2001) (emphasis added).

donations of books and non-book materials to local communities and Navajo Nation chapters.”<sup>78</sup>

Exclusive jurisdiction over internal governmental affairs is a fundamental aspect of self-government, and the general rule preserving tribal authority over any determination of the nature of its tribal institutions should be applied in this case. Requiring the Navajo Nation to seek approval of the designation of Chapter Houses as libraries from three separate states (Arizona, New Mexico and Utah) undercuts the Nation’s authority, violates its rights as a sovereign nation and its treaty rights, and is constitutionally offensive. In the same manner as states designate libraries for themselves, the Navajo Nation has designated Chapter Houses as libraries and mandated that the Office of the Navajo Nation Library work with Chapter Houses to provide library and educational services. The inquiry should end there.

## **2. The Chapter Houses Qualify as a “Library” under FCC Rules**

Section 54.400(d) of the FCC’s Rules contains a multi-pronged definition of “library.” The definition includes a “library,” a “library consortium” and “a private library, but only if the state in which such private library is located determines that the library should be considered a library for the purposes of this definition.”<sup>79</sup> As the CALs acknowledge, the Navajo Nation and the states of Arizona, New Mexico and Utah determined that the Chapter Houses were libraries. Although the Nation does not believe that it is required by Federal law to obtain state acknowledgement of its Chapter Houses as libraries it sought and received acknowledgement letters from the states of Arizona,

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<sup>78</sup> *Id.* at Section IV.

<sup>79</sup> 47 C.F.R. § 54.500(d). USAC incorrectly accords this definition statutory authority in quoting it at pages 3-4 of the CAL Explanation Letter, and then citing to “47 U.S.C. §54.500(d), (d).”

New Mexico, and Utah.<sup>80</sup> Under existing FCC rules, state and tribal determinations of a “library” are decisive.

USAC points to no authority under which it is empowered to look behind such determinations. There is no Commission precedent for disregarding state letters and tribal determinations and denying E-rate funding based on observations of USAC personnel. There is a good reason for the lack of precedent on this issue. As discussed below, USAC’s application of the statutory definition of “library” entails a novel interpretation of the Communications Act that far exceeds USAC’s authority, especially when read in the context of the Federal trust responsibility and government-to-government relationship with Indian tribes.

### **3. The Statutory Definition of “Library”**

The 1996 Telecommunications Act that extended the E-rate program to libraries does not contain a definition of a “library.” Instead, the Act references the definition of “library” contained in the Library Services and Construction Act (LSCA). The LSCA was enacted in 1962 and amended in 1984 by Public Law 98-480 (Library Services and Construction Act Amendments of 1984) to specifically address the needs of Tribes.

Section 2(a) of the amended LSCA reads as follows:

Sec. 2. (a) It is the purpose of this Act to assist the States in the extension and improvement of public library services to areas and populations of the States which are without such services or to which services are inadequate *and to assist Indian tribes in planning and developing library services to meet their needs.*<sup>81</sup>

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<sup>80</sup> See CAL Explanation Letter, pp. 4-6 (acknowledgement by USAC that the Beneficiary received acknowledgment letters from Arizona, New Mexico and Utah).

<sup>81</sup> Pub. L. 84-480 (1984) (emphasis added), appended hereto as Attachment 5.

The 1984 LSCA Amendments established a new Title IV, “Library Services for Indian Tribes,” which found that: “Indian tribes and reservations are generally considered to be separate nations and seldom are eligible for direct library allocations from States.”<sup>82</sup> To this end, Congress concluded:

It is therefor [sic] the purpose of this title (1) to promote the extension of public library services to Indian people living on or near reservations; (2) to provide incentives for the establishment and expansion of tribal library programs; and (3) to improve the administration and implementation of library services for Indians by providing funds to establish and support ongoing library programs.<sup>83</sup>

LSCA placed Tribes on equal or near-equal footing with states,<sup>84</sup> and set aside appropriations for Tribes.<sup>85</sup> It also recognized and approved the use of libraries *“to serve as community centers for information and referral.”*<sup>86</sup>

Congressional intent was clear. When Congress enacted the 1996 Telecommunications Act (“1996 Act”) to extend Universal Service Fund support, it looked to the LSCA and its history to define what constituted a “library,” and to recognize that Tribes are sovereign nations whose needs were not adequately addressed by the conventional approach to library funding. The 1996 Act was signed into law by President Clinton on February 8, 1996. The versions of the 1996 Act posted on the FCC’s website still reference the LSCA definition of a “library.”<sup>87</sup>

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<sup>82</sup> *Id.*, Sec. 114.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* Sec. 105(a) (inserting “and Indian Tribes” after “States” in the heading of Section 5 of the Act).

<sup>85</sup> *Id.* Sec. 105(c)(1).

<sup>86</sup> *Id.* Sec. 110 (emphasis added).

<sup>87</sup> *See* <http://transition.fcc.gov/telecom.html>

A problem of statutory interpretation arises with the repeal of LSCA by Congress a few months after the 1996 Act was passed. The problem is compounded by the Omnibus Consolidated Appropriations Act of 1997,<sup>88</sup> a 750 page bill that contained hundreds of technical corrections to various statutes. The 1997 Appropriations Act shifts the definition of “library,” to which Section 254(h) of the Communications Act refers, from LSCA to the Library Services and Technology Act (LSTA), enacted later in 1996.<sup>89</sup> The LSTA definition of “library”<sup>90</sup> does not include specific findings with respect to Tribes, Tribal rights, or the interplay between states and Tribes. Section 9161, “Services for Native Americans,” states simply:

From amounts reserved under section 9131 (a)(1)(A) of this title for any fiscal year the Director shall award grants to Indian tribes and to organizations that primarily serve and represent Native Hawaiians (as the term is defined in section 7517 of this title) to enable such tribes and organizations to carry out the activities described in section 9141 of this title.”<sup>91</sup>

The FCC recognized the interpretive issue in its 1997 Order implementing the schools and library program:

Section 254(h)(5) does not include an explicit definition of libraries eligible for support. Rather, in section 254(h)(4)'s eligibility criteria, Congress cited LSCA. The Joint Board, therefore, used the definition of library found in Title III of the LSCA. In late 1996, however, Congress amended section 254(h)(4) to replace citation to the LSCA with a citation to the newly enacted LSTA. In light of this

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<sup>88</sup> Pub. L. 104-208. Available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104\\_cong\\_public\\_laws&docid=f:publ208.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_public_laws&docid=f:publ208.pdf). Undersigned counsel can find no legislative history connected with this change. *See* <http://www.access.gpo.gov/congress/legislation/97appro.html> (Government Printing Office site containing documents related to Public Law 104-208, including all House, Senate, and Conference Reports). Other than citing the language of Section 709, no other mention is made of the change to the 1996 Telecommunications Act.

<sup>89</sup> 20 U.S.C. §§ 9121-9163.

<sup>90</sup> 20 U.S.C. § 9122.

<sup>91</sup> 20 U.S.C. § 9161.

amendment to section 254(h)(4), we find it necessary to look anew at the definitions of library and library consortium and adopt definitions that are consistent with the directives of section 254(h).<sup>92</sup>

After discussing the differences in the statutory definitions, the FCC concluded, “[w]e, therefore, adopt the LSTA definition of library for purposes of section 254(h), but we conclude that a library’s eligibility for universal service funding will depend on its funding as an independent entity.”<sup>93</sup> This conclusion was based on the assumption that “LSTA defines a library more broadly than did the former LSCA and includes, for example, academic libraries and libraries of primary and secondary schools.”<sup>94</sup> While this assumption may be correct in some contexts, it is incorrect with respect to Tribal libraries. The original version of Section 254(h), based on LSCA, defines a “library” as “eligible to participate in State-based plans for funds,” whereas the version of Section 254(h) based on LSTA defines a library as “eligible for assistance by a State library administrative agency.”<sup>95</sup>

The distinction is significant. For Indian Country in general, and the Navajo Nation in particular, this “conforming” amendment, lacking any legislative history, can have a disastrous impact if implemented without regard to federal policy with respect to tribes and the history of Section 254(h). Because LSCA provided grants to states to assist tribes, tribal libraries met the LSCA definition and qualified for E-rate support. By contrast, because LSTA provides grants directly to Tribes, it is less clear whether Tribal libraries are “eligible to participate in State-based plans for funds.” In addition, under LSTA, the eligibility of a

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<sup>92</sup> *Federal-State Joint Board on Universal Service, Report and Order*, CC Docket No. 96-45, FCC 97-157, 12 FCC Rcd 8776, 9069-70 (*Order*). The Commission released an erratum correcting this Order on June 4, 1997. See *Federal-State Joint Board on Universal Service, Order on Reconsideration*, CC Docket No. 96-45, FCC 97-246, 62 Fed. Reg. 40,742 (July 30, 1997).

<sup>93</sup> *Id.* at ¶ 558 (footnotes omitted).

<sup>94</sup> *Id.* at ¶ 557.

<sup>95</sup> *Id.* at ¶ 552.

“private library” is determined by a state, since a private library qualifies for e-rate funding, “only if the State in which such private library is located determines that the library should be considered a library for purposes of this subtitle.”<sup>96</sup>

The Government Accounting Office (GAO) reached a similar conclusion concerning the need to interpret Section 254(h) with due consideration for issues of tribal sovereignty. In its 2006 report, “Telecommunications: Challenges to Assessing and Improving Telecommunications For Native Americans on Tribal Lands,”<sup>97</sup> the GAO noted that the eligibility criteria set forth in the LSTA raise complex jurisdictional issues.

The Communications Act defines E-rate eligible libraries as those eligible for assistance from a state library administrative agency under the Library Services and Technology Act (LSTA), which provides federal grant funds to support and develop library services in the United States. LSTA has two types of library grants that primarily relate to governmental entities: one for states and one for federally recognized tribes and organizations that primarily serve and represent Native Hawaiians. To be eligible for E-rate funds, a tribal library must be eligible for state LSTA funds and not just tribal LSTA funds.

The eligibility criterion also has practical implications for the E-rate program. Libraries applying for LSTA funds must self-certify their eligibility. As part of its integrity process, USAC requires a third party verification of the eligibility requirement. Thus, USAC verifies a library’s eligibility for E-rate funds by asking state library administrative agencies to provide written certification of a library’s eligibility for state LSTA funds. This process has prompted a number of comments from several of those we interviewed. Some tribal and state library agency officials noted that the current eligibility criterion infringes on tribal sovereignty by involving the state in tribal library E-rate funding. One state librarian, for example, expressed discomfort at being put in the position of acting on behalf of a sovereign tribe and expressed the strong belief that eligibility for E-rate funding should be a matter between the tribe and USAC, without involvement by state government agencies. USAC officials told us that they have received some E-rate applications from tribal libraries. In those cases, a USAC board member successfully worked with the states in question to obtain the certifications. However, USAC officials and the

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<sup>96</sup> Pub. L. No. 104-208, § 213(2), quoted *Id.* at n. 1436.

<sup>97</sup> GAO-06-189, released January, 2006.

USAC board member emphasized the time-consuming nature of these resolution efforts.<sup>98</sup>

The CALs in this case ignore these complexities entirely. They consider only the literal language of LSTA and fail to consider either the purpose of Section 254(h) or federal policy of reconciling statutory language with the interests of affected Tribes whenever possible. Rather than untangle a knotty problem of statutory construction, USAC cuts the knot by ignoring the history of the Section 254(h) in favor of its own “observations” that Chapter House libraries don’t look enough like traditional libraries.

USAC’s simplistic approach denies substantive rights to a class whose rights had previously been recognized by Congress. Absent any evidence of Congressional intent, the CALs abrogate rights previously granted to tribes and radically depart from federal policy of promoting Indian self-determination and sovereignty.<sup>99</sup> Under the doctrine of “sympathetic construction,” statutes are to be construed sympathetically to Tribal interests, especially where the statute is ambiguous or subject to multiple

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<sup>98</sup> *Id.* at pp. 30-31.

<sup>99</sup> *See, e.g., Director of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316, 323-24, 121 S.Ct. 941, 945 (2001) (declining to find that the States’ ability to tax the income of banks for cooperatives was eliminated by Congress where deletion of two sentences in one of numerous conforming and technical amendments adopted in 1985 to the Farm Credit Act of 1971 eliminated the express statutory authorization for such taxation, and where such an interpretation would mean “that Congress made a radical-but entirely implicit-change in the taxation of banks for cooperatives with the 1985 amendment”); *see Ramirez-Osorio v. I.N.S.*, 745 F.2d 937, 943-44 (5th Cir. 1984) (declining to find that a conforming amendment to the Refugee Act of 1980 altered or created substantive rights where there was no clear Congressional intent in the language of the Act or the legislative history); *see Morton v. Mancari*, 417 U.S. 535, 555 94 S.Ct. 2474, 2485 (1974) (holding that the Equal Employment Opportunity Act of 1972 did not implicitly repeal the provisions in the Indian Reorganization Act of 1934 for Indian preference in federal government employment on and near reservations, where Congress did not express an intent to contradict policy to promote Indian self-government).

interpretations.<sup>100</sup> The doctrine also overcomes normal agency deference when it comes to statutory construction.<sup>101</sup>

#### **4. The Definition of a Tribal “Library” Requires Government-to-Government Consultation**

Instead of single-handedly rewriting Federal policy on Indian law, USAC should have submitted the question of what qualifies as a library to the Commission, which, in turn, should have consulted on a government-to-government basis with the Navajo Nation. The Federal trust relationship requires consultation to achieve a “tailored approach.”

Tribes are inherently sovereign governments that enjoy a special relationship with the U.S. predicated on the principle of government-to-government interaction. This government-to-government relationship warrants a tailored approach that takes into consideration the unique characteristics of Tribal lands in extending the benefits of broadband to everyone. Any approach to increasing broadband availability and adoption should recognize Tribal sovereignty, autonomy and independence, the importance of consultation with Tribal leaders, the critical role of Tribal anchor institutions, and the community oriented nature of demand aggregation on Tribal lands.<sup>102</sup>

In adopting policies that have a particular impact on Tribes, there is a Federal mandate to consult with Indian tribes on a government-to-government basis under Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*.<sup>103</sup> In addition,

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<sup>100</sup> *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767-68, 105 S.Ct. 2399, (1985) (“[t]he canons of construction [of statutes] applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians . . . [and] statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit”).

<sup>101</sup> *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10<sup>th</sup> Cir. 1997); *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991).

<sup>102</sup> National Broadband Plan, p. 146 (Box 8-3).

<sup>103</sup> Executive Order No. 13175, 65 Fed. Reg. 67249 (November 9, 2000). *See also* <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>.

History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to

the FCC’s own Tribal Policy Statement provides that, “[t]he Commission, in accordance with the federal government’s trust responsibility, and 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.”<sup>104</sup>

The present case calls out for a consultative rather than a punitive process.

### **5. “Anchor Institutions” are the Key to Broadband Deployment in Indian Country**

The National Broadband Plan (NBP) repeatedly recognizes the vital role that “anchor institutions” play on Tribal lands in multiple places:

The federal government and state governments should develop an institutional framework that will help America’s anchor institutions obtain broadband connectivity, training, applications and services.<sup>105</sup>

Any approach to increasing broadband availability and adoption should recognize Tribal sovereignty, autonomy and independence, the importance of consultation with Tribal leaders, the critical role of Tribal anchor institutions, and the community oriented nature of demand aggregation on Tribal lands.<sup>106</sup>

In recognition of the unique challenges facing Tribal communities, Congress should consider amending the Communications Act to provide discretion to the FCC to define circumstances in which schools, libraries and health care providers that receive funding from the E-rate or Rural Health Care program may share broadband network capacity that is funded by the E-rate or the Rural Health Care program with other community institutions designated by Tribal governments.<sup>107</sup>

This “tribal-centric” approach, which recognizes the importance of Tribal anchor institutions, has been adopted in various proceedings currently before the Commission.

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undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between federal officials and tribal officials has greatly improved federal policy toward Indian tribes. Consultation is a critical component to creating a sound and productive federal-tribal relationship.”

<sup>104</sup> *Tribal Policy Statement*, 16 FCC Rcd at 4081.

<sup>105</sup> NBP, p. 136.

<sup>106</sup> *Id.*, p. 146.

<sup>107</sup> *Id.*, p. 154. As demonstrated *infra*, p. 36, each Navajo Chapter house had two sets of connectivity, one for the “administration” side and one for the library side.

For example, as stated in a pending Notice of Inquiry: “Thus, any approach to deploying communications services, removing barriers to entry, and increasing broadband availability and adoption must recognize Tribal sovereignty, autonomy, and independence, the unique status and needs of Native Nations and Native communities, the importance of consultation with Native Nation government and community leaders, and the critical role of *Native anchor institutions*.”<sup>108</sup> The FCC also specifically has recognized the critical role Navajo Chapter Houses play in bringing telecommunications services to the Navajo.<sup>109</sup>

NTIA recognized Tribal Chapter Houses as “anchor institutions” in Round 2 BTOP funding under ARRA.<sup>110</sup> Utah recognizes Chapter Houses as “anchor institutions.”<sup>111</sup> The 110 Chapter Houses serve a myriad of functions, from the seat of

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<sup>108</sup> *Improving Communications Services For Native Nations, Notice of Inquiry*, CG Docket 11-41, FCC 11-30, ¶ 5 (released March 4, 2011) (emphasis added). See also *In the Matter of Universal Service Reform, Mobility Fund, Notice of Proposed Rule Making*, WT Docket 10-208, FCC 10-182 (released October 14, 2010); *Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands*, WT Docket 11-40, FCC 11-29 (released March 3, 2011) (“Access to 9-1-1, and other public safety services, is critical to every American no matter their location. Likewise, broadband service to anchor institutions and residential areas is beneficial to our entire Nation.” Comments of Commissioner Clyburn).

<sup>109</sup> See, e.g., <http://transition.fcc.gov/cgb/news/070104itsummit.html> (June 24, 2004 FCC Public Notice describing meeting between FCC officials and the Navajo Nation Telecommunications Regulatory Commission (NNTRC) related to using Chapter Houses as hubs for communications services). See also <http://transition.fcc.gov/cgb/rural/presentations/ONSAT2OverviewofNNHeadStartTechnologyPlan.pdf> and <http://transition.fcc.gov/cgb/rural/presentations/ONSAT1HeadStartITTPresentation.pdf> (two presentations concerning the Navajo use of Chapter Houses as libraries that still reside on the FCC’s website).

<sup>110</sup> See <http://www.broadbandusa.gov/files/BTOP%20NOFA%201-15-10%20with%20disclaimer.pdf>.

<sup>111</sup> See <http://www.stimulatingbroadband.com/2009/11/utah-broadband-stimulus-gov-herbert.html> (Utah governor Gary Herbert in 2009 recommended funding for connectivity to “110 Anchor Institutions (Chapter Houses)”).

local government to the home for Indian Health Service representatives. As discussed below, the functions of the Chapter Houses include that of a library.

#### **6. The Navajo Chapter Houses Function As Libraries**

The Navajo Chapter Houses function as libraries. E-rate funded computers, many now silent for over three years since USAC began to withhold E-rate funding, provided critical educational services to some of the poorest and least “connected” individuals in the United States. When the Bill and Melinda Gates Foundation sought libraries where computers could be located and made available to the Navajo people, the Chapter Houses were the only suitable sites. The Gates Report had this to say about the functions of Chapter Houses and their suitability as computer libraries:

Each Chapter House is the site of community gatherings, meetings, events, and the place local residents vote. The Chapter House also serves as the “county seat” for the elected officials and the government employees who deliver services to the Navajo people. Recently, a change in Navajo Nation leadership resulted in the endorsement of a local empowerment movement designed to give more autonomy to the local Chapter Houses as they seek to improve their local economies.

In order to introduce Navajo tribal members to the technology so that they could consider participation in the Program, the Project Coordinator for NAATP met with an official from every Chapter House and made a presentation which included a demonstration of the machines. She reports that ‘Interest became intense when elders saw and heard the machines speaking Navajo.’ She had installed the Navajo Language Sentence Machine program. The demonstration proved so successful that all 110 Chapter Houses decided to participate in the NAATP, a first time – many say – that all Chapter Houses have agreed on anything! Computer savvy members hope using the Navajo Language program will encourage community members to experiment with other software as well.<sup>112</sup>

Designating the 110 Chapter Houses as libraries made perfect sense. The Chapter Houses are “anchor institutes,”<sup>113</sup> cultural centers for Navajos, and the functional

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<sup>112</sup> Attachment 2, Exhibit 1, pp. 9 & 17.

<sup>113</sup> See *supra*, section II.B.5.

equivalent of public libraries.<sup>114</sup> In addition to government meetings, classes are taught, and other community meetings are held at the Chapter Houses. There is no other set of buildings spread throughout the Navajo Nation that can serve this purpose. If the Chapter Houses are not libraries, there are no libraries for the Navajo.

The 2003-2005 Navajo Nation Library Consortium Technology Plan (“Library Consortium Technology Plan”) recognized the key role of Chapter Houses within the Navajo library system in making available educational resources and preserving Navajo culture.<sup>115</sup>

To serve the 111 branch/libraries we have at present over 1000 computers with access to various information resources via the internet. We will work to expand the resources currently available to include the federal, state, and Navajo Nation information resources to meet the needs of the patrons across the Navajo Nation. This is particularly important, as there are many historical and traditional Navajo items, information and educational artifacts at our main Window Rock Library that need to be shared with the Chapter/Libraries. We also will work to collect historical data and information at the Chapter/Libraries that will be shared.<sup>116</sup>

The 2003-2005 Library Consortium Technology Plan called for the Chapter Houses to be the site of distant learning. “This new level of service [funded by E-rate] allows the chapter/libraries to provide distance education and video level training at some of the most remote and rural and underserved locations in the entire United States.”<sup>117</sup> To track usage and gauge the extent to which Navajo Nation library resources were being

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<sup>114</sup> The Navajo Nation objects most strenuously to USAC’s claim that the multiple uses for which Chapter House infrastructure are put disqualify them as libraries. *See* Attachment 1, CAL Explanation Letter, p.9.

<sup>115</sup> *See* Attachment 6, Navajo Nation Library Consortium Technology Plan (2003-2005).

<sup>116</sup> *Id.*, p. 3.

<sup>117</sup> *Id.*, p. 4.

disseminated throughout the Navajo Nation, the Library Consortium Technology Plan called for the collection of data from the library card system.<sup>118</sup>

In stark contrast, if USAC's conclusions are credited, the Navajo Nation has only one library to serve 26,111 square miles.<sup>119</sup> Residents of Antelope Canyon, AZ would need to travel 240 miles and almost five hours to have access to E-rate supported computers. Residents of Tuba City, the largest Navajo community, would need to travel over 150 miles and three hours. The two young men referenced earlier who used the computers at the Mexican Water Chapter House to do homework to earn their degrees would be 135 miles, and almost three hours, away from supported library services under USAC's definition of "library."

The Navajo Chapter Houses vary radically in terms of size, condition, and architecture.<sup>120</sup> They may not "look" like traditional libraries, but they perform the same key functions of cultural preservation and perpetuation. They are an organized system of "special libraries and information centers" created by the Navajo Nation to improve "services to the clientele of such libraries."<sup>121</sup>

Until 150 years ago, Navajo was a purely spoken language. The Navajo language first appeared in written form in 1849, and then used only by outsiders. Because a uniform Navajo alphabet was not developed until 1939, book publishing in the native Navajo language has been possible for only slightly more than 70 years. It should

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<sup>118</sup> *Id.*, p. 2, 4.

<sup>119</sup> *See* Attachment 1, CAL Explanation Letter, p. 7.

<sup>120</sup> *See* Attachment 2, Exhibit 27 (images of the 110 Chapter Houses).

<sup>121</sup> *See* 47 U.S.C. § 54,500(d),(e).

therefore come as no surprise that the Chapter House libraries do not contain large collections of books.

The Chapter Houses are the only viable locations to preserve Navajo culture and provide internet access for educational purposes. The Gates Foundation, the Nation, and other Federal and state agencies have invested heavily in the construction, modification, installation, and maintenance of the Chapter Houses as libraries. The FCC has been briefed numerous times on the function of Chapter Houses as the “hub” for community access to the Internet.<sup>122</sup> In its 2006 audit, KPMG viewed the Chapter Houses as libraries. Consequently, there is no basis for questioning the eligibility of Chapter Houses for funds expended more than four (4) years ago or for second-guessing the Nation’s decision to employ Chapter Houses as the repositories of Navajo culture.

Contrary to USAC’s contention, eligible library functions were not comingled with ineligible administrative functions. The Navajo Nation partitioned the connectivity at the Chapter Houses between library services and administrative uses.<sup>123</sup> Chapter House connectivity functions were consistently segregated between “Administrative” and “Lab (libraries).” An internal August 6, 2004, memo made clear that the E-rate-supported OnSat services provided to the Chapter House were for library purposes only,

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<sup>122</sup> See, e.g., <http://transition.fcc.gov/cgb/news/070104itsummit.html> (June 24, 2004 FCC Public Notice describing meeting between FCC officials and the Navajo Nation Telecommunications Regulatory Commission (NNTRC) related to using Chapter Houses as hubs for communications services). See also <http://transition.fcc.gov/cgb/rural/presentations/ONSAT2OverviewofNNHeadStartTechnologyPlan.pdf> and <http://transition.fcc.gov/cgb/rural/presentations/ONSAT1HeadStartITPresentation.pdf> (two presentations concerning the Navajo use of Chapter Houses as libraries that still reside on the FCC’s website).

<sup>123</sup> See Attachment 2, Exhibit 9 (“Nez Report”).

and that if any Chapter House wished to use OnSat for administrative or other government services, it would have to contract for those services separately.<sup>124</sup>

Like libraries in other rural communities, the Chapter Houses serve a variety of cultural purposes. The Navajo people are communal by nature, and use their Chapter Houses as gathering places to exchange ideas, participate in Tribal governance, and make use of vital Federal and Tribal services. The versatility of the Chapter Houses does not mean that one of their functions is not that of a library. The Navajo Nation strenuously objects to USAC's finding that the multiple functions of Chapter Houses disqualify them as libraries. USAC claims "[t]he documentation, information obtained through interviews, and the observations made at the site visit indicate that the Chapter Houses are seats of local government and function as community centers."<sup>125</sup> They most certainly do. But they also function as "information centers"<sup>126</sup> where Navajo citizens, especially children, can have access to computers to bridge the Digital Divide. Under the LSCA, still a relevant indication of Congressional intent, the collocation and use of libraries as community centers was statutorily encouraged, not prohibited.<sup>127</sup>

#### **7. The Navajo Chapter Houses Function as a Library Consortium**

The CALs err in concluding that the Navajo Chapter Houses are not a "Library Consortium." The Commission's Rules define a library consortium as follows:

A "library consortium" is any local, statewide, regional, or interstate cooperative association of libraries that provides for the systematic and effective coordination of schools, public, academic, and special libraries

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<sup>124</sup> See Attachment 1, CAL Explanation Letter, p. 9.

<sup>125</sup> *Id.*

<sup>126</sup> See 47 U.S.C. § 54.500(d),(e).

<sup>127</sup> See *supra*, Section II.B.3.

and information centers, for improving services to the clientele of such libraries.<sup>128</sup>

The CALs take an inappropriately narrow view of a library consortium by viewing such a consortium solely as a repository for books. As the definition set forth above illustrates, the statutory definition more broadly encompasses any regional or interstate association that provides library services to its clientele through “special libraries and information centers.” The related definition of “library services” is also not confined to books, but includes any “materials suitable for scholarly research and not otherwise available to the public.”<sup>129</sup>

As noted above, the Library Consortium Plan clearly describes the Chapter Houses in terms that satisfy the statutory definition of a library consortium. The statute requires a coordinated system of information centers that make available material of an educational nature that would not otherwise be made available to the public. As explained in the Library Consortium Technology Plan, the Chapter Houses serve as “information resources” that provide access to “historic and educational artifacts” for the Navajo Nation. The historic and educational artifacts may not focus primarily on books, as they would in the print cultures familiar to USAC representatives, but preserving and making such materials available is a statutorily recognized function of a library, and of a library consortium such as the Navajo Nation Chapter Houses.

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<sup>128</sup> 47 C.F.R. § 54.500(d),(e).

<sup>129</sup> 47 C.F.R. § 54.500(d)(4)(i).

**C. USAC's Findings as to Violations of the FCC's Competitive Bidding Requirements are Unsupported by the Record**

The CALs conclude that NNDEC violated the Commission's competitive bidding requirements by entering into the Master Agreement with OnSat in 2001.<sup>130</sup> There is no specific finding that NNDEC failed to comply with competitive bidding requirements for the FY 2007 funding requests at issue here. The CALs characterize the NNDEC's 2003 competitive bidding process as a "sham," finds the 2005 Head Start request (not at issue here) to be tainted by the lack of an approved modification of the Master Agreement, and finds the competitive bid process for FY 2006 and 2007 to be "tainted by the conduct described above."<sup>131</sup> This last statement, the only basis for rescinding FY 2007 funding, is without specific support in the record.

USAC correctly finds that the OnSat Master Agreement was the contracting vehicle to initiate connectivity to the Navajo Chapter Houses in 2001. USAC incorrectly concludes that this contract was not preceded by a competitive bidding process. As the Gate Foundation reports:

After working with a number of vendors, NAATP narrowed down the viable providers to two firms. (Others were interested, but pulled out for various reasons such as too few sites, unwillingness to adjudicate possible disputes in tribal courts, and the inability to make alterations to accommodate NAATP machines.) Both providers presented to the Navajo Division of Community Development and the Navajo Tribal Council. Based on the presentations, the Navajo Nation decided to contract with OnSat Network Telecommunications. At this point, the second provider declined to offer their product to other southwest tribes and NAATP has worked exclusively with OnSat since then.<sup>132</sup>

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<sup>130</sup> Attachment 1, CAL Explanation Letter, pp. 11-13.

<sup>131</sup> *Id.*, p. 13.

<sup>132</sup> *Id.*, p. 14.

The process described by the Gates Foundation has all the hallmarks of competitive bidding – multiple carriers responding to the equivalent of an RFP, two carriers making formal presentations to the highest levels of Tribal government in an open forum, and a final decision to enter a contract with one of those carriers. Since the Navajo Nation was not part of the E-rate program in 2001, it can hardly be faulted for failing to follow the precise competitive bidding requirements set forth in Section 54.504 of the Rules.<sup>133</sup>

USAC is equally wrong in finding that “[t]he Navajo Nation used the same 2001 Master Agreement to seek funding in 2004 and 2005.”<sup>134</sup> The FY 2006 funding request was based on Modification (Mod) 10 to the Master Agreement, not the “2001 Master Agreement” itself. Moreover, for FY 2007, the Beneficiary did follow the letter of the competitive bidding rules by filing an FCC Form 470, issuing an RFP, and evaluating the two bids in response.<sup>135</sup> That evaluation was conducted under the Navajo Nation Rules and Regulations, Section III(G)(1), which states:

The goal of Bid Evaluation is to select a responsible vendor that is the most responsive and best serves the needs of the Navajo Nation which include adherence to the Navajo Nation Business Opportunity Act and providing the Procuring Party with a reasonable price that is equal to or below the Maximum feasible Cost for the Goods requested with such Goods

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<sup>133</sup> 47 C.F.R. § 54.504. At Attachment 2, p. 41, undersigned counsel stated: “Because of the unique nature of the arrangement, in which the Gates Foundation funded the entire Master Agreement, the 2001 Master Agreement was not competitively bid.” In retrospect, and upon a fuller review of the documents, that response should have been expanded to say: “Because of the unique nature of the arrangement, in which the Gates Foundation funded the entire Master Agreement, the 2001 Master Agreement was not competitively bid *pursuant to the FCC competitive bidding rules.*” As demonstrated herein, as reported by the Gates Foundation, there were multiple bidders for the services that were ultimately awarded under the OnSat Master Agreement, with two bidders presenting their competing bids to the Navajo Nation Tribal Council.

<sup>134</sup> Attachment 1, CAL Explanation Letter, p. 13.

<sup>135</sup> Attachment 2, p. 43.

delivered to the specified location by the specified delivery date. The lowest cost alone may not always best serve the needs of the Navajo Nation.<sup>136</sup>

According to Mr. Franklin, price was the primary factor used in evaluating the bids in 2007 (weighted at 45 percent of the total scoring).<sup>137</sup> The Nation was allowed to take into consideration and award a preference to a supplier willing to provide hiring preferences and training to tribal members.<sup>138</sup> As noted in the Response to USAC, OnSat's score could not have been beaten by Southwest, even if Southwest had received a perfect 45 out of 45 points for price.<sup>139</sup> OnSat was awarded 23 out of 45 points for price, 25 out of 25 points for Prior Experience and 30 out of 30 points for "Navajo Experience." By contrast, Southwest was awarded only 15 out of 25 points for Prior Experience and 15 out of 30 points for Navajo Experience.<sup>140</sup> Nevertheless, price was given a separate category, and accorded the highest weighing factor (45 percent).<sup>141</sup> The 45/25/30 "split" used by NNDEC in 2007 is consistent with the guidance example given in the *Ysleta Order*, "For example, if an applicant assigns 10 points to reputation and 10 points to past experience, the applicant would be required to assign at least 11 points to price."<sup>142</sup> Under the *Ysleta Order*, an applicant complies with the competitive bidding

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> See *Western Wireless Corporation*, FCC 01-283, ¶ 15 (released October 5, 2001).

<sup>139</sup> Attachment 2, p. 43.

<sup>140</sup> *Id.*

<sup>141</sup> See *Requests for Review of Decisions of the Universal Service Administrator, Allendale County School District*, DA 11-723, ¶ 4 ("*Allendale County School District*") (Wireline Comp. Bur., released April 21, 2011).

<sup>142</sup> *Request for Review by Ysleta Independent School District of the Decision of the Universal Service Administrator*, CC Docket Nos. 96-45, 97-21, Order, 18 FCC Rcd 26407 (2003) ("*Ysleta Order*").

rules by giving price only a 35 percent weight (11/31). By comparison, the weight factor used by NNDEC for price in 2007 was 45 percent. Moreover, giving OnSat high marks in “Prior Experience” and “Navajo Experience” is consistent with the analysis in *Allendale County School District*, where the Commission found that weighing price at only 20 percent, compared to 80 percent given to past performance was correct, given that the low bidder in that instance had been used by the school district before, and its equipment had failed to function in school buildings.<sup>143</sup> The fact that OnSat had provided service to the 110 Chapter Houses for the previous six (6) years thus supported the weight given to the Prior Experience factor in 2007. OnSat was hardly the perfect choice. It was not, however, an unreasonable choice given the scoring criteria the Nation was required to apply. Although in retrospect it may have been unwise to have continued to contract with OnSat for services, given the problems that were uncovered by the Special Review, released *after* the FY 2007 provider bids were reviewed and the contract granted, the Nation’s choice does not violate the Commission’s competitive bidding rules.

Based on its evaluation, OnSat was awarded the contract for FY 2007, and the Beneficiary and OnSat negotiated and entered into yet another modification of the Master Agreement for FY 2007.<sup>144</sup> Multiyear contracts with modifications and master state

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<sup>143</sup> *Allendale County School District*, ¶ 11.

<sup>144</sup> The Navajo Nation Response to USAC was critical of this contracting regime, but not because it violated the FCC’s competitive bidding rules. Rather, the Master Agreement itself was a poor contract from the perspective of the Navajo Nation, severely limiting the Nation’s ability to receive credits for down time or even monitor whether it was receiving service, especially once OnSat let it be known in 2006 that it considered the Master Agreement to establish a “flat fee” arrangement whereby the Navajo Nation (and by implication USAC) was responsible for full payment regardless of whether each of the 110 Chapter Houses received service throughout the year. See Attachment 2, pp. 3-6. Moreover, allowing other parts of the Navajo Nation government to use the Master Agreement through additional contract modifications made

agreements are permitted under FCC Rules.<sup>145</sup> Accordingly, the Commission should conclude that for the FY 2007 Funding Requests, NNDEC complied with the competitive bidding requirements of the E-rate rules.

### **III. REQUEST FOR WAIVER**

The Commission's rules allow waivers "for good cause shown."<sup>146</sup> The Commission has extended this waiver authority to waivers of E-rate Program rules.<sup>147</sup> A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. Waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.<sup>148</sup> The Commission looks favorably on waivers where strict compliance would cause great hardship,<sup>149</sup> and where there is no evidence of fraud

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contract oversight a nightmare, leading to the situation found in the Special Review of the Navajo Nation ultimately paying more than its non-discounted portion of E-rate support, plus non-E-rate supported services over the period investigated.

<sup>145</sup> *Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Order*, 15 FCC Rcd. 6732, 6736, ¶ 10 (1999) (noting that applicants can enter into agreements of any length); *see also Albert Lea Area Schools, File No. SLD-517274, et al., CC Docket No. 02-6, Order*, 24 FCC Rcd. 4533 (WCB 2009) ("Applicants are not required to rebid multi-year contracts each year"). *See also Requests for Review of the Decisions of the Universal Service Administrator by Academia Discipulos de Cristo, Bayamon, Puerto Rico*, 21 FCC Rcd. 9210, ¶ 3, 10 (WCB 2006).

<sup>146</sup> 47 C.F.R. § 1.3.

<sup>147</sup> *See, e.g., Request for Review of Decision by the Universal Service Administrator by Bishop Perry Middle School, Order*, 21 FCC Rcd. 5316, 5618 ¶4 (2006) ("Bishop Perry Order").

<sup>148</sup> *Requests for Review by Richmond County School District*, 21 FCC Rcd. 6570, 6572 (2006), *citing Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) and *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972)).

<sup>149</sup> *Request for Waiver of the Decision of the Universal Service Administrator by Owensboro Public Schools, Owensboro, Kentucky, Order*, 21 FCC Rcd. 10047, ¶5 (2006).

or misuse of the funds.<sup>150</sup> A waiver is especially warranted when a strict application of the rules would create substantial inequities.<sup>151</sup>

In the event that the Commission concludes that the Navajo Chapter Houses do not strictly qualify as libraries, the Navajo Nation requests a waiver in this instance to allow E-rate support for the Chapter Houses. The Commission has waived its other USF rules on numerous occasions to assist Native Americans to gain access to vital telecommunications services.<sup>152</sup> The Commission further granted a limited waiver for school and libraries in Alaska to provide public access to their bandwidth when not in use by schools and libraries for educational purposes.<sup>153</sup> The Commission described the problem faced by remote villages in Alaska as follows:

Many of these schools and libraries rely on satellite telecommunications services for their Internet connections, and the satellite services are most often provided on a non-usage sensitive basis. Due to the remote nature of schools and libraries in Alaska, there is usually only one provider of this satellite down link service, and that provider typically only provides this

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<sup>150</sup> See generally *Request for Waiver of the Decision of the Universal Services Administrator by Barberton City School, Barberton, Ohio et al., Schools and Libraries Universal Service Support Mechanism, Order*, 23 FCC Rcd. 15526, 15530 ¶7 (Telecom. Access Pol. Div. 2008).

<sup>151</sup> See generally, *Requests for Review of Decisions of the Universal Service Administrator by Approach Learning and Assessment Centers et al, Schools and Libraries Universal Service Support Mechanism, Order*, 23 FCC Rcd. 15510, 15513-14 ¶8 (Telecom. Access Pol. Div. 2008); *Request for Review of Decision of the Universal Service Administrator by Radford City Schools, Radford, Virginia, Schools and Libraries Universal Support Mechanism, Order*, 23 FCC Rcd. 15451, 15453 ¶4 (Telecom. Access Pol. Div. 2008).

<sup>152</sup> See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, DA 99-2970 (Com. Car. Bur. 1999) (*Gila River Order*) (granting a temporary waiver of section 54.403(a) to allow Tribally owned telcos to be eligible for second-tier federal Lifeline support). This waiver was codified in *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, *Twelfth Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 12208 (2000).

<sup>153</sup> *Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Petition of the State of Alaska for Waiver for the Utilization of Schools and Libraries Internet Point-of-Presence in Rural Remote Alaska Villages Where No Local Access Exists and Request for Declaratory Ruling, Order*, 16 FCC Rcd. 21511 (2001).

service on a 24 hour, 7 days a week basis. Schools and libraries occupy the satellite connections for educational purposes when they are open, but during times when the schools and libraries are closed, the available connections remain unused. As a result, due to the non-usage sensitive nature of the services, services that could be used after the operating hours of schools and libraries presently go unused.<sup>154</sup>

The Commission described its overall implementation of Section 254(h) in Section 54.504 as “narrowly construed,” allowing it flexibility to grant waivers given good cause.<sup>155</sup> It concluded, “Given their extreme isolation and the lack of access to affordable Internet services, we believe it is appropriate to allow rural remote areas in Alaska that lack local or toll-free dial up access to the Internet to utilize excess service obtained through the universal service mechanism under the limited circumstances described above.”<sup>156</sup> The Commission found that 75 percent of Alaskans lacked access to Internet via a local dial-up or toll-free connection.<sup>157</sup> The Commission concluded, “[w]e find that the waiver is also in the public interest because it is consistent with the Commission’s efforts to encourage access to advanced telecommunications and information services.”<sup>158</sup>

The Navajo Nation is similarly situated. As described above, 75 percent of Navajos lack broadband access via a wireline carrier. At least as of FY 2007, the only way to deliver connectivity to much of the Navajo Nation was via satellite services. And as described here, the Navajo Chapter Houses are the only infrastructure throughout the Navajo Nation that could house the computers and connectivity equipment. The Navajo

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<sup>154</sup> *Id.*, ¶ 4.

<sup>155</sup> *Id.*, ¶ 8.

<sup>156</sup> *Id.*, ¶ 10.

<sup>157</sup> *Id.*, ¶ 11.

<sup>158</sup> *Id.*

Nation submits that a similar waiver is justified in this instance to allow for E-rate support at the Navajo Chapter Houses.

There is a further equitable basis for such a waiver. The Navajo Nation has been part of the E-rate program since FY 2003. It has proceeded in good faith on the assumption that the Chapter Houses qualify for E-rate support. It has briefed the FCC several times on its efforts to bring Internet access to its people through the E-rate program. After all these years, it would be highly inequitable for the FCC to declare that the Chapter Houses cannot qualify as libraries, and to seek to recoup millions of dollars from the Navajo Nation.

In the event that the Commission concludes that the Beneficiary violated the competitive bidding rules for FY 2007, the Navajo Nation requests a waiver of those rules, given the special circumstances of this case.<sup>159</sup> The difficulties of bringing Internet connectivity to the 110 Chapter Houses has been outlined above, as has the background as to how the Navajo Nation acquired the computers from the Gates Foundation, and how the Gates Foundation assisted the Navajo Nation in finding a carrier that could provide service to the Chapter Houses, some of which lacked electricity. Under the special circumstances here, the Commission should grant a waiver of its competitive bidding rules.

Finally, a waiver is requested based on the undue hardship that would befall the Navajo Nation, absent a waiver. Between the current CALs and others issued, USAC

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<sup>159</sup> See *Request for Waiver of the Decision of the Universal Service Administrator by Great Rivers Education Cooperative and I-K Electric Company; Schools and Libraries Universal Service Support Mechanism, File No. SLD-371294, CC Docket 02-6, Order, 21 FCC Rcd 14115, ¶ 9, n. 40 (2006)* (“in sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule”).

now seeks to recover almost \$5,000,000 from the Navajo Nation, and has refused payments of another \$4,500,000 in pending invoices from FY 2006-2008. To rescind almost \$10,000,000.00 of funding to a population with an unemployment rate of 50 percent and a poverty rate of 40 percent is unconscionable. It is tragedy enough that USAC's actions have denied Internet access to people most in need of such access. That lack of access not only widens the Digital Divide, but puts many of those individuals at further risk of falling further into poverty and being unable to use the Internet to seek jobs or take advantage of federal programs that require Internet access. Unless reversed, the \$10 million penalty that USAC proposes will have consequences that go far beyond the E-rate program.

#### **IV. CONCLUSION**

The E-rate program was designed to provide opportunity and access to the Internet for those whom the information revolution had left behind. Congress expressly intended that the E-rate program support services for the least served and most vulnerable populations. The Navajos are on the farthest end of that scale, in many cases lacking access to basic infrastructure (electricity, clean water, and Plain Old Telephone Service) the rest of the country has taken for granted for almost a century. Now, the Navajos are being told by USAC that the only places where they congregate for community activities are not good enough for E-rate support because they don't "look" like libraries.

There is something fundamentally unjust in this equation. The Navajo Nation has designated its Chapter Houses as libraries under its own laws, charged the Beneficiary to extend the reach of the Navajo Nation Library to the Chapter Houses via electronic means and obtained determinations from the states of Arizona, New Mexico and Utah that the Chapter Houses are Libraries. The Commission should accept these

governmental designations and permit the Navajo Chapter Houses to receive E-rate support. If a waiver is necessary, one should be granted.

Finally, the Commission should conclude either that the Navajo Nation substantially complied with the competitive bidding rules or waive its rules in this instance. Ultimately it should remand this case and instruct USAC to provide funding for the portion of FY 2007 where the Navajo Nation received Chapter House library service from OnSat (through April 6, 2008).

Respectfully submitted,

**NAVAJO NATION DINÉ  
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September 30, 2011

## CERTIFICATE OF SERVICE

I, Cindy Lloyd, certify on this 30th of September, 2011, a copy of the foregoing Request for Review and Waiver has been served via electronic mail or first class mail, postage prepaid, to the following:

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\_\_\_\_\_  
/s/  
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### Attachment List

1. CAL Notification Letters and CAL Explanation Letters (attached hereto)
2. Navajo Nation Response to USAC, dated December 8, 2008 (and exhibits thereto) (Incorporated by reference)
3. "A Special Review of the Navajo Nation Payments to OnSat," Audit Report No. 07-04, prepared by Elizabeth Begay of the Nation's Auditor General's Office (filed separately under request for confidentiality). (Incorporated by reference)
4. KPMG Audit (Incorporated by reference)
5. LSCA Amendments Pub. L. 98-480 (Incorporated by reference)
6. Technology Plan (Incorporated by reference)