

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

**OPPOSITION AND COMMENTS  
OF THE GILA RIVER INDIAN COMMUNITY AND  
GILA RIVER TELECOMMUNICATIONS, INC.  
TO PETITIONS FOR RECONSIDERATION**

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## EXECUTIVE SUMMARY

The Gila River Indian Community (“GRIC”) and Gila River Telecommunications, Inc. (GRIC and Gila River Telecommunications, Inc., collectively, “GRTI”), by its attorneys, hereby submits this opposition and comments in the above-referenced proceeding in which the Federal Communications Commission (“FCC” or “Commission”) seeks comments on twenty four petitions for reconsideration of its order (“*USF/ICC Transformation Order*”) to reform and modernize the universal service fund (“USF”) and intercarrier compensation (“ICC”) system and transition to the Connect America Fund (“CAF”). GRTI urges the Commission to affirm adoption of the Tribal Engagement Requirement (as defined herein) and the Tribal Reporting Requirement (as defined herein). In addition, the Commission should reconsider its decision to make publicly available the financial disclosures of tribally-owned carriers and should reconsider several aspects of its caps on capital and operating expenses and corporate operations expenses.

GRTI urges the Commission to affirm adoption of the Tribal Engagement Requirement and the Tribal Reporting Requirement. GRTI demonstrates that the Commission adhered to the notice-and-comment requirements of the Administrative Procedure Act with respect to the Tribal Engagement Requirement. In addition, GRTI shows that the Tribal Engagement requirement is fully supported by the record. GRTI also dispels the suggestion by certain petitioners that comments submitted by Indian Country did not support the Tribal Engagement Requirement. Rather, Indian Country is united in its support for the Tribal Engagement Requirement and its belief that such rules will lead to increased access to broadband on tribal lands.

GRTI further demonstrates that the Tribal Engagement Requirement and Tribal Reporting Requirement are legally sound. Specifically, the Tribal Engagement Requirement does not violate the Communications Act of 1934, as amended, nor federal law, is within the scope of the Commission’s jurisdiction, and is constitutionally sound. In addition, the Tribal Reporting Requirement is not impermissibly vague.

GRTI supports the request of the United States Telecom Association (“USTA”) that the Commission should allow privately held eligible telecommunications carriers to seek confidential treatment of their financial and operational reports, which under the new rules adopted in the *USF/ICC Transformation Order* must be filed with the Commission. In its petition, USTA states that privately held companies do not routinely publicly disclose the confidential financial and operation information that is now required to be disclosed. Similarly, tribally-owned companies never publicly disclose such information. Indeed, tribes and tribally-owned entities closely guard such confidential information because such information is relevant to the internal affairs of the tribe.

GRTI supports the request of the National Exchange Carriers Association, Inc. (“NECA”), Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”); and Western Telecommunications Alliance (“WTA”) that the Commission reconsider several aspects of its caps on reimbursable capital and operating costs and corporate operations expenses (collectively, the “High Cost Caps”). GRTI agrees with NECA, OPASTCO and WTA that several aspects of the High Cost Caps are not rational. In addition, the High Cost Caps are not rational as applied to tribally-owned carriers given the unique circumstances of tribally-owned carriers.

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(“USF”) and intercarrier compensation (“ICC”) system and transition to the Connect America Fund (“CAF”).<sup>1</sup>

As a tribally-owned and operated telecommunications carrier, GRTI has a unique insight into the challenges of providing advanced telecommunications and information services on tribal lands. Indeed, when the GRIC decided to purchase the local exchange carrier serving the GRIC from U.S. West over twenty years ago, the telephone penetration rate in the community hovered around 20%. Today, with assistance provided to GRTI through USF, the wireline telephone penetration rate in the GRIC is approximately 84%. Importantly, GRTI still depends heavily on USF and ICC revenues to support its efforts to raise the telephone penetration and broadband adoption rates in the community. GRTI presently estimates that the rules adopted in the *USF/ICC Transformation Order* will reduce GRTI’s annual USF and ICC revenues by a total of approximately \$1.6 million in 2012 when compared to USF and ICC support GRTI received in 2011. In future years, GRTI believes that USF and ICC revenues will continue to decline. Consequently, given the adverse financial impact on GRTI that will result from application of the new rules adopted in the *USF/ICC Transformation Order*, GRTI is uniquely situated to comment on the petitions for reconsideration of the *USF/ICC Transformation Order*.

Given this perspective, as more fully set forth below, GRTI urges the Commission to affirm adoption of the Tribal Engagement Requirement (as defined herein) and the Tribal Reporting Requirement (as defined herein). In addition, for the reasons set forth herein, the Commission should reconsider its decision to make publicly available the financial disclosures of

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<sup>1</sup>*Connect America Fund, A National Broadband Plan for Our Future, et al.*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51; Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (2011) (“*USF/ICC Transformation Order*”).

tribally-owned carriers and should reconsider several aspects of its caps on capital and operating expenses and corporate operations expenses.<sup>2</sup>

**I. The Commission Adhered to the Notice-and-Comment Requirements of the Administrative Procedure Act with Respect to the Tribal Engagement Requirement**

The *USF/ICC Transformation Order* adopted a requirement that eligible telecommunications carriers (“ETCs”) serving tribal lands and receiving USF support must meaningfully engage the tribal governments in their support areas (“Tribal Engagement Requirement”). Such engagement must include (1) a needs assessment and deployment planning with a focus on tribal community anchor institutions; (2) feasibility and sustainability planning; (3) marketing services in a culturally sensitive manner; (4) rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and (5) compliance with tribal business and licensing requirements.<sup>3</sup> The United States Telecom Association (“USTA”) argues that the Commission adopted the Tribal Engagement Requirement without adhering to the notice-and-comment requirements of the Administrative Procedures Act (“APA”).<sup>4</sup> In support of its argument, USTA selectively quotes part of a sentence from *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, where the DC Circuit found that an agency must “fairly apprise interested persons.”<sup>5</sup> Not surprisingly, USTA does not quote the remainder of the sentence since the full sentence states: “The agency must ‘fairly apprise interested

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<sup>2</sup> The Commission has the authority to adopt the above recommendations and treat tribal lands and tribal entities differently as a matter of law for the reasons previously articulated by GRTI in this proceeding. Comments of Gila River Telecommunications, Inc., WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51 at 7-10 (filed Aug. 24, 2011) (“Gila River Further Comments”).

<sup>3</sup> *USF/ICC Transformation Order* at ¶ 637.

<sup>4</sup> Petition for Reconsideration of the United States Telecom Association, WC Docket No. 10-90 et al., at 18 (filed December 29, 2011) (“USTA Petition”).

<sup>5</sup> *Id.* at 18 (citing *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980)).

persons’ of the nature of the rulemaking, but a final rule may properly differ from a proposed rule and indeed must so differ when the record evidence warrants the change.”<sup>6</sup> Indeed, in the instant proceeding, the Commission sought comment on whether high-cost recipients should “be required to engage with Tribal governments to provide broadband to Tribal and Native community institutions” and asked, “Are there additional requirements that should apply on Tribal lands?”<sup>7</sup> Despite USTA’s argument to the contrary, the APA does “not require an agency to publish in advance every precise proposal to which it may ultimately adopt as a rule.”<sup>8</sup> Indeed, a contrary conclusion, as argued for by USTA, “would lead to the absurdity that an agency could learn from comments on its proposals only at the peril of starting a new procedural round of commentary.”<sup>9</sup> Consequently, it is clear that the Commission adopted the Tribal Engagement Requirement in conformance with the notice-and-comment requirement of the APA.

## **II. The Tribal Engagement Requirement is Fully Supported by the Record**

The petition for reconsideration filed by a group that calls itself the Rural Incumbent Local Exchange Carriers Serving Tribal Lands (“RLEC Petitioners”)<sup>10</sup> claim that the Tribal Engagement Requirement adopted by the *USF/ICC Transformation Order* “is not supported by

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<sup>6</sup> *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 647 F.2d at 1221.

<sup>7</sup> *USF/ICC Transformation Order* at ¶ 151.

<sup>8</sup> *Daniel Intern. Corp. v. Occupational Safety and Health Review Com’n*, C.A.4, 1981, 656 F.2d 925, 931 (4<sup>th</sup> Cir. 1981).

<sup>9</sup> *Id.*

<sup>10</sup> The RLEC Petitioners are Copper Valley Telecom, Dubois Telephone Exchange, Inc., Gold West Telecommunications Cooperative, Midstate Communications, Inc., the Ponderosa Telephone Co., Range Telephone Coop., Inc., Table Top Telephone Company, Inc., Triangle Telephone Cooperative d/b/a Triangle Communications, Venture Communications Cooperative, Western New Mexico Telephone Company, and West River Cooperative Telephone Company.

the record and, therefore, it is arbitrary and capricious.”<sup>11</sup> In support of its claim, the RLEC Petitioners make three arguments, neither of which is compelling. First, the RLEC Petitioners state that there is no cited evidence in the *USF/ICC Transformation Order* supporting the adoption of the Tribal Engagement Requirement.<sup>12</sup> Second, the RLEC Petitioners argue that the comments submitted by representatives of Indian Country actually support the notion that the Tribal Engagement Requirement is not needed.<sup>13</sup> Finally, the RLEC Petitioners assert that available evidence suggests that rural incumbent local exchange carriers (“ILECs”) have made broadband “extensively” available on tribal lands.<sup>14</sup> As explained below, there is no merit to any of these arguments.

**A. The RLEC Petitioners Ignore the Record Support for the Tribal Engagement Requirement**

The RLEC Petitioners state that the record cited by the Commission is insufficient to support adoption of the Tribal Engagement Requirement. Specifically, the RLEC Petitioners argue that comments cited by the Commission support only the adoption of the Tribal Engagement Requirement in the wireless context. Yet, this argument ignores the *National Broadband Plan*<sup>15</sup> which cited by the Commission to support application of the Tribal Engagement Requirement to wireline carriers. In addition, the rationale for adoption of the Tribal Engagement Requirement applies equally in the wireless and wireline contexts, as tribal lands face similar issues with both types of services. Finally, the RLEC Petitioners ignore the

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<sup>11</sup> Petition for Reconsideration of Rural Incumbent Local Exchange Carriers, WC Docket 10-90 et al., at 1-2 (filed December 29, 2011) (“RLECs Petition”).

<sup>12</sup> *Id.* at 3-5.

<sup>13</sup> *Id.* at 5-6.

<sup>14</sup> *Id.* at 6-7.

<sup>15</sup> Federal Communications Commission, *Connecting America: The National Broadband Plan* (rel. Mar. 16, 2010) (“*National Broadband Plan*”).

fact that the record cited by the Commission in the *USF/ICC Transformation Order* is a mere sampling of record support for the Tribal Engagement Requirement.

As an initial matter, the Tribal Engagement Requirement is supported by the *National Broadband Plan*. Accordingly, the *USF/ICC Transformation Order* appropriately relies upon the *National Broadband Plan* in adopting the Tribal Engagement Requirement.<sup>16</sup> As Native Public Media (“NPM”) and the National Congress of American Indians (“NCAI”) demonstrate in their opposition to the RLECs Petition, the *National Broadband Plan* “is replete with evidence of the unique status and needs of Tribes, as well as the need for Tribal involvement, and government-to-government consultation.”<sup>17</sup>

Secondly, the RLEC Petitioners fail to recognize that the rationale for the Tribal Engagement Requirement applies equally in both the wireless and wireline contexts. For example, the RLEC Petitioners claim that joint comments submitted by NPM and NCAI, comments submitted by Twin Houses, and reply comments submitted by the Navajo Nation Telecommunication Regulatory Commission are limited to the Commission’s proposal to establish consultation requirements for wireless providers. Therefore, according to the RLEC Petitioners, such comments do not establish a basis for applying the Tribal Engagement Requirement to wireline providers. Yet, the rationale for the Tribal Engagement Requirement applies in both the wireless and wireline context. For example, to support a Tribal Engagement Requirement, the joint comments of NPM and NCAI cite difficulties in getting incumbent

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<sup>16</sup> See *USF/ICC Transformation Order* at fn. 1047-48 (citing to *National Broadband Plan*).

<sup>17</sup> Opposition of Native Public Media and the National Congress of American Indians to petition for Reconsideration, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, and WT Docket No. 10-208, at 4 (filed Jan. 9, 2012) (“Opposition of NPM and NCAI”); see also *id.* at fn. 8 (citing examples from *National Broadband Plan* of evidence of unique status of Tribes and need for Tribal involvement and consultation).

providers to use Native labor and abide by rights of way permission and business and other permitting requirements.<sup>18</sup> These same issues arise in the wireline context. Indeed, the amount of infrastructure that must be deployed to provide wireline services is greater than the infrastructure required to provide wireless services. Consequently, rights of way and permitting issues generally arise more often in the provision of wireline services than in the provision of wireless service.

Furthermore, the RLEC Petitioners fail to recognize that the record cited by the Commission is only a sampling of record support for the Tribal Engagement Requirement. Indeed, the Commission makes clear that the support to which it cites represents examples of support for the Tribal Engagement Requirement and not the entire record of support.<sup>19</sup> Such a showing conforms with the APA, which requires only that an agency reference sufficient evidence to support its decision.

In any event, additional record evidence exists to support the Tribal Engagement Requirement. For example, GRTI submitted comments in this proceeding urging adoption of a more stringent requirement than the Tribal Engagement Requirement ultimately adopted by the Commission.<sup>20</sup> In support, GRTI cited to a resolution by the NCAI urging the FCC to impose consultation requirements on all “regulated commercial telecommunications entities”<sup>21</sup> and the *National Broadband Plan’s* recommendation that “Tribal governments should play an integral

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<sup>18</sup> Joint Comments of Native Public Media and the National Congress of American Indians, WT Docket 10-208, at 9, fn. 19 (filed May 4, 2011).

<sup>19</sup> *USF/ICC Transformation Order* at fn. 1049 (“*See, e.g. . . .*”).

<sup>20</sup> Gila River Further Comments at 11-12 (supporting a requirement that would mandate all carriers serving tribal lands to obtain the approval of the appropriate tribal government before receiving federal funds).

<sup>21</sup> *Id.* at fn. 38 (citing NCAI Resolution MKE-11-005 In support of Tribal Positions on Universal Service Reform).

role in the process for designating carriers who receive support to serve Tribal lands.”<sup>22</sup> There can be no question that the Commission had sufficient support in the record to adopt the Tribal Engagement Requirement.

**B. Comments from Indian Country Wholly Support the Tribal Engagement Requirement**

GRTI also disagrees strongly with the RLEC Petitioners’ argument that comments of the National Tribal Telecommunications Association (“NTTA”) and other representatives of Indian Country somehow support the RLEC Petitioners position that a consultation obligation is not necessary.<sup>23</sup> GRTI is a member of NTTA and would not support the submission of comments that took a position that Tribal Engagement Requirements are unnecessary for incumbent local exchange carriers. Indeed, the comments to which the RLEC Petitioners cite specifically advocate for a requirement that regulated providers consult with the tribes they serve.<sup>24</sup> Likewise, NPM and NCAI also make clear in their opposition to the RLECs Petition that they “have consistently argued for a ‘seat at the table’ that will allow Tribes a voice” in how telecommunications services will be provided to Native peoples.<sup>25</sup>

**C. The Tribal Engagement Requirement will Lead to Increased Access to Broadband**

As another, equally unpersuasive argument, the RLEC Petitioners challenge the conclusion that tribal lands lack access to broadband.<sup>26</sup> To support this claim, the RLEC Petitioners argue that the National Broadband Map demonstrates that much of Indian Country is

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<sup>22</sup> *Id.* at fn. 39.

<sup>23</sup> RLECs Petition at 4-5.

<sup>24</sup> Comments of National Tribal Telecommunications Association, WC Docket 10-90 et al., at 27 (filed April 18, 2011).

<sup>25</sup> Opposition of NPM and NCAI at 6.

<sup>26</sup> RLECs Petition at 5-7.

served.<sup>27</sup> Yet, the RLEC Petitioners only identify 8 of 565 federally-recognized tribes that have near 100% broadband availability. This selective showing equates to less than 1.5% of all federally-recognized tribes. The notion that the Commission would conclude that Tribes have broadband available based on the availability of broadband to less than 1.5% of federally-recognized tribes is absurd. Moreover, GRTI has demonstrated previously in this proceeding that the evidence supporting the RLEC Petitioners data, namely, the National Broadband Map, exaggerates the availability of broadband. For example, the National Broadband Map overstates the broadband availability in the Gila River Indian Community.<sup>28</sup> Consequently, it would be entirely inappropriate for the Commission to conclude that the Tribal Reporting Requirement is unnecessary based on such an unsupported showing.

### **III. The Tribal Engagement Requirement is Consistent with the Communications Act and Federal Law and Not Beyond the Scope of the Commission’s Jurisdiction**

The RLEC Petitioners argue that the Tribal Engagement Requirement violates the Communications Act of 1934, as amended, (the “Communications Act”) and federal law and is beyond the scope of the Commission’s jurisdiction. The precedent upon which the RLEC Petitioners rely is inapposite to the facts in the instant proceeding. In any event, the Tribal Engagement Requirement is consistent with the Communications Act and federal law and is not beyond the scope of the Commission’s jurisdiction.

The *USF/ICC Transformation Order* requires, as part of the Tribal Engagement Requirement, that ETCs serving tribal lands must comply with tribal business and licensing requirements, including certificates of public convenience and necessity requirements, in order to

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<sup>27</sup> *Id.* at 6-7.

<sup>28</sup> Comments of Gila River Telecommunications, Inc., WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, and CC Docket Nos. 01-92, 96-45, at 17-20 (filed April 18, 2011).

receive USF support for such lands. RLEC Petitioners rely on a decision by the Commission in the *Western Wireless Order*,<sup>29</sup> and its interpretation of the Supreme Court’s decision in *Montana v. United States*,<sup>30</sup> to argue that neither tribes nor the Commission have jurisdiction over ETCs serving tribal lands. The *Western Wireless Order* concerned a carrier’s ETC designation to serve a reservation. According to the RLEC Petitioners, the *Western Wireless Order* provides “an analysis for determining the extent of Tribal authority, the Commission’s authority and the state commission’s authority over carriers providing service on Tribal lands.”<sup>31</sup> The RLEC Petitioners assert that neither tribes nor the Commission have jurisdiction to impose the instant requirements on ETCs. As explained below, there is no merit to either argument.

First, the RLEC Petitioners argue that *Montana v. United States* establishes that tribes do not have authority over ETCs in the instant proceeding. *Montana v. United States* sets forth the principle that tribes generally lack jurisdiction to regulate non-members of their reservation, subject to two important exceptions.<sup>32</sup> The first exception is that a “tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements.”<sup>33</sup> The second exception is that a tribe may “exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has

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<sup>29</sup> *In the matter of Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota; Federal-State Joint Board on Universal Service*, 16 FCC Rcd 18145 (2001) (“*Western Wireless Order*”).

<sup>30</sup> *Montana v. United States*, 450 U.S. 544 (1981).

<sup>31</sup> RLECs Petition at 8-9.

<sup>32</sup> *Montana v. United States*, 450 U.S. at 566.

<sup>33</sup> *Id.*

some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>34</sup>

As an initial matter, the issue of whether tribes have authority to impose certain requirements on carriers serving their tribal lands is inapposite to the Tribal Engagement Requirement. As NPM and NCAI note, the Tribal Engagement Requirement is not imposed by tribes, but instead by the Commission.<sup>35</sup> Consequently, the question of tribal authority over carriers serving their tribal lands is not at issue here.

Moreover, even if the issue of tribal authority over carriers were relevant to the instant proceeding, it is clear that tribes do hold authority over carriers serving their tribal lands. Again, as NPM and NCAI demonstrate in their opposition, courts since *Montana* have recognized that the inherent sovereign right of tribes includes the right to regulate the activities of non-members on tribal lands, independent of the two exceptions provided in *Montana*.<sup>36</sup>

Further, tribal regulation of carriers serving their lands falls under both exceptions to *Montana*, thereby providing tribes jurisdiction to regulate non-members on their lands. Under the first *Montana* exception, federal courts have recognized that the entry onto tribal lands and provision of service to tribal members is a “consensual relationship” triggering the rights of tribes to regulate the activities of non-tribal members.<sup>37</sup> In addition, under the second exception to *Montana*, a tribe may exercise authority over the conduct of entities within its lands if such

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<sup>34</sup> *Id.*

<sup>35</sup> NPM and NCAI Opposition at 9.

<sup>36</sup> *Id.* at 10-11 (citing *Water Wheel Camp Recreational Area, Inc. v. Larance*, 642 F.3d 8021, 8039-40 (9<sup>th</sup> Cir. 2011)).

<sup>37</sup> NPM and NCAI Opposition at 11 (citing *Big Horn County Elec. Co-Op v. Adams*, 53 F. Supp.2d 1047 (D. MT 1999), *aff'd in part, reversed in part*, 219 F.3d 944 (9<sup>th</sup> Cir. 2000)) (finding that a utility’s activity in providing electricity to residents of a reservation for a fee constituted a consensual relationship as defined by *Montana*).

conduct has some direct effect on the “welfare of the tribe.”<sup>38</sup> Here, the provision of advanced telecommunications and information services, and the conformance of such services with the tribal business and licensing requirements, has a direct effect on the welfare of the tribe. Consequently, it is clear that tribes have jurisdiction over carriers serving their tribal lands.

Second, the RLEC Petitioners imply that the Commission does not have authority to impose the Tribal Engagement Requirement. Once more citing to the *Western Wireless Order*, the RLEC Petitioners argue that the Commission has determined previously that Section 214 of the Communications Act does not affect jurisdictional disputes between tribes and states.<sup>39</sup> However, once again, the *Western Wireless Order* is inapposite to the current proceeding. The *Western Wireless Order* concerned a carrier’s ETC designation to serve a tribal land. Here, the dispute concerns a requirement imposed by the Commission for those carriers seeking to receive federal USF support. This falls solely within the realm of the Commission’s authority under Section 214 of the Communications Act. Consequently, the Commission does have authority to impose the Tribal Engagement Requirement.

#### **IV. The Tribal Engagement Requirement is Constitutionally Sound**

The RLEC Petitioners and USTA argue that their First Amendment rights are infringed by requiring them to hold discussions with Tribes with regard to “marketing services in a culturally sensitive manner” on tribal lands (“Tribal Advertising Rule”).<sup>40</sup> This argument fails because it does not properly recognize the Supreme Court’s well established precedent that the government has latitude to compel factually accurate advertising.

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<sup>38</sup> *Montana v. United States*, 450 U.S. at 566.

<sup>39</sup> RLECs Petition at 10-11.

<sup>40</sup> *Id.* at 11 (quoting *USF/ICC Transformation Order* at ¶ 637); USTA Petition at 18-19.

In *Glickman v. Wileman Brothers & Elliott, Inc.*, a fruit producer challenged a rule promulgated by the Secretary of Agriculture requiring fruit growers to pay for the generic advertising of their products.<sup>41</sup> The Court found not only that the requirement that the growers pay for the advertising does not violate the First Amendment, but also stated that it did not present a First Amendment issue.<sup>42</sup> According to the Court, the producer’s objection to the advertising requirement “provide[d] no basis for concluding that factually accurate advertising constitutes an abridgment of anybody’s right to speak freely.”<sup>43</sup> The Court explained that the advertising requirement “cannot be said to engender any crisis of conscience.”<sup>44</sup> Thus, the compulsion of factually accurate advertising was found not to violate the First Amendment.<sup>45</sup>

Under these guidelines, Congress and the Commission have required for over fifteen years that ETCs agree to “advertise the availability of [supported] services and the charges therefore using media of general distribution.”<sup>46</sup> Therefore, carriers wishing to take advantage of USF support have had to agree to accept similar conditions to advertise the existence of such services for years. Yet, this existing restriction on commercial speech has never been

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<sup>41</sup> 117 S. Ct. 2130 (1997).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 474.

<sup>44</sup> *Id.* at 472.

<sup>45</sup> Moreover, when purely commercial speech is at issue, the First Amendment primarily serves to protect the consumer’s interest in the free flow of truthful information. *See e.g., Edenfield v. Fane*, 507 U.S. 761, 766, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (“First Amendment coverage of commercial speech is designed to safeguard” society’s “interes[t] in broad access to complete and accurate commercial information”); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 783, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) (“A commercial advertisement is constitutionally protected not so much because it pertains to the seller’s business as because it furthers the societal interest in the ‘free flow of commercial information’ ”) (quoting *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)).

<sup>46</sup> 47 U.S.C. § 214(e)(1)(B); 47 C.F.R. § 214(e)(1)(B).

successfully challenged. Indeed, the existing advertising requirement is an example where the government is insisting that public funds be spent for “factually accurate advertising.”<sup>47</sup>

Similarly, the instant Tribal Advertising Rule is a requirement imposed by the Commission that requires recipients of USF support to engage in factually accurate advertising. Here, the Commission authorized the Tribal Advertising Rule in recognition of the unique circumstances on tribal lands and to further the Commission’s policy to promote tribal sovereignty. No part of the Tribal Advertising Requirement can be said to engender a crisis of conscience in those carriers serving tribal lands. Consequently, the Tribal Advertisement Rule is constitutionally sound.

#### **V. The Tribal Engagement Requirement is Not Unduly Burdensome**

The RLEC Petitioners argue that the Tribal Engagement Requirement is overly burdensome.<sup>48</sup> As NPM and NCAI point out, this argument is premature.<sup>49</sup> Indeed, the *USF/ICC Transformation Order* delegates to the Office of Native Affairs and Policy (“ONAP”) the duty of “developing specific procedures regarding the Tribal engagement process as necessary.”<sup>50</sup> Consequently, the RLEC Petitioners do not yet know the extent of any possible burden that may be imposed upon them. In addition, the RLEC Petitioners do not offer any concrete examples of how the Tribal Engagement Requirement is overly burdensome. Instead, the RLECs Petition merely references a litany of costs that may be incurred by ETCs serving tribal lands with no demonstration of the extent or consequences of such burdens. Consequently, the argument must be rejected because the RLEC Petitioners simply have not established that the Tribal Engagement Requirement is burdensome.

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<sup>47</sup> *Glickman v. Wileman Brothers & Elliott, Inc.*, 117 S. Ct. at 474.

<sup>48</sup> RLECs Petition at 13.

<sup>49</sup> NPM and NCAI Opposition at 16.

<sup>50</sup> *USF/ICC Transformation Order* at ¶ 637.

## **VI. The Tribal Reporting Requirement is Not Impermissibly Vague**

The *USF/ICC Transformation Order* requires that ETCs serving Tribal lands must file reports with the Commission demonstrating compliance with the Tribal Engagement Requirement (“Tribal Reporting Requirement”).<sup>51</sup> At a minimum, ETCs must demonstrate that they fulfilled the Tribal Engagement Requirement through discussions which included: (1) a needs assessment and deployment planning with a focus on tribal community anchor institutions; (2) feasibility and sustainability planning; (3) marketing services in a culturally sensitive manner; (4) rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and (5) compliance with tribal business and licensing requirements. USTA argues that the Tribal Reporting Requirement is impermissibly vague.<sup>52</sup> USTA’s argument is premature. As discussed above, the *USF/ICC Transformation Order* delegates to the ONAP the duty of “developing specific procedures regarding the Tribal engagement process as necessary.”<sup>53</sup> Until ONAP develops such procedures, it is not possible to evaluate whether or determine if the Tribal Reporting Requirement is impermissibly vague.

## **VII. The Commission Should Reconsider its Decision to Make Publicly Available the Financial Disclosures of Tribally-Owned Carriers**

GRTI supports the request of USTA that the Commission should allow privately held ETCs to seek confidential treatment of their financial and operational reports, which under the new rules adopted in the *USF/ICC Transformation Order* must be filed with the Commission.<sup>54</sup> In its petition, USTA states that privately held companies do not routinely publicly disclose the

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<sup>51</sup> *USF/ICC Transformation Order* at ¶ 604.

<sup>52</sup> USTA Petition at 19.

<sup>53</sup> *USF/ICC Transformation Order* at ¶ 637.

<sup>54</sup> *See* USTA Petition at 29.

confidential financial and operation information that is now required to be disclosed.<sup>55</sup>

Similarly, tribally-owned companies never publicly disclose such information. Indeed, tribes and tribally-owned entities closely guard such confidential information because such information is relevant to the internal affairs of the tribe.

The Commission has recognized in this proceeding and others the importance of promoting the sovereign rights of Tribes over their internal affairs.<sup>56</sup> Consequently, the Commission's rules should avoid infringing upon tribal sovereignty to the maximum extent possible. Since the disclosure of confidential financial information to others besides the Commission and the Universal Service Administrative Company would serve no legitimate governmental interest, the Commission should refrain from requiring the public disclosure of such information of tribally-owned entities, in part to promote and further the sovereign rights of Tribes over their internal affairs and machinations.

### **VIII. The Commission Should Reconsider Several Aspects of Its Caps on Capital and Operating Expenses**

GRTI supports the request of the National Exchange Carriers Association, Inc. ("NECA"), Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"); and Western Telecommunications Alliance ("WTA") that the Commission reconsider several aspects of its caps on reimbursable capital and operating costs

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<sup>55</sup> *Id.*

<sup>56</sup> *See, e.g., USF/ICC Transformation Order* at ¶484 ("We also adopt Tribal engagement requirements and preferences that reflect our unique relationship with Tribes. We believe that these measures should provide meaningful support to expand service to unserved areas in a way that acknowledges the unique characteristics of Tribal lands and reflects and respects Tribal sovereignty."); *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078 (2000) ("The Commission also recognizes the rights of Indians Tribal governments to set their own communications priorities and goals for the welfare of their membership.").

and corporate operations expenses (collectively, the “High Cost Caps”).<sup>57</sup> GRTI agrees with NECA, OPASTCO and WTA that several aspects of the High Cost Caps are not rational.<sup>58</sup> In addition, the High Cost Caps are not rational as applied to tribally-owned carriers given the unique circumstances of tribally-owned carriers.

The *USF/ICC Transformation Order* applies regression analyses to cap reimbursable capital expenses (“CapEx”) and operating expenses (“OpEx”) for purposes of determining high cost loop support and interstate common line support (“ICLS”) for rate of return carriers.<sup>59</sup> In addition, the *USF/ICC Transformation Order* extends the limit on recovery of corporate operations expenses to ICLS.<sup>60</sup> GRTI agrees with NECA, OPASTCO, and WTA that the Commission acted prematurely in (1) adopting regression analysis-based constraints<sup>61</sup> and (2) applying the CapEx and OpEx caps and extending the corporate operations expense cap to ICLS.<sup>62</sup>

In addition, GRTI believes that the High Cost Caps are arbitrary and capricious when applied to tribally-owned carriers. Tribally-owned carriers face unique circumstances not encountered by their non-tribally owned counterparts. One example of the unique circumstances facing tribally-owned carriers, and for that matter all carriers serving tribal lands, is the higher expenses incurred for network operations and investment. As the Commission has recognized in

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<sup>57</sup> Petition for Reconsideration and Clarification of the National Exchange Carrier Association, Inc.; Organization for the Promotion and Advancement of Small Telecommunications Companies; and Western Telecommunications Alliance, WC Docket No. 10-90 et al., at 9-13 (filed December 29, 2011) (“Petition of NECA et al.”).

<sup>58</sup> *Id.* at 9

<sup>59</sup> See *USF/ICC Transformation Order* at ¶ 214-226.

<sup>60</sup> See *id.* at ¶ 229.

<sup>61</sup> Petition of NECA et al. at 9-10 (“the Commission has ventured down a path that could limit cost recovery in unworkable or unlawful ways”)

<sup>62</sup> *Id.* at 11 (“Application of new caps on cost recovery through ICLS is hasty and injudicious”).

this proceeding, tribally-owned and operated carriers serve communities that historically lack critical infrastructure.<sup>63</sup> Under the new public interest obligations adopted by the *USF/ICC Transformation Order*, GRTI will be forced to expedite the deployment of broadband by installing fiber to the home throughout its very large service area with low population density in order to meet 4 Mbps uplink and 1 Mbps downlink minimum required speeds. Adding to the substantial cost of this deployment is the fact that tribal lands, like the GRIC, generally do not have the same infrastructure normalities (i.e., roads, highways, modernized housing, urbanized conveniences, etc.) as non-tribal lands. Thus, costs to offer advanced telecommunications and information services to areas with non-modernized infrastructure are very high, in part due to the lack of such infrastructure normalities that are common in more modernized areas, and even in most rural, non-tribal lands.

Another contributing factor to the higher cost of network operations and investment for tribally-owned carriers is the responsibility of such carriers to the residents of their community. For example, whereas U.S. West historically delayed the extension of lines or charged exorbitant installation fees to residents of the GRIC, GRTI, as a tribally-owned entity, is obligated to provide service to all residents at the same standard rate, regardless of cost, and in a timely fashion.<sup>64</sup> In addition, tribally-owned carriers make full, expedient repairs to damaged or stolen plant on tribal lands, whereas non-tribally owned carriers have been known to delay or minimize repair costs.<sup>65</sup> The relatively high telephone penetration rates on tribal lands served by tribally-

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<sup>63</sup> *USF/ICC Transformation Order* at ¶ 1059.

<sup>64</sup> Moreover, a large percentage of GRTI's customers are at or near the poverty line, reducing the estimated revenues for each such line extension.

<sup>65</sup> Providers on tribal lands often experience high rates of theft because their plant is comprised of copper and wood which are items of value on economically-depressed tribal lands.

owned and operated carriers, such as the penetration rates on the GRIC, evidence the greater commitment to service provided by carriers such as GRTI.

Tribally-owned carriers also face increased costs and delays associated with obtaining cultural clearance for rights-of-way on tribal lands.<sup>66</sup> Obtaining cultural clearance for rights of way over which to extend plant in the GRIC cost GRTI more than \$30,000 in 2011. In addition, delays in obtaining cultural clearance can postpone the extension of service by as much as six months. Further, if cultural clearance is ultimately not granted, for example, due to the existence of burial grounds or other culturally significant findings, an alternative, more expensive route must be developed.

Network operation and investment by tribally-owned carriers also are unique due to the lack of technically trained residents of tribal lands. As the *National Broadband Plan* noted, Tribes face a shortage of technically trained members who can undertake deployment and adoption planning.<sup>67</sup> As a tribally-owned entity, GRTI attempts to hire employees and obtain services from within its community. As any economist can attest, when the supply of technically trained workers and their services is low, the price for such workers and their services increases. In addition, in those instances in which GRTI seeks employees and service from non-residents, salaries and costs of services are often inflated since the GRIC is not located within a

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<sup>66</sup> GRTI recognizes that non-tribally-owned carriers serving tribal lands presumably face such costs as well. However, GRTI notes that such carriers often do not abide by many rights of way rules and other permitting requirements on tribal lands. *See* Joint Comments of NPM and NCAI at 9, fn. 19 (citing difficulties in getting incumbent providers to abide by rights of way permission and business and other permitting requirements).

<sup>67</sup> *National Broadband Plan* at Box 8-4. *See, e.g.*, U.S. Census Bureau: American FactFinder, Sex by Educational Attainment for the Population 25 Years and Over (American Indian and Alaska Native Alone) [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_10\\_1YR\\_B15002C&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_B15002C&prodType=table) (last visited Jan. 18, 2012) (estimating that almost 23% of American Indians and Alaskan Natives over the age of 25 do not hold a high school diploma or equivalent).

metropolitan area. Consequently, tribally-owned carriers such as GRTI often experience higher than normal network operations costs due to the lack of technically-trained, locally-based employees and service providers.

The High Cost Caps fail to recognize such unique circumstances, but instead subject tribally-owned carriers to the same cost limitations as non-tribally-owned carriers.

Consequently, the imposition of the High Cost Caps on tribally-owned carriers is arbitrary and capricious.

## **IX. Conclusion**

As the Commission transforms the way in which advanced telecommunications and information services are deployed throughout the nation, GRTI urges the Commission to fulfill its responsibility to Indian Country. As former Commissioner Michael J. Copps stated:

We are also moving toward fuller appreciation of what tribal sovereignty means and of the need to accord tribes the fuller and more active role they must have in order to ensure the best and most appropriate deployment and adoption strategies for their areas and populations. I feel encouraged that we are at long last positioning ourselves to make progress by working more closely and creatively together. The sad history here, as we all know, is many promises made, many promises broken. We need to turn the page, and I think we are beginning to do that now.<sup>68</sup>

In order to increase broadband availability on tribal lands in the future, GRTI urges the Commission to affirm adoption of the Tribal Engagement Requirement and the Tribal Reporting Requirement. In addition, for the reasons set forth herein, the Commission should reconsider its

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<sup>68</sup> *USF/ICC Transformation Order* at Statement of Commissioner Michael J. Copps.

decision to make publicly available the financial disclosures of tribally-owned carriers and should reconsider several aspects of its High Costs Caps as applied to tribally-owned carriers.

Respectfully Submitted,

**Gila River Indian Community and Gila River  
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February 9, 2012

## CERTIFICATE OF SERVICE

I, Sean Conway, hereby certify that this 9th day of February 2012, I caused a copy of the foregoing OPPOSITION AND COMMENTS OF THE GILA RIVER INDIAN COMMUNITY AND GILA RIVER TELECOMMUNICATIONS, INC. TO PETITIONS FOR RECONSIDERATION to be filed electronically in the Commission's Electronic Comment filing System and a copy to be delivered by first-class mail, postage prepaid, to the following:

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