

**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 an Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Line-Up)	WC Docket No. 03-109
)	
Universal Service Reform – Mobility Fund)	WT Docket No. 10-208

REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

The Rural Incumbent Local Exchange Carriers Serving Tribal Lands,¹ by their attorneys, hereby reply to the oppositions to their Petition asking the Commission to reconsider its requirement concerning Tribal engagement as it applies to wireline eligible telecommunications carriers (ETCs) in the above-captioned *Order*.² In their Petition, Petitioners demonstrated that

¹ The rural incumbent local exchange carriers listed in Attachment A are participating in the filing of this Reply to Oppositions to Petition for Reconsideration.

² *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Reform – Mobility Fund; Report and Order and Further Notice of Proposed Rulemaking, WC Dockets No. 10-90, 07-135, 05-337, 03-*

the Tribal engagement requirement imposed on wireline ETCs is not supported by the record. The requirement that ETCs demonstrate compliance with Tribal business and licensing requirements, including certificates of public convenience and necessity from Tribal governments, violates state and federal law, the Communications Act and it is beyond the scope of the Commission's jurisdiction. The requirement concerning marketing violates the First Amendment of the Constitution of the United States. And, the Commission's consultation and reporting requirements are unduly burdensome. The oppositions filed by various parties do not refute any of these points and, therefore, Petitioners renew their call for the Commission to eliminate its unsupported and unlawful requirement.

I. The Requirement that ETCs must Comply with Tribal Business and Licensing Requirements Violates Commission Precedent, the Act, State and Federal Law and is Beyond the Scope of the Commission's Jurisdiction

As demonstrated in the Petition, the Commission's requirement that ETCs must comply with Tribal business and licensing requirements, including certificates of public convenience and necessity requirements, or else be subjected to financial consequences, including the loss of federal universal service support, violates Commission precedent, state and federal law, the Act, and it is beyond the scope of the Commission's authority. Specifically, the Commission's current requirement conflicts with its previous interpretation of the Communications Act and the authority of tribes and state commissions as expressed in the *Western Wireless Order*.³ In that order, the Commission found that the Communications Act does not expressly delegate authority

109; CC Dockets No. 01-92, 96-45; GN Docket No. 09-51; WT Docket No. 10-208, released November 18, 2011, at ¶¶636-637, §54.313(a)(9)(*Order*).

³ *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 (FCC 2001) (*Western Wireless Order*).

to the tribes to regulate nonmembers.⁴ The Commission also found that its decision did not affect the "continued state regulation of wireline carriers serving Reservations."⁵

Further, the Commission's rule requiring ETCs to comply with tribal requirements regarding certificates of public convenience and necessity conflicts with Section 214(e), which grants state commissions the authority to designate ETCs. The Commission's rule would allow the Commission or the tribes to effectively negate a state ETC designation by allowing the tribe to deny the grant of a certificate of public convenience and necessity and thereby prohibit an ETC from operating on tribal land. Neither the Commission nor the tribes have the authority to negate a state ETC designation in this manner.

As shown in the Petition, all of the Petitioners are local exchange carriers that have received a certificate of public convenience and necessity, or its equivalent, from their respective state commissions, which authorizes them to operate throughout their respective service areas, including all Tribal lands that are part of their service areas. None of the Petitioners have consented to Tribal authority for the provision of services on Tribal lands. Further, all of the Petitioners have been designated as an ETC for their entire service area, including those areas encompassing Tribal lands, pursuant to state law and Section 214(e)(2) of the Act. Accordingly, the Commission's rule conflicts with its precedent in the *Western Wireless Order* and the Communications Act.

Some parties argue that the Petitioners' reliance on *Montana v. United States* is misplaced. As an initial matter, it was the Commission that established in the *Western Wireless Order* that the *Montana* analysis should be applied and the Commission has not revised or

⁴ *Western Wireless Order* at 18154.

⁵ *Id.* 18152.

reversed its findings on this point. Some parties also point to cases, decided before the *Western Wireless Order*, to challenge the Commission's interpretation. However, it must be presumed that the Commission was aware of these cases and did not find them controlling.⁶

Moreover, *Reservation Telephone Co-Operative v. Henry*,⁷ supports the conclusion that tribes lack jurisdiction over wireline carriers authorized to operate by the state commission. In *Reservation Telephone Co-Operative v. Henry*, the Court addressed whether the Tribe could impose a tax against rights-of-way and telephone lines used by rural telephone cooperatives throughout the reservation. In finding that the Tribe could not impose the tax against two telephone cooperatives, the Court applied the *Montana* analysis and found that "*Montana* clearly established the standard for determining whether an Indian tribe's regulatory activities constitute an exercise of its sovereign powers or an unwarranted intrusion into areas outside the tribe's jurisdiction."⁸ The Court further found that under *Montana*, a tribe cannot regulate non-members of the Tribe "unless there is an express delegation of power from Congress or the regulation meets the criteria for one of the enunciated exceptions."⁹ Significantly, the Court found, as a matter of law, that the telephone cooperatives did not enter into a consensual relationship "with

⁶ Two cases, decided after the *Western Wireless Order*, *United States v. Lara*, 541 US 193 (2004) and *Water Wheel Coop. Recreational Area, Inc. v. Larance*, 642 F.3d 802 (9th Cir. 2011), do not support the opposing parties and are distinguishable from *Western Wireless*. In *Lara*, the Supreme Court's decision interpreted a statute granting tribes the authority to prosecute non-members. The Court also found that the case involved "no interference with the power or authority of any States." *Lara* at 205. Similarly, in *Water Wheel*, the court's decision was based, in part, on its finding that there was no competing State interest involved. *Water Wheel* at 814.

⁷ *Reservation Telephone Co-Operative v. Henry*, 278 F.Supp.2d 1015 (D. ND 2003)

⁸ *Id.* at 1021.

⁹ *Id.* at 1022.

the tribe or its members as a result of providing telecommunication services on the Reservation, or as a result of the sale and service of telephone equipment."¹⁰ According to the Court:

The Cooperatives in this dispute fall within the general jurisdiction of the North Dakota Public Service Commission which has the authority to require them to obtain Certificates of Public Convenience and Necessity in order to serve the public. The Cooperatives have obtained such certificates from the Public Service Commission which grants them exclusive rights for telephone and telephone Internet services in a specified area unless similar authority is granted to another cooperative by the PSC. The Cooperatives received their authority to operate and provide telecommunications services on the Reservation from a grant of legislative authority which does not equate with a 'consensual relationship' to satisfy the *Montana* test. The Court concludes, as a matter of law, that the telecommunications services provided by the Cooperatives to the Three Affiliated Tribes are not of a consensual nature to satisfy the first *Montana* exception.¹¹

The Court also found that the second *Montana* exception did not apply. According to the Court, "[t]he Cooperative's actions of providing telecommunications services, and the related sales and service of telephone equipment, do not endanger the tribe's political integrity, the economic security, or the health or welfare of the tribe." In addition, the Court found that the second *Montana* exception

... is only triggered by non-member conduct that threatens the Indian tribe. It does not permit the exercise of civil authority when it may arguably be considered 'necessary' to self-government. The Cooperatives provide valuable telecommunications services to the Reservation and no reasonable argument has been made, or could be made, that such services pose a threat to the tribe or endanger its political integrity so as to invoke the second *Montana* exception.¹²

Accordingly, the Commission's rule, which requires wireline ETCs, authorized to operate pursuant to a grant of authority from the state commission, to comply with Tribal authority, clearly is unlawful and must be reconsidered.

¹⁰ *Id.* at 1023.

¹¹ *Id.* at 1024.

¹² *Id.*

II. Restrictions on Speech Must be Narrowly Tailored

As demonstrated in the Petition, the Commission's requirement that ETCs must meaningfully engage Tribal governments, including "marketing services in a culturally sensitive manner," goes beyond the Act and cannot be squared with the First Amendment's guarantee of free speech. As shown in the Petition, the Commission's rule does not meet the four-part test in *Central Hudson*,¹³ to determine whether government restrictions on commercial speech are permissible.¹⁴ Specifically, the restriction is not limited to misleading speech or illegal activities; the Commission has not articulated a substantial interest in regulating speech in this context; it has not shown that its restriction on speech directly and materially advances a government interest or presented any evidence to support its claim;¹⁵ and, the Commission's restriction is not narrowly tailored, as it applies in all situations where an ETC provides service on Tribal land, even where broadband service is available. Further, the language is vague and it could allow restriction of any speech. Clearly, therefore, the Commission's requirement fails the test established in *Central Hudson*.

Some parties argue that the Commission's requirement is not a violation of the First Amendment because Section 214(e) requires ETCs to advertise their services;¹⁶ the government can condition the grant of benefits, even if such conditions might impact First Amendment

¹³ *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* 447 U.S. 557, 100 S. Ct. 2343, June 20, 1980 (*Central Hudson*).

¹⁴ Petitioners note that the United States Telecom Association has asked the Commission to reconsider the entire Tribal engagement rule because the entire rule violates the First Amendment. Petitioners also support this position.

¹⁵ In *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1237, the court indicated that the Commission must present empirical evidence to support its claim that a restriction on speech directly and materially advances a government interest.

¹⁶ See, Opposition and Comments of the Gila River Indian Community and Gila River Telecommunications, Inc. to Petitions for Reconsideration at 12-14 (Gila River Opposition).

rights;¹⁷ and the government can compel factually accurate advertising.¹⁸ Petitioners agree that Section 214(e) of the Act requires ETCs to advertise the supported services throughout the designated service area. Petitioners do not oppose this requirement and in fact, they comply with it. The Commission's new rule, however, goes far beyond the requirement in Section 214(e). Indeed, if the new rule is nothing more than an attempt to ensure accurate advertising of services, there would be no need for the rule. Accordingly, to survive challenge, the Commission's new restriction on speech must satisfy the test established in *Central Hudson*. Because the Commission has not and cannot show that the new rule passes the *Central Hudson* test, the rule must be eliminated.

III. The Consultation Requirement is Unduly Burdensome

In the Petition, Petitioners demonstrated that the Commission's specific consultation and reporting requirements will be extremely burdensome and costly for Petitioners to implement. Further, Petitioners demonstrated that the requirements are even more burdensome for Petitioners that serve only a small portion of Tribal lands or that serve portions of multiple Tribal lands, which would necessitate that they engage in multiple assessment, planning and marketing efforts for each specific Tribal land area that they serve.

In its opposition, the Navajo Nation states that it "is sympathetic" to the argument that the rule could be burdensome for carriers that provide service to only a small portion of a reservation and that it "is considering establishing an automatic waiver from engagement for carriers with a *de minimis* footprint on Navajo soil, and providing a waiver mechanism for other carriers who

¹⁷ See, Opposition of the Navajo Nation Telecommunications Regulatory Commission to Petition for Reconsideration at 6-7 (Navajo Nation Opposition).

¹⁸ See, Gila River Opposition at 12-14.

believe that engagement with NNTRC is overly burdensome."¹⁹ While Petitioners appreciate the consideration shown by the Navajo Nation on this issue, it highlights the validity of the argument made by Petitioners. Accordingly, the Commission should reconsider its rule.

IV. The Consultation Requirement is not Supported by the Record

Various Parties take exception to Petitioners' argument that the evidence cited by the Commission in the *Order* does not support the Commission's conclusion concerning the need for the Tribal consultation requirement. They also attempt to refute the Petitioners' argument that the Commission ignored record evidence and the data in the National Broadband Map which make clear that a consultation obligation on all ETCs serving Tribal lands is not necessary to promote the universal deployment of broadband service.

In support of their position, the Parties argue that there is other record evidence that the Commission could have relied on to support its *Order* and that the Petitioners failed to consider the evidence in the National Broadband Plan (NBP) that supports the Commission's conclusions. As an initial matter, it is the Commission's burden to support its conclusions with evidence. As demonstrated in the Petition, the evidence cited by the Commission in the *Order* does not support its conclusion.

In addition, the NBP cannot save the Commission's *Order*, because the so-called evidence in the NBP is the same old, outdated, unsupported and discredited statement that less than 10% of residents on Tribal lands have broadband available.²⁰ Accordingly, the NBP does not contain evidence supporting the Commission's rule.

¹⁹ Navajo Nation Opposition at 18.

²⁰ NBP at 152, Box 8-4.

As for the record evidence presented by Petitioners and the data in the National Broadband Map demonstrating that there are Tribal lands with broadband coverage of 95% and more, various parties argue that Petitioners provided only a few such examples and there are many recognized Tribal lands. This is a weak criticism as availability of broadband service on over 300 Tribal lands is readily available through the National Broadband Map (NBM). A cursory review of the data in the NBM for Tribal lands in addition to those served by Petitioners shows that there are many Native Nations with wireline broadband access to 95% or more of the population. The Commission cannot simply ignore this data.

V. Conclusion

The Petitioners ask the Commission to reconsider its requirement concerning Tribal engagement as it applies to wireline ETCs. As demonstrated herein and in the Petition, the requirements imposed on wireline ETCs are not supported by the record and they are unduly burdensome. In addition, the requirement concerning marketing violates the First Amendment of the Constitution of the United States. And, the requirement that ETCs demonstrate compliance with Tribal business and licensing requirements, including certificates of public convenience and necessity from Tribal governments, violates Commission precedent, state and federal law, the Communications Act and it is beyond the scope of the Commission's jurisdiction. For these reasons, the Commission must rescind its unsupported and unlawful requirement.

Respectfully submitted,

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Attachment A

List of Petitioners

Chickasaw Telephone Company

Copper Valley Telecom

Dubois Telephone Exchange, Inc.

Golden 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

West River Cooperative Telephone Company

Certificate of Service

I hereby certify that on February 21, 2012, a copy of the forgoing **Reply to Oppositions to Petition for Reconsideration** was served on each of the following via US Mail, postage prepaid:

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