

**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 Link-Up)	WC Docket No. 03-109
)	
Universal Service Reform – Mobility Fund)	WT Docket No. 10-208

To: Wireline Competition Bureau

PETITION FOR WAIVER OF TOTAH COMMUNICATIONS, INC.

I. INTRODUCTION AND BACKGROUND

Totah Communications, Inc. (“Totah”)¹ by its attorneys and pursuant to Section 1.3 of the Federal Communications Commission’s (“FCC” or “Commission”) rules,² hereby respectfully requests a waiver of Section 54.313(a)(9) of the FCC’s rules which requires eligible telecommunications carriers (“ETCs”) to demonstrate on an annual basis that they have engaged Tribal governments in their supported areas.³ As discussed below, the Commission’s Tribal

¹ Totah Communications, Inc. is a rural, rate-of-return incumbent local exchange carrier, founded in 1954, that provides facilities-based telecommunications service and broadband access to subscribers in Northeastern Oklahoma and a small portion of Southeastern Kansas.

² 47 C.F.R. § 1.3.

³ 47 C.F.R. § 54.313(a)(9).

engagement obligations are, as a practical matter, inapplicable due to the unique circumstances surrounding Totah's provision of services to Tribal members in the Totah service area.

While Totah serves federally recognized Tribes,⁴ Totah serves no Tribal "sovereign institutions,"⁵ "Tribal governments,"⁶ or "Tribal Councils."⁷ In short, there are no Tribal officials that govern land within Totah's service areas. Specifically, Tribal members living in Totah's service area do not live in defined communities and are interspersed among the general population in Totah's service area. Like the rest of Totah's customer base, Tribal members in Totah's service area have access to advanced telecommunications and broadband services. Simply put, the underlying purpose of the Commission's rule – ensuring the "successful deployment"⁸ of advanced telecommunications and broadband services to traditionally underserved Tribal members – is already being met by Totah. Further, grant of Totah's requested waiver is in the public interest since requiring contact with non-existent Tribal governments is not possible and would be frustratingly superfluous and any "potential reduction in universal service support" for failing to do so would harm the very people the Commission is attempting to aid with its new Tribal engagement rules. Accordingly, Totah has no reasonable alternative but to request a waiver of the Commission's Tribal engagement obligations.

⁴ Of the Tribal members it serves, Totah provides service mainly to Cherokee, Osage, and Muscogee (Creek) members.

⁵ *Office of Native Affairs and Policy, Wireless Telecommunications Bureau, and Wireline Competition Bureau Issue Further Guidance on Tribal Government Engagement Obligation Provisions of the Connect America Fund*, WC Docket No. 10-90 *et al.*, Public Notice, DA 12-1165, ¶ 28 (July 19, 2012) ("*Further Guidance Public Notice*"). The *Further Guidance* outlines the actions that ETCs are expected to take in order to fulfill the FCC's Tribal engagement obligations.

⁶ *Id.*

⁷ *Id.* at ¶ 12.

⁸ See *Connect America Fund*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, ¶637 (Nov. 18, 2011) ("*USF/ICC Transformation Order*").

In the *USF/ICC Transformation Order*, the Commission adopted Tribal engagement obligations that require ETCs “to demonstrate on an annual basis that they have meaningfully engaged Tribal governments in their supported areas” regarding the deployment of communications services.⁹ The obligations apply to ETCs “currently providing service or contemplating the provision of service on Tribal lands.”¹⁰ Such Tribal 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.”¹¹ Recipients of universal service support must “submit to the Commission and appropriate Tribal government officials an annual certification and summary of their compliance with this Tribal government engagement obligation.”¹² Carriers will be subject to “potential reduction[s] in universal service support should they fail to fulfill their engagement obligations.”¹³ As discussed in more detail below, potentially reducing Totah’s universal service support as a result of it being unable, as a practical and logical matter, to meet its Tribal engagement obligations, would not be in the public interest given Totah’s unique circumstances.

II. TOTAH’S TRIBAL CIRCUMSTANCES ARE UNIQUE

Totah’s Tribal population is patently different than typical Tribal lands throughout the United States. As the Commission recognizes, Oklahoma primarily consists of “former

⁹*USF/ICC Transformation Order* at ¶ 637.

¹⁰ *Id.*

¹¹ *Id.* See also 47 C.F.R. § 54.313(a)(9).

¹² *USF/ICC Transformation Order* at ¶ 637.

¹³ *Further Guidance Public Notice* at ¶ 7.

reservations.”¹⁴ These former reservations are now identified as Oklahoma Tribal Statistical Areas (“OTSAs”). OTSAs are statistical areas identified by the U.S. Census Bureau as federally recognized tribes based in Oklahoma that had a former American Indian Reservation in Oklahoma prior to Oklahoma statehood. Tribal members in Totah’s service area may live within their Tribe’s OTSA or they may live outside the OTSA.¹⁵ In addition, non-Tribal members live within these former reservations/OTSAs. Because of this disbursement/mixing of Tribal and non-Tribal populations, the Tribal population served by Totah is *not* at all geographically isolated like the majority of Tribal areas in other states. On Totah’s Tribal lands, individuals who are members of Tribes live alongside non-Tribal individuals and utilize many of the same community services and facilities as non-Tribal members, including telecommunications, education, and healthcare. The non-sovereign former reservations in Totah’s service area are subject to Oklahoma municipal, county, and state laws and regulations.

Many of the Commission’s Tribal engagement obligations are designed to bring ETCs and Tribal government officials together in order to discuss ways to navigate complex Tribal regulations.¹⁶ With the absence of clearly defined Tribal areas, Totah’s service area lacks the complex government and sovereignty issues found on other Tribal lands, such as those that are applicable on federally-designated Tribal reservations. On the majority of Tribal lands, particularly federally-designated Tribal reservations, Tribal governments are responsible for overseeing everything from basic government services to economic development in their communities. There is no such Tribal government oversight present in Totah’s service area.

¹⁴ *Id.* at n. 2.

¹⁵ See *Guidelines for Delineating Oklahoma Tribal Statistical Areas*, 2010 Census Tribal Statistical Areas Program, U.S. Census Bureau, Version 1, January 2009.

¹⁶ *Further Guidance Public Notice* at ¶ 26.

Instead, the process for deploying broadband is similar, if not identical to, to deploying broadband on non-Tribal land.

III. APPLICATION OF THE TRIBAL ENGAGEMENT OBLIGATION IS UNNECESSARY AND OVERLY BURDENSOME IN TOTAH'S SERVICE AREA

As noted above, Totah does not differentiate between Tribal individuals living in former reservation lands and non-Tribal individuals. Nor does Totah differentiate between Tribal lands and non-Tribal lands when deciding which services to deploy. Pursuant to Oklahoma Corporation Commission rules, Totah is both a Carrier of Last Resort ("COLR") and an Eligible Telecommunications Carrier ("ETC").¹⁷ As such, Totah's existing business plans and its COLR and ETC obligations facilitate and support connectivity to *all* subscribers located within its service area, regardless of whether or not the area consists of Tribal lands and regardless of whether or not the requesting customer is a member of an American Indian Tribe. *All* Tribal members throughout Totah's entire service area have access to advanced telecommunications and broadband services. Therefore, the engagement obligations and actions described in the *Further Guidance Public Notice* are basically redundant when it comes to the goal of providing advanced services to Tribal members in Totah's service area. In reality, there is no Tribal government or official with whom Totah can engage in its service area.

Oklahoma COLR obligations ensure that every requesting customer in Totah's area receives service.¹⁸ Such obligations are imposed by the state of Oklahoma and have given nearly every resident in Totah's service area the chance to receive basic and advanced

¹⁷ See, OAC 165:55-1-4 Definitions - "'Carrier of last resort' means a telecommunications service provider as designated by the Commission pursuant to OAC 165:55-17-29." See also, OAC: 165:55-17-29 Eligible Telecommunications Carrier - "Each incumbent LEC is designated as an eligible telecommunications carrier for the territory for which it was certified on the date of the adoption of the Federal Telecommunications Act of 1996. ..."

¹⁸ OAC 165:55-13-12.

telecommunications services. Totah's COLR obligations also serve many of the same purposes as the Commission's Tribal engagement obligations. The Tribal engagement obligations are intended to facilitate the "deployment and adoption of communications technologies on Tribal lands."¹⁹ Oklahoma COLR obligations already impose a duty on Totah to make its best efforts to bring communications services to all individuals, Tribal and non-Tribal, living within its service territory. The ultimate goal of the Commission's Tribal engagement obligation is being met and will continue to be met in Totah's service area because of Totah's existing COLR obligations²⁰ and lack of cultural, economic, and administrative barriers that generally exist in other states' clearly defined and distinctly separate Tribal regions.

As discussed above, Totah serves an area that lacks distinct Tribal communities and recognized Tribal leaders. Any Tribal officials or Tribal governments are located outside of Totah's service area. For example, members of the Cherokee Nation live within Totah's service area, but the Cherokee government offices are located hundreds of miles outside of Totah's service area.²¹ If the full scope of the Commission's Tribal engagement obligations are applied to Totah, Totah will be expending substantial resources to reach and work with leaders who neither reside in nor have knowledge of Totah's service area. It is unreasonable for Totah to be expected to spend time and money developing strategic plans for reservations that no longer exist and for Tribal members that already have access to advance telecommunications and broadband

¹⁹ *Further Guidance Public Notice* at ¶ 30.

²⁰ Totah is bound by its federal and state ETC obligations that require Totah to provide service to all consumers in its study area. *See, e.g.*, 27 U.S.C. §§ 214(e)(1) and 254(b)(2) and OAC 165:55-17-29.

²¹ Totah has, in good faith, contacted and will contact Tribal leaders outside of its study area to seek input and advice, but given the scope of the engagement obligations outlined in the *Further Guidance Public Notice*, the instant request for waiver is necessary in order to avoid possible universal service penalties.

services. As the Commission notes, “with the entire engagement process, reasonableness should prevail.”²²

IV. GRANT OF TOTAH’S REQUEST FOR WAIVER IS IN THE PUBLIC INTEREST

The Commission may waive any of its rules if the petitioner shows “good cause.”²³ A waiver may be granted if: 1) the waiver would better serve the public interest than would application of the rule; and 2) special circumstances warrant a deviation from the general rule.²⁴ In addition, the Commission may grant a waiver when such waiver results in a “more effective implementation of overall policy on an individual basis.”²⁵

As the Commission recognizes in this proceeding, “there is no one size fits all guidance that will be universally applicable” when developing Tribal engagement obligations.²⁶ As discussed above, the full scope of the Commission’s general Tribal engagement obligations simply does not fit Totah’s special circumstances. Totah does not serve distinct Tribal communities – a situation unique to Totah’s service area. If the full scope of the Commission’s Tribal engagement obligations is applied to Totah, Totah could be penalized with a loss in needed universal service support. Such support is currently being used to provide advanced services to Totah’s Tribal members, interspersed throughout Totah’s service area. Any loss of such support would be contrary to the public interest and Section 254 of the Telecommunications Act of 1996 and would harm Tribal members seeking advanced services at just and reasonable

²² *Further Guidance Public Notice* at ¶ 15.

²³ 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

²⁴ *Northeast Cellular*, 897 F.2d at 1166.

²⁵ *Wait Radio*, 418 F.2d at 1159.

²⁶ *Further Guidance Public Notice* at ¶ 4.

rates in Totah’s rural service area.²⁷ Further, the underlying purpose of the rule – to promote service to Tribal members – would be thwarted by its application and resulting loss of universal service support. Accordingly, the Commission’s goal of facilitating “the deployment and improvement of communications services on Tribal lands”²⁸ is best met with the treatment of Totah on an individual basis, pursuant to Totah’s request for waiver.

V. CONCLUSION

Totah is currently providing advanced telecommunications and broadband services to every Tribal member that desires such services in Totah’s service area. With zero formal Tribal communities and Tribal governments in its service area, it will be exceedingly difficult for Totah to comply with the Commission’s Tribal engagement obligations in any meaningful fashion. For the reasons set forth herein, Totah respectfully requests that the Commission grant this petition for waiver and refrain from strictly applying the Tribal engagement and reporting obligations to Totah.

Respectfully submitted,

TOTAH COMMUNICATIONS, INC.

/s/

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²⁷ 47 U.S.C. § 254(b)(3).

²⁸ *Further Guidance Public Notice* at ¶ 2.

DECLARATION OF MARK M. GAILEY

I, Mark M. Gailey, do hereby declare under penalty of perjury under the laws of the United States of America, that I am the President of Totah Communications, Inc. and I have personal knowledge of the facts and representations set forth herein, and believe them to be true and accurate.



Mark M. Gailey



Date